INTERSTATE COMMERCE ACTS ANNOTATED

1977 SUPPLEMENT

VOLUME 22

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Note

Public Law 94-210, Railroad Revitalization and Regulatory Reform Act of 1976, February 5, 1976, 90 Stat. 31, amended Part I of the Interstate Commerce Act. The following sections of Part I were amended by this act but were received too late for publication in volume 22:

§ 1(5)
§ 1(6)
§ 1(12)
§ 1(14)(a)
§ 1(18)
§ 1(19) repealed
§ 1(20) repealed
§ 1(21) repealed
§ 1(22) repealed
§ 1a
§ 5
§ 5(2)(a)
§ 5(2)(f)
§ 5(2)(g)
§ 5(2)(h)
§ 5(3)
§ 5(5)
§ 5(8)
§ 5(10)
§ 5(14)
§ 5(16)
§ 5(17)
§ 5a
§ 5b

TITLE 49—TRANSPORTATION

INTERSTATE COMMERCE ACT

[See Table of Cases for history of cases indicated by asterisk (*)]

Short title.—This act may be cited as the Interstate Commerce Act. (Sept. 18, 1940, c. 722, § 1, 54 Stat.899.)

National transportation policy.—[Unchanged. See vol. 11, p. 8954.]

Historical note, see vol. 11, p. 8954; vol. 21, p. 16227.

Notes of Decisions

Volume 11—p. 8954; Volume 12—p. 10109; Volume 13—p. 10861; Volume 14—p. 11341; Volume 15—p. 11887; Volume 16—p. 12513; Volume 17—p. 13139; Volume 18—p. 13919; Volume 19—p. 14925; Volume 21—p. 16227

2. The Commerce Clause.—[Vols. 16-19, 21].—Relief sought by taxi company holding exclusive franchise from New Orleans Aviation Board to provide passenger service at Moisant International Airport, in suit to enjoin limousine service of interstate passenger carrier from operating on airport grounds, denied. In view of recognized right of the states to regulate interstate commerce for the suitable protection of people of the state, the Board has a right to impose reasonable rules and regulations upon concessions and other parties who use the airport; also, an exclusive franchise between a state or city, whose charter is derived from the legislature, and a local company that deals with intrastate commerce would appear to be proper; however, neither plantiff cab company nor the Board, through the exclusive franchise, or the Board through failure to negotiate with defendant carrier—authorized to provide interstate passenger service directly to and from the airport—may exclude defendant from operating on the airport grounds without interfering with and placing an undue burden on interstate commerce.—Toye Bros. Yellow Cab Co. v. Irby, 305 F. Supp. 905 (910-11)*.

Seizure of the Civil War locomotive "General" which State of Georgia claims to own, pursuant to writ of attachment obtained in Tennessee court by City of Chattanooga, when it was being shipped by rail from Louisville, Ky., to Kennesaw, Ga., constituted an undue and unlawful burden on interstate commerce in violation of the Commerce Clause. Mere fact that a shipment is moving in interstate commerce does not, alone, render it immune from attachment in a state court proceeding where the court has jurisdiction; however, Georgia was not a party to the City's suit, was not served with process, and would not be bound by decision therein. In such circumstances, the writ of attachment not only constituted an undue burden on interstate commerce, but also constituted a taking of the State's property without due process of law. Georgia's claim to ownership and possession of "General" may not be treated apart from its claim that wrongful seizure of its property moving in interstate commerce violated the Constitution; lower court's dismissal of the suit for lack of jurisdiction is reversed and the cause remanded.—State of Georgia v. City of Chattanooga, Tenn., 406 F. 2d 830 (832-4).

5. National Transportation Policy, In General.—[Vols. 11-19. 21].

Adequate Transportation System: [Vols. 17, 19, 21].—Considering §13a in relation to the NTP and recognizing (1) the basis and relation to the history and present condition of the nation's rail passenger system, (2) fact that the railroad's passenger train service is an integral part of the national rail passenger system, (3) that the debilitated condition of this service in many ways reflects an intensification of national economic and technological trends, (4) the history of imbalanced public policy choices as between the railroads and other forms of transportation, and (5) the record of the rail industry's generally poor attitude and effectiveness in performing passenger transportation, discontinuance of all of considered trains is not warranted. Although justified by §13a(1), the authorized train discontinuances will not "solve" New Haven's passenger service problem; the time, responsibility, and opportunity have arrived for the rail industry and appropriate public authorities to reverse the broad trends apparent throughout this proceeding and, by a responsible cooperative effort, to restructure and strengthen rail passenger service throughout the country.—New York, N.H. & H. R. Co. Discontinuance, 327 I.C.C. 151 (153, 224-5).

The standard which should guide cooperative effort negotiations concerning the future of carrier's passenger service is that all sides, including the public in general, the States, the railroads themselves, and railway labor organizations, should make a *reasonable effort* to achieve a satisfactory result. Close scrutiny will be given to the good faith and efficacy of the cooperative efforts of all parties in any future passenger train discontinuance case. In this connection, the privately-owned railroad, as a "common carrier" in its broadest sense bears an initial obligation to provide service to all segments of the public, both freight and passenger, as the public may require and be willing to pay for on a reasonable basis. This general obligation can be nullified only by an Act of Congress and particular services offered by the railroad can be discontinued only with the express or tacit permission of the States or of the Commission under §13a.—Id., pp. 220, 225.

However, the concept that public policy, and particularly that of States threatened with rail passenger service discontinuances, should be responsible for underwriting all losses incurred by the railroad from those services, and for paying such losses in accordance with carrier's determination of amounts is entirely inconsistent with the obligation of the railroads to sustain and improve essential economically viable passenger services. Its endorsement would, in effect, totally discourage railroads from investing in the maintenance and improvement of their passenger operations; i.e., the reasonable effort required of it so as to put those services on a break-even basis or better.— Id., p. 222.

In matching railroads' reasonable effort to sustain and improve essential rail passenger services, the public through its governmental representatives must be willing to provide a reasonable level of support for these services; i.e., that level of financial or other public assistance which will stimulate the carrier to initiate or, if already initiated, continue its own reasonable effort to sustain and improve essential and economically viable passenger services. However, such public support should not be limited solely to the contribution of direct or indirect financial assistance but must encompass joint governmental-carrier programs to determine, on the basis of current and projected demand patterns, what services actually are essential to the public and at what level they should be maintained or modified, rational investment of capital, research, and technological skills therein, and rational reformation of rate and service concepts no longer responsive to public demand or productive of acceptable levels of patronage and revenue.—Id., pp. 222-3.

The railroad must accord to promotion of its economically viable passenger service the same reasonable effort as when it is threatened by competitive forces; i.e., service improvements, long-range market analysis, rate information, capital investment in research and technological achievements applicable to passenger operations, and sound analysis of the real costs of providing passenger services with a rail plant used also for the provision of freight services. And, since this concern to preserve viable service has taken into consideration the stake of railway labor in the achievement of such result, railway labor should cooperate fully in the industry-government efforts that are necessary to restructure and strengthen passenger service. However, when chronic and worsening deficits persist despite carrier's having made a reasonable effort, for a reasonable period of time, then point has been reached demonstrating unwillingness on part of public either to sustain the services through patronage or by assuming a fair share of the cost of maintaining such services.—Id., pp. 217-8, 220-21.

Since the Commission is required to promote adequate and efficient service, when scope of pending application is area-wide, it must consider many factors related to the maintenance of a balanced transportation system, including existence of sufficient carrier capacity to encourage competition, incentives for real innovation and improvement in service, and constraint against monopolistic motor carrier operations. Instant record shows that extensive operations are being conducted by at least four common carriers of considered commodities which, in effect, make up the core of the Birmingham, Ala.,-Florida system, and, while the Commission has a policy to encourage competition, it must balance this against wasteful duplication of services and creation of excessive capacity which would adversely effect continuance of efficient operations by existing carriers. Thus, although record reveals some genuine dissatisfaction with part of the existing service, it also shows existence of untried motor carrier capacity which should be allowed to absorb additional traffic and to operate at a more efficient level before comparable services of applicant are added.—Terminal Transport Co., Inc., Ext.—Birmingham, 103 M.C.C. 699 (715-6).

The Commission is charged with promoting "safe, adequate, economical and efficient service;" therefore, it should take notice of, foster and encourage technological advancements in order to effect sound regulation and see that the resulting benefits are not withheld from the shipping public. Thus, since utilization of equipment to its fullest capacity is economically sound, considered "truckload lot" restrictions, which prohibit segments of the motor carrier industry and shipping public from full utilization of present-day transportation methods, are repugnant to the public interest and the national transportation policy, and should be removed.—Removal of Truckload Lot Restrictions, 106 M.C.C. 455 (487)*.

See also Great Northern Pac. & B. Lines, Merger—Great Northern, §5(2), n. 3; Restrictions on Service by Motor Common Carriers at §204(a) (1), n. 1.

Applications, operating authority: [Vols. 17, 19, 21].—Argument of plaintiffs (protestants in Commission proceeding) that, in granting additional passenger authority to applicant, the Commission's consideration of a "balanced passenger transportation 'system'" changed or contradicted the criteria enunciated in the *Pan American* case, 1 MCC 190, is without merit; especially since the Commission's evidentiary conclusions and holdings point to an orderly consideration of the elements of that case. Furthermore, assuming, arguendo, that the Commission's "balanced transportation" theory did modify the *Pan American* standard, that modification is best described as supplemental and not contradictory. And when supplemental principles stated by the Commission are imbedded in both the national transportation policy and the primary statutes governing economic regulation and competition, their invocation can only be salutary.—The Short Line, Inc. v. United States, 290 F. Supp. 939 (943-4)*.

In the National Transportation Policy, Congress stated guidelines for the promotion of adequate transportation systems and the avoidance of ruinous competition. Language therein reflects a concern over fair competition in the industry which the courts had previously voiced; and, since its enactment, the courts have held that the policy is a guide for the Commission and that its decisions and the Act must be read in the light thereof. Generally, absent a competing carrier, the Commission may authorize a new service shown to be needed and, where there is service, it may even authorize competition in order to compel adequate service; however, its powers over competition are not all- inclusive, and any destructive competition resulting from a grant of authority may give rise to a private antitrust action. Thus, if the national policy is applied in reviewing grant of authority to intervenor (without a finding of inadequacy of existing service) which permits it to offer the same service plaintiff provides, the court cannot approve a certificate which is inconsistent with the findings and the inconsistency is such that existing carriers might be endangered.—Drum Transport, Inc. v. United States, 298 F. Supp. 667 (669-70, 672-3)*.

Under the national transportation policy the Commission is required to promote an adequate and efficient transportation service; accordingly, in motor-carrier application proceedings, it must consider such factors as the existence of sufficient carrier capacity to encourage competition, incentives for real innovation and improvement in service to the public, and constraint against monopolistic motor carrier operations. In light thereof, grant of additional authority to applicant between Birmingham, Ala., and the Florida Panhandle would create needless duplication of services and excessive capacity which would tend to adversely affect continuance of efficient operations by the several existing carriers. Denied.—M. R. & R. Trucking, Co., Extension, 105 M.C.C. 69 (80, 83)*.

The promotion of safe, adequate, economical, and efficient service and the fostering of sound economic conditions in transportation are among the aims of the national transportation policy guiding the determination of public convenience and necessity in application proceedings. Efficient and economical two-way motor operations which eliminate the added cost of empty return movements benefit the shipper and their carriers alike. The return-traffic problem of specialized carriers including those operating with tank vehicles persists and is not easily remedied because of the many facets of interest in competitive transportation which must be fairly administered. The overall record before the Commission does not supply the necessary detail for insight into the problem on an industrywide basis, nevertheless, the Commission recognizes the propensity of carriers and their shippers to resolve mutual problems by the use of novel transportation schemes which should not be thwarted when such schemes are lawful and the need for such service is supported by substantial evidence. Within the confines of this record, some furtherance of a two-way transportation system is warranted.—Rogers Cartage Co., A Corporation-Extension, 110 M.C.C. 139 (147, 148)*.

See also Almeida Bus Lines, Inc., Extension, case, §207(a), n. 25 *Existing carriers.*; Specialized Transp. Services, Inc., §209 (b), n. 20; Truck Transport, Inc., v. United States, §207 (a), n. 25.

Combination, strong railroads: [Vols. 15, 19, 21].—See Great Northern Pac. & B. Lines, Merger—Great Northern, §5(2), n. 7.; Southern Pac. Co.—Control—Western Pac. R. Co. case, §5(2), n. 7

Competition and ratemaking: [Vols. 11-19, 21].—The Commission must recognize the overriding problem today facing all common carriers—the heavy and increasing diversion of traffic into unregulated channels. It is essential for management to seek ways to recapture or retain this traffic if regulated carriers are to improve and consolidate their relative positions; with so many economic factors favoring diversion to unregulated carriage, experiment and ratemaking innovation is the only feasible approach, and, so long as experiments are not clearly unlawful, they should not be discouraged. Unless the Commission is to dictate carrier policy, measures designed to provide better and less expensive service than shippers can provide for themselves must be given a fair chance to develop through exercise of managerial discretion.—Reduced Exceptions Ratings Based on Density, 323 I.C.C. 341 (345)

Defendants' claim that competition at issue herein is market competition is incorrect. Market competition occurs when different commodities or geographic areas compete for same customers. Situation herein is carrier competition as two or more carriers are competing for same traffic between the same two points.—Great Lakes Ship Owners Assn. v. Chicago & N.W. Ry., 337 I.C.C. 287 (293-4)

See also Motor Vehicles, Kansas City, Mo., to Southwest, at §1(5), n. 289; Wine, Pacific Coast to the East case, §15a(3), n. 2.

Cost of service: [Vols. 12, 13, 17, 19, 21].—See American Commercial Lines, Inc. v. United States, under ***Inherent advantages***, below.

Destructive competition: [Vols 11, 19, 21].—Proposed reduced commodity rates of southern rail carriers on all freight, minimum 10,000 pounds in straight or mixed shipments, designed to recapture some of high-rated merchandise and l.c.l. traffic lost to private and regulated motor carriage, are not shown to constitute a destructive competitive practice. Costs of protestant motor carriers are not shown, nor is it shown that they possess any inherent advantages that would be impaired by the proposal. The proposed reductions are not detrimental to respondents' revenue requirements, but on the contrary may be reasonably expected to produce a substantial net revenue increase; and protestants' fear that they will divert substantial traffic is not enough, alone, to warrant a finding of destructive competition. [See 372 US 744.]—Freight, all Kinds, Southern and IFA Territories, 323 I.C.C. 730 (739).

Competition which protestants will be forced to meet as a result of respondent's proposal to reduce motor class rates, minima 5,000 and 10,000 pounds, is not shown to be "destructive" within meaning of the national transportation policy. While the evidence indicates that protestants, particularly the motor carriers, will be required to make widespread reductions in their rates and that the result will be a net loss of revenues to many carriers, those circumstances, standing alone, do not constitute destructive competition in light of the fact that proposed rates generally exceed respondent's fully distributed costs by a substantial margin. In considering the statutory requirement of the need in the public interest of adequate and efficient transportation service at the lowest cost consistent with the furnishing of such service, the Commission may condemn reduced rates which cover fully distributed costs (including a reasonable profit) only in the most compelling circumstances; no such compelling circumstances having been shown, proposed rates cannot be found competitively destructive.—Volume Class Rates, Transcontinental Territory, 325 I.C.C. 735 (740)*.

Establishment of proposed reduced transcontinental incentive rail rates on wine does not constitute a destructive competitive practice, as urged by protestant Sea-Land (which, on the record, must be regarded the low-cost mode), within rationale of decision in 372 US 744. Principles enunciated in, and rationale in, the cited decision relate solely to intermodal competitive rate adjustments; instant proceeding, on the other hand, does not involve the same issue since considered rate adjustment was not prompted or established for purpose of intermodal competition, but to enable west coast shippers to compete in markets in official and southern territories.—Wine, Pacific Coast to East, 326 I.C.C. 119 (151-5)*.

Moreover, on reconsideration, the Commission does not require carriers to withhold counter action until diversion of traffic actually takes place. And, in view of the Supreme Court's conclusions in the cited case that (1) "something more than even hard competition must be shown before a particular rate can be deemed unfair or destructive", and (2) all reduced rates which force the competitive low-cost mode to go below its fully distributed costs might "not unduly impair that advantage", obviously, the court did not intend to prescribe a mechanical formula for the Commission to apply whenever the issue of destructive competition is presented. Record shows that nonregulated carriage is the major source of competition, and, in such circumstances, regulated carriers may lawfully reduce their rates below the fully distributed cost level of another regulated carrier which competes to some extent for the traffic.—Id., 329 I.C.C. 167 (173-5)*.

Where, on further hearing, all-barge is shown to be the low-cost transportation mode, and reduced limited-transit rail rates exceed barge rates and barge fully distributed costs and revenues therefrom exceed railroads' out-of- pocket costs, fact that the rail rates cause diversion from the barge line affords no basis for finding a destructive competitive practice has occurred. Rates may be established at levels below fully distributed costs where there is competitive necessity therefor; and if a carrier is prohibited from establishing a reduced rate that is not detrimental to its own revenue requirements, merely because the rate will divert traffic from others, then carrier is thwarted from asserting its own inherent advantages of cost and service. Therefore, absent a showing of genuine threat to continued existence of a service uniquely capable of filling a transcendent national defense or other public need, rates in question cannot be found to constitute a destructive competitive practice.—Grain from Idaho, Oreg. & Wash., to Ports in Oreg. & Wash., 326 I.C.C. 358 (366-8)*.

In addition, prior holding that considered limited-transit rail rates constituted a destructive competitive practice against truck-barge transportation mode is not supported when the record, on further hearing, does not permit reliable determinations to be made as to costs of the truck portion of truck barge movement.—Id., pp. 363-4.

Because of loss of traffic since initiation of defendant railroads' plan II TOFC rate of 163 cents on activated carbon, minimum weight 60,000 pounds per shipment loaded in 2 trailers, from Marshall, Tex., to New York, N.Y., and related points, complainant Sea-Land insists that the coastwise water carriers must have a rate differential in order for them to share in the traffic. Railroads' TOFC fully distributed cost, excluding deficits, is 158.5 cents per 100 pounds, and including deficits is 165.3 cents per 100 pounds; its rate level is above complainant's out-of-pocket costs. Where complainant fails to prove that it is the low-cost mode of transportation either on an out-of-pocket or fully distributed basis of comparison, and that the assailed rate is below defendants' out-of-pocket cost for the movement involved, the principles of the *New Haven* case have no application. The rate assailed is therefore not shown to be unjust and unreasonable, or in contravention of the national transportation policy.—Sea-Land Service, Inc. v. Baltimore & O. R. Co., 326 I.C.C. 708 (709-11, 712).

Proposed reduced rail TOFC per-flatcar charge, which is shown to be compensative on an out-of-pocket basis, and which would improve railroads' overall revenue position, would not constitute destructive competition when protesting water carrier failed to establish that motor-water-motor transportation is the low-cost mode for considered traffic and, as such, is entitled to protection pursuant to provisions of the national transportation policy and §15a(3). Therefore, despite the fact that evidence indicates that proposed rail rates will have an adverse effect on volume of certain Sea-Land traffic, protestant's argument that proposed TOFC rates threaten existence of a service uniquely capable of filling a transcendent public need, is not persuasive.—Canned or Preserved Foodstuffs from Fla. to N.Y. & N.J., 326 I.C.C. 776 (780-2)*.

Commission found that defendant's tariff provision requiring a minimum-annual-volume of coal created destructive competition because shipper, to receive the lower rate, must ship approximately 85 percent of its annual consumption of coal by defendant thus foreclosing the availability of this traffic to other carriers.—Great Lakes Ship Owners Assn. v. Chicago & N.W. Ry., 337 I.C.C. 287 (293-4)

Defendant's reliance on *VEPCO, New York Harbor*, and *Unit Train* cases, as cited herein, to prove that the national transportation policy does not apply is ill-founded. Carriers claiming injury in those cases were not subject to Commission's jurisdiction and were not entitled to claim protection of the national transportation policy. Complainants herein are steamship companies holding and using certificates from this Commission and are entitled to protection from destructive competition. Schedules ordered canceled.—Id., p. 292-3.

Assailed tariff requirement conditioning application of unit-train rate on tender of a minimum annual-volume of 850,000 tons of coal found to be a destructive competitive practice as the ultimate result of such requirement is to prevent competition of a substantial portion of the relevant market in violation of "initial handicap" doctrine formulated in *New York Central*, 194 F. Supp. 947, 951.—Great Lakes Ship Owners Assn. v. Chicago & N. W. Ry., 341 I.C.C. 272 (278-283)*

There are certain modes, such as foreclosing other modes subject to act from competing, which because of their pernicious effect on competition and lack of redeeming virtue are presumed unreasonable and unlawful without an elaborate inquiry as to precise harm which they cause.—Id., p. 284.

Described practices of respondent Greyhound are shown to be unreasonable and inconsistent with commitments it made in eight earlier §5(2) proceedings, in which it acquired passenger authorities surrounding petitioner's routes and, thereby, attained near monopoly in the area; are competitively destructive and contrary to the national policy. Greyhound intended statements in earlier proceedings, as to public benefit and no harm to existing carriers or service, to amount to assurance that it would not unnecessarily disrupt existing practices or traffic patterns without regard to the competitive effect; acquisitions were approved on findings of consistency with the public interest and respondent, by later modifying arrangements then in effect for its own gain, created situation which is no longer consistent therewith. Greyhound's failure to abide by commitments it made to obtain encircling authorities, without sound reason, constitutes destructive competition, is inconsistent with public interest, and provides good cause for supplemental proceedings, notwithstanding the prior consummations and issuance or certificates.—Mt. Hood Stages, Inc.—Petition for Modification, 104 M.C.C. 449 (459-63)*.

Exemption: [Vols. 12, 13, 14, 16, 18, 21].—In determining whether the contiguous-municipalities exemption of §203(b8) should be removed as to traffic between Detroit, Mich., and Windsor, Ontario, effect of transportation performed thereunder on regulated carriers authorized to serve Detroit must be evaluated, under directive of the national policy to foster sound economic conditions among the carriers and discourage destructive competitive practices. Thus, factors which would not be controlling in fixing commercial-zone boundaries assume greater importance. But although petitioners regularly interline their Detroit traffic with Canadian motor carriers, including shipments moving to and from Canadian or United States points beyond the border cities, and the exemption subjects a part of their total volume to diversion to unregulated carriers, less than 2 percent of shipments handled by them in foreign commerce are shown to have moved solely between Detroit and Windsor. This small amount of traffic is not important enough to warrant exercise of the Commission's power to remove an exemption designed by Congress for general applicability.—Commercial Zones and Terminal Areas—Detroit, 96 M.C.C. 709 (714-5)*.

And though the number of shipments handled between Detroit-Windsor and points beyond, under separate arrangements made by shippers with the exempt local carter and the line-haul carrier, has increased over the past 10 years, the effect on petitioners of diversion of the small percentage of their traffic represented by such shipments is relatively slight. Moreover, removal of the exemption would preclude the local cartage operations declared to be covered thereby in 154 F. Supp. 431, and no reason now appears for altering the conclusion reached in the Commission's 69th annual report that such a result would not be in public interest; nor would it contribute to the promotion of efficient service contemplated by the national policy. Something more definite and precise respecting effect of the sought relief on exempt local carters, authorized short-haul carriers, line-haul operations within the United States, and the public interest generally, is required to justify removal, in whole or in part, of the exemption conferred by §203(b8).—Id., pp. 716-7.

Commission found that neither the Act nor the national transportation policy precludes the issuance of a certificate of public convenience and necessity authorizing operations as a common carrier by motor vehicle to an agricultural cooperative performing exempt transportation under section 203(b)(5) of the act. This issue is considered one of general transportation importance.—American Farm Lines Common Carrier Application, 114 M.C.C. 30 (41-42)*.

For motor carriage of articles to be mailed see Armored Carrier Corp. v. Security Dispatch, Inc. Case, §202(b), n. 20.

Inherent Advantages: [Vols. 13, 14, 16-19, 21].—The District Court erred in rejecting Commission decision disapproving appellee railroads' rate on ingot molds, reduced to meet barge-truck competition, which (though above rail out-of-pocket cost) was substantially below railroads' fully distributed costs; also, the court erred in the grounds on which its judgment was based, i.e., (1) that the Commission's use of a comparison between fully distributed costs of the two transport modes to determine inherent cost advantage was not consistent with provisions, and legislative history, of §15a(3) and the national transportation policy, and (2) that it failed to adequately express its reasons for deciding that fully distributed, rather than out-of-pocket, cost was the appropriate basis for determination of which mode was the low cost mode for considered traffic and its reasons for disallowing the proposed rate.—American Commercial Lines, Inc. v. Louisville & N. R. Co., 392 U.S. 571 (574-5)*.

While the meaning of "inherent advantage" is not spelled out in the statute, fallacy of railroads' argument, and lower court's holding, that Congress intended by that term to refer to situations in which one carrier could transport goods at a lower out-of-pocket cost than another, is that it renders the term inherent advantage essentially meaningless in context of the language and history of §15a(3). Lower court read the statute as reflecting Congressional intent that, in most cases, inherent advantage should be determined by comparing out-of-pocket costs and held that the Commission failed to justify its use of a comparison of fully distributed costs as the proper basis for determining which of the competing modes had the inherent advantage; however, neither relevant statutes, their legislative history, nor the *New Haven* case, 372 US 744, relied on heavily by the parties, requires the Commission to use either out-of-pocket or fully distributed costs as a measure of inherent advantage; rather, as the cited decision said, the appropriate measure "may be" neither. It "may be" that after due consideration another method may prove to be preferable in such cases, but initial determination of that question is for the Commission.—Id., pp. 581-4. 590.

After noting its past consistent use of fully distributed costs for determining which of two competing transport modes has an inherent cost advantage, that a rulemaking proceeding on the whole question was then pending before it, and that legislative history of §15a(3) indicated that Congress intended a comparison of fully distributed costs when it referred to the national policy in that section, the Commission concluded that proposed rail rate would undercut barge-truck combination's ability to exploit its inherent advantage by forcing barge and truck carriers to go well below their fully distributed costs to regain traffic which, if rates of both modes were the same, would move entirely by rail; it further found that, due to lower rail out-of-pocket costs, appellee railroads would be able to outlast their competitors in any rate war if they were allowed to set rates on an out-of-pocket basis. The Commission had ample authority to deal with the matter as it did, and its reasons for finding that proposed rail rate would impair inherent advantages enjoyed by the barge-truck service were adequately articulated; reversed and remanded to District Court with instructions to affirm the Commission's report and order.—Id., pp. 575-9, 592-4.

Protestant motor carrier's cost evidence does not meet the burden of proving that protestant is the low-cost mode of transportation on shipments of canned goods from the Pacific coast to eastern destinations and is not therefore entitled to protection of an inherent advantage from destructive competition by respondent railroads.—Canned Goods, Between Pacific Coast and the East, 332 I.C.C. 55 (68).

The use of open-tariff TOFC service by carriers would not be in contravention of the national transportation policy which states "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of the Act, so administered as to recognize and preserve the inherent advantages of each***," when it was found that all TOFC service is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transportation: the railroad's ability to provide efficient line-haul transportation of huge volumes of freight for great distances at high speed; and the motor carrier's ability to provide door-to-door, and if necessary job- or farm-site, pickup and delivery.—Substituted Service—Piggyback, 322 I.C.C. 301 (329)*.

—Also TOFC service could even be said to be trimodal, because added to the two factors already mentioned is its ability to combine in a type of container service many small shipments—a type of service which has become associated with the business of the freight forwarder.—Id., p. 329.

The shipping public is entitled to benefit from the inherent advantages of water carrier service, including low-cost transportation, even though motor and rail transportation is available. Shippers and communities are entitled to adequate transportation service by water, with its inherent benefits and advantages, upon proof of need therefor.—Coyle Lines, Inc., Extension, 323 I.C.C. 386 (392, 393).

See also Grain from Idaho, Oreg. and Wash. to Ports in Oreg. and Wash., under *Destructive Competition*, above; Southern Pac. Co.—Control—Western Pac. R. Co. case, §5(2), n. 7; Wine, Pacific Coast to the East case, under *Destructive Competition*, above.

National defense: [Vols. 12, 15-21].—The national defense clause may not be applied so freely as to nullify the more particularized mandates of the national transportation policy, absent extraordinary circumstances which genuinely threaten the continued existence of a transportation service that is uniquely capable of filling a transcendent national defense or other public need. The fact that surviving carrier's parent holding company is controlled by a Canadian corporation does not constitute such a circumstance and does not warrant denial of the application.—Ryder Truck Lines—Control and Merger, 104 M.C.C. 328(334).

Reduced rates: [Vols. 14, 19].—The maintenance of reduced joint rates with the use of less than 70-ton cars could be accomplished only at the expense of revenue losses to the carriers concerned. The primary consideration is how to achieve a balance in rail transportation costs between competing shippers under similar transportation conditions without unduly sacrificing the revenues of the carriers. Since the evidence established substantial savings from the use of the larger cars and there is nothing in the record to establish any extra cost in providing such cars, these savings to be accomplished through innovations in equipment, service and technological efficiencies should be promoted and fostered under the national transportation policy, rather than discouraged, and passed on to all shippers in competing origins.—Coal, Ky., Tenn. and Va. to North Carolina, 329 I.C.C. 572 (586)*.

Rule of ratemaking: [Vols. 13, 18, 19, 21].—Principle that the "legislative discretion implied in the rate-making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself," expressed in other Federal agency decisions, is equally applicable to rate regulation carried out by the Interstate Commerce Commission, especially where the determination made on an interim basis is in general accord with both the legislative history of relevant statutes and the results in prior Commission decisions. Accordingly, since a rulemaking proceeding was then pending before the Commission in which the whole question of a proper standard of costing in situations involving intermodal competition was being examined in depth, the Commission had ample authority to decline to deal with appellee railroads' broad contentions in their individual rate case. District court erred in failing to recognize that authority, and in refusing to permit the Commission to exercise its judgment in a proceeding it believed would provide the most adequate record for resolving the problems involved.—American Commercial Lines, Inc. v. Louisville & N. R. Co., 392 U.S. 571 (578, 590-3)*.

Stopoff privileges: [Vol. 17].—See Stopping-in-Transit Charges and Restrictions, at §1(6), no. 566.

Through routes, joint rates: [Vol. 12].—See Atchison, T. & S. F. Ry. Co. v. United States, §3(4), n. 10, and §4(1), n. 2.

Water carriers: [Vols. 11, 14-16, 18, 21].—See Wine, Pacific Coast to the East case, under *Destructive Competition*, above.

10. Coordinated service.—[Vols. 13, 14, 17-19].—The underlying policy of §5(2)(b) governing applications by railroad-controlled motor carriers filed under §207 requires the Commission to recognize and preserve the inherent advantages of all modes of transportation and, necessarily, to restrict rail entry into the motor carrier field. It is of particular importance that intermodal competition between various rail and independent motor carriers be retained to prevent the blurring of statutory distinctions between the separate modes of service, which would be contrary to the overall public interest and the national transportation policy.—Great Northern Ry. Co. Extension, 96 M.C.C. 699 (702, 706).

Grant of a motor common carrier certificate to an air freight forwarder, restricted to traffic having an immediately prior or subsequent movement by air is a step towards achieving intermodal coordination, and possibly a step towards alleviating the small shipments problem. The Interstate Commerce Act does not prohibit certification of an air carrier as a motor common carrier nor does it impose a special burden of proof on an air carrier entering the motor carrier field.—Direct Air Freight Corp.—Common Carrier Application, 106 M.C.C. 785 (790-91).

Economy of operation: [13, 14, 17, 18].—See §25, n. 2

Key point condition: [Vols. 12-19, 21].—Applicant's operations over its routes are restricted to service which is supplemental to that of parent railroad, and in order to insure that applicant's motor operations remain subordinated to parent's rail service, certain points on its routes have been designated as key points, the effect of which is to prevent all-over motor service from being rendered and to insure that it remains a true substituted motor-for-rail service and does not become an independent motor operation. The removal of Laredo as a key point could result in the institution of a new competitive service, regardless of applicant's disavowal of this intention; and more basically the removal of this restriction would allow applicant to offer a service not now offered by its parent railroad company. Denied—Missouri Pac. Truck Lines Ext.-Removal of Key Point, 99 M.C.C. 754 (755, 759).

Although removal of applicant's Omaha, Nebr., key-point restriction would result in operating economies, it might result in the impairment of protestant Crouch's motor operations. Therefore, in order to protect Crouch from excessive and unwarranted competition, a restriction is substituted prohibiting applicant from transporting any traffic moving between Omaha, on the one hand, and St. Joseph and Kansas City, Mo., on the other, except that having a prior or subsequent movement by rail.—Missouri Pac. Truck Lines Extension, 100 M.C.C. 677 (682-3).

Modification of key-point restriction at Poplar Bluff, Ark. was approved to enable applicant to perform substituted motor service from St. Louis to destinations in Missouri. Applicant has shown that such operations would accomplish economies and needed improvements in rail service. Complete removal of such restriction is denied as all-motor movements are not the basis for economies and improvements in service and would divert significant traffic from protestant.—Missouri Pac. Truck Lines, Ext.-Key Points, 111 M.C.C. 383 (387-8)

Application to modify key-point of Abilene, Tex. so as to provide motor carrier service solely for REA express shipments between Dallas-Fort Worth and intermediate point along route of movement to key-point of El Paso, Tex. approved. Modification results from discontinuance of two trains handling such traffic; inability of protestants to meet needs of REA; and applicant's satisfactory service under temporary authority.—Texas & Pacific Motor Transport Co.-Modification, 111 M.C.C. 389 (393).

Restriction of applicant's authority to only those express shipments having prior or subsequent movement by rail found not justified as it would foreclose applicant from traffic it formerly or presently handles and would preclude applicant from rendering a complete and rounded service on all tendered express traffic.—Id., p. 394.

Restrictions, auxiliary, supplemental service: [Vols. 12-19, 21].—When Commission granted rail-subsidiary respondent considered authority subject to key point limitations, it intended to preclude respondent's all-motor service between Los Angeles and Phoenix. However, about 2 months after authority granted respondent instituted joint-line motor carrier service between Los Angeles and Phoenix in conjunction with San Diego Forwarding Company, a motor common carrier; the practical effect of this joint-line service was to allow respondent to perform an all-motor movement by having its interlining carrier perform service to or from point a short distance beyond geographical limit of Los Angeles key point. Since under these circumstances considered motor service is no longer subordinate to parent railway's service, authority granted in prior report must be modified in order to insure that respondent's service is limited to that which is auxiliary to and supplemental of rail service. Authority modified by substituting restriction that all shipments must have prior or subsequent movement by rail for present key-point restriction.—Santa Fe Trail Transp. Co., Extension, 103 M.C.C. 164 (169-71)*.

The restriction "regardless by whom loaded" recommended by the examiner to be placed in the certificates of both specific commodity carriers in order to preclude the handling of commodities which because of their size and weight require the use of special equipment for the purpose of protecting protestant heavy haulers should not be used in any grants of operating authority. As long as applicants themselves do not use mechanical devices for loading and unloading, it is completely immaterial how the loading and unloading is done. Use of labor-saving devices by consignors or consignsees would have no effect upon the transportation services which applicants provide, either insofar as it effects the commodities which they transport or the equipment which they use. The Commission specifically found in 53 M.C.C. 277 (the St. Johnsbury case) that the use of modern devices for the economical and expedient loading, unloading, and handling of freight should not be denied any class of shipper. Therefore, the burdensome restriction upon operating rights (regardless by whom loaded) is contrary to the national transportation policy and should be rejected herein and in any future applications.—Herr's Motor Express, Inc., Extension- Wheeling Steel 108 M.C.C. 626 (633, 635)*.

Substituted freight service: [Vols. 12-15, 17-19, 21].—The Commission concluded in *Substituted Freight Service*, 232 ICC 683 that the service substituted for common carrier service is itself common carriage and cannot be performed by motor vehicle in the absence of appropriate motor common carrier authority; that the substitution of one form of transportation for another where the shipper otherwise directs would be a breach of the contract of carriage; and that the routes over which substituted service is performed and the parties performing it must be fully set forth in lawfully filed tariffs.—Substituted Service—Piggyback, 322 I.C.C. 301 (331)*.

One carrier may make use of the service which another carrier holds out to the public generally. So long as the first carrier is operating *qua* carrier and gives the public proper notice through its tariff, it can substitute another's service for its own in this way.—Id., p. 333.

When TOFC service is offered by a rail carrier to the public generally, there is nothing to preclude its use by motor or water common or contract carriers, in lieu of their all-highway operations in the performance of authorized transportation between authorized service points, or by for-hire carriers engaged in transportation which is exempt from economic regulation. To the extent that this finding differs from that expressed in any of the Commission's previous decisions, such decisions are overruled.—Id., p. 336.

Trailer-on-flatcar service, generally: [Vols. 18, 21].—There can be no doubt of the benefit which TOFC service has already rendered the railroads in allowing them to recapture traffic lost to competing modes of transportation, and especially to private motor carriage. Also benefiting have been the motor carriers which have been provided with an opportunity, through the use of plan I TOFC service to obtain efficient line-haul transportation and thus to help themselves even while their business helps their rail competitors; the freight forwarders, which have been afforded an economical means for transporting the small shipments which they consolidate; and most important, the shippers and the general public which ultimately reap the benefit of the increased efficiency and economy that are invariably the result of the combination of competing forces so that each operates in the area where it functions best.—Substituted service-Piggyback, 322 I.C.C. 301 (322)*.

The record clearly supports the conclusion that it would be in the public interest to lay down, through formal rules, certain guidelines for TOFC service and practices. These rules would aid in furthering, not restricting, the growth of piggyback, as providing some standardization of industry practices and as a means of insuring that piggyback service is made available to all persons who are able to make effective use of it.—Id., p. 323.

15. State regulations; police power; cooperation generally.—[Vols. 13-17, 18, 19, 21].—It is well established that regulation of interstate commerce by the states is not invalid as long as there is a real relation to suitable protection of people of the state and requirements of the regulation are reasonable; therefore, New Orleans Aviation Board, (established by legislature of Louisiana) has the right to impose reasonable rules and regulations upon concessions and other parties who use Moisant International Airport. However, even though an exclusive franchise to serve the airport had been granted to local taxi company, the city Board, as proprietary owner of the airport, may not exclude an interstate carrier or passenger who complys with its reasonable regulations for use of the facilities, including the access ways and ramps.—Toye Bros. Yellow Cab Co. v. Irby, 305 F. Supp. 905 (910)*.

See also Leonard Express, Inc. v. United States, §202(b), n. 20.

PART I

INTERSTATE COMMERCE ACT; RAILROADS

Chapter 1, Title 49, U.S. Code

[See Table of Cases for history, parallel citation, of cases indicated by asterisk(*)]

Section 1. Regulation in general; car service; alteration of line.—(1) Carriers subject to regulation.—[Unchanged. See vol. 9, p. 6969.]

Amendments, see footnotes, vol. 1, pp. 157-158, vol. 6, p. 4537; historical notes, vol. 1, p. 158, vol. 9, p. 6969. vol. 21, p. 16272.

(Cross Reference)

Section 6 of the Emergency Rail Facilities Restoration Act, Pub. Law 92-591, Oct. 27, 1972, 86 Stat. 1304, which pertains to line abandonment, provides as follows:

"(a) Except as provided in subsection (b) of this section, and except for the conveyance of facilities pursuant to subsection 4(c)(3), all abandonment of facilities and services shall continue to be subject to the appropriate provisions of the Interstate Commerce Act.

"(b) The damage or destruction caused by the natural disasters of June 1972 to any railroad facility, equipment, or service therefrom, of a railroad obtaining assistance under this Act, or any action taken pursuant to this Act affecting any railroad, shall not be evidence in any proceeding before any Federal agency or in any court in which line abandonment is an issue. Any violation of this section shall be deemed to be prejudicial."

The Regional Rail Reorganization Act of 1973 [P. L. 93-236, 87 Stat. 1021, 45 U.S.C. §791] states: "The provisions of the Interstate Commerce Act (49 U.S.C. 1 et seq.) *** are inapplicable to transactions under this Act to the extent necessary to formulate and implement the final system plan whenever a provision of any such Act is inconsistent with this Act."

Notes of Decisions

Volume 1—p. 159; Volume 6—p. 4538; Volume 9—p. 6970; Volume 11—p. 8960; Volume 12—p. 10116; Volume 13—p. 10867; Volume 14—p. 11346; Volume 15—p. 11893; Volume 16—p. 12519; Volume 17—p. 13148; Volume 18—p. 13929; Volume 19—p. 14950. Volume 21—p. 16272.

Interstate Commerce and Application of Act Thereto

1. Interstate commerce defined. —[Vols. 1, 6, 9, 11-13, 15, 19].—Commission, citing *Osborne*, 306 ICC 155, and *McWilliams*, 100 F.Supp. 66, found that rail switching movements within a single State, following interstate movements by unregulated water carriers performing transportation of commodities under exemption of §303(b) of the Act, are in interstate commerce and are subject to the Commission's jurisdiction.—Monsanto Company v. Alton & So. Ry. Co., 339 I.C.C. 319 (321-3)

8. Rail-water movement partly between points in same State.—[Vols. 1, 6].—Railroads were entitled to charge interstate, rather than lower intrastate, rates on bananas that were carried in chartered vessels from tropic ports to California ports, immediately unloaded into waiting rail cars, and shipped by rail from California ports to banana wholesalers within that State. The waterborne segment was not a movement by common carrier, within §1(1), since mere continuity in transportation is not tantamount to a common "arrangement" with the connecting railroad for a continuous carriage or shipment; however, under provisions of §1(2)(a), the domestic leg of a through movement of shipments to or from a foreign country is subject to Commission regulation even though the rail portion thereof is wholly within one State. Accordingly, interstate rates are found applicable on considered shipments whether or not the waterborne movement was by private or common carrier.—Long Beach Banana Distributors, Inc. v. Atchison, T. & S.F. Ry. Co., 407 F. 2d 1173 (1177-80).

17. Continuity of movement.—[Vols. 1, 6, 9, 17, 19, 21].—See Long Beach Banana Distributors, Inc. v. Atchison, T. & S.F. Ry. Co., n. 8, above.

23. Transshipment of export or import traffic.—[Vols. 1, 6, 9, 12, 18].—See Long Beach Banana Distributors, Inv. v. Atchison, T. & S.F. Ry. Co., n. 8, above.

Foreign Commerce

51. Foreign commerce defined.—[Vols. 1, 6, 9, 15, 19].—Criteria such as form of contract, billing, and when, where, or to whom title to the goods passes are not controlling on whether the commerce is interstate, foreign, or intrastate; the key question is whether the transportation within the United States was a continuation of the movement which commenced outside the United States. Complainant's continuing intention was to have the goods moved from the European origin either to an inland U.S. customer or, if not sold, to a warehouse, and it designated the port of entry before the articles left Europe; thus, its continuing intention was to reship all inbound traffic in continuous movement, and passage of 5 days' time before removal of unsold goods to its warehouse was immaterial. And while complainant argues that it "received" the goods in the United States, the involved traffic, including shipments moving to destinations both within and beyond the State of the port of entry, was moving as a continuation of the foreign commerce and not as separate and distinct movements in domestic commerce, and the property was received from origins not located in the continental United States.—Southern States Cooperative, Inc. v. Baltimore & O. R. Co., 323 I.C.C. 400 (403-4).

52. Transportation to or from a foreign country.—[Vols. 1, 6, 9, 12, 13, 15-19, 21].—The unequivocal language and plain meaning of §1 (1) (a), as amended by the Transportation Act of 1920, confirms Commission's authority to regulate tariffs of joint rates and through routes by rail and water carriers between the United States and any foreign country, to extent that the transportation takes place within the United States. It is of no consequence that we lack power over participating carriers. Our jurisdiction over such joint rates is not diminished merely because we can issue order affecting those rates only against domestic carriers subject to our authority. See *Canada Packers*, 385 US 182.—International Joint Rates and Through Routes, 337 I.C.C. 625 (627-29).

The elimination of the word "adjacent" from the statute by the Transportation Act of 1920 broadened Commission's jurisdiction to include traffic between the United States and any foreign country. Commission's subsequent decisions to refuse to accept filing of tariffs establishing joint rates on such movements was self-imposed and unfounded.—Id., p. 628-9

Commission concluded that record herein did not show any particular need for a general rule on filing of tariffs which establish joint rates on import-export traffic between carriers subject to our jurisdiction and water carriers of foreign commerce subject to jurisdiction of the Federal Maritime Commission. Appropriate rules were adopted in the prior report, 337 ICC 625, and are affirmed. Commission reaffirms also that we have the authority to accept such tariffs for filing.—International Joint Rates and Through Routes, 341 I.C.C. 246 (247-8)*

56. Canadian traffic.—[1, 6, 9, 11-13, 17-19].—The Commission has jurisdiction over divisions of revenue received from rail single-factor volume commodity rates from Canada by United States carriers and their costs for the transportation. Such evidence is germane with respect to whether the rates are so low as to cast a burden on other traffic (compare 310 ICC 349, 351).—Sulphur, Canadian Origins to East St. Louis, Ill., 326 I.C.C. 288 (292-3).

Common carriers, and application of Act Thereto

66. Common carriers defined.—[Vols. 1, 6, 9, 11, 14, 18, 19, 21].—Commission found that terminal company that once conducted carfloat and railroad operations as agent for other carriers is itself a common carrier, inasmuch as such services were available to the general public. Agency relationship does not preclude this finding (see Brooklyn, 249 US 296) as common carriage is determined by the nature of service performed, not what a carrier calls itself.—Status of Bush Terminal, Inc., 342 I.C.C. 550 (562-65)

101. Carriers subject to the Act; generally.—[Vols. 1, 19, 21].—See Boston & Maine Corp. Discontinuance case, 324 I.C.C. 418, §13a, n. 2.

Section 1. (2) Transportation subject to regulation.—[Unchanged. See vol. 9, p. 6980, amendment, vol. 19, p. 14953.]

Amendments, see footnotes, vol. 1, p. 222, vol. 6, p. 4559; historical note, vol. 1, p. 158.

Notes of Decisions

Volume 1—p. 222; Volume 6—p. 4559; Volume 9—p. 6980; Volume 14—p. 11348; Volume 19—p. 14953.

Internal Affairs not Subject to Federal Regulation

1. In general.—[Vols. 1, 6, 19].—In action against railroad seeking refund of part of freight charges collected for rail transportation of bananas (carried to the United States from tropic ports in chartered vessels) from California ports to banana wholesalers within that State, railroads were entitled to charge interstate rather than intrastate rates for the rail movement which originated and terminated wholly within California, regardless of whether or not the bananas were brought into the United States ports by private or common carriers. Upon arrival at California ports, the bananas were immediately unloaded into waiting rail cars and moved to the wholesalers; thus, the waterborne segment was part of a through movement from a foreign country to a United States point.—Long Beach Banana Distributors, Inc. v. Atchison, T. & S.F. Ry. Co., 407 F. 2d 1173 (1177-8).

Under provisions of §1(2)(a), that the Act does not apply to transportation "wholly within one state and not shipped to or from a foreign country to or from a place in the United States, as aforesaid," the "and not" clause specifies an exception. Application of that exception would make transportation wholly within one state subject to Commission regulation, but it would not make the foreign part of a through movement subject thereto; thus, whether the foreign part of a through movement comes within "purview" of the Act is of no concern. Moreover, since phrase "as aforesaid" does not operate to limit foeign part of the total through movement to common carriage, its inclusion in the "and not" clause does not preclude application of the clause where foreign part of a through movement is by private water carrier. Accordingly, interstate rate was applicable on considered shipments whether or not the waterborne movement was by private or common carrier. Decision in Chicago, M. St. P. & P. Ry. v. Campbell River Mills Co., 53 F. 2d 69, overruled insofar as it requires a contrary result.—Id., pp. 1178-81.

3. Intrastate rates.—[Vols. 1, 6, 9, 19].—The Commission has no jurisdiction to determine applicability of purely intrastate rates; its function is to determine the applicable interstate rates and whether or not undercharges exist. As to any intrastate shipments of involved traffic, the Tennessee court, which is holding in abeyance one defendant's undercharge suit pending outcome of instant proceeding, is the proper forum for according defendants the relief they are found entitled to.—W. R. Grace & Co. v. Illinois Central R. Co., 323 I.C.C. 102 (110).

Section 1. (3)(a) Definitions.—[Unchanged. See vol. 9, p. 6982, amendment, vol. 11, p. 8963.] [54 Stat. 899.]

Amendments, see footnotes, vol. 1, p. 229, vol. 6, p. 4562; historical notes, vol. 1, p. 230, vol. 9, p. 6982.

Historical Note

Public Law 93-627, 88 Stat. 2136, states that a deepwater port and storage facilities serviced directly by such deepwater port shall be subject to regulation as a common carrier in accordance with the Interstate Commerce Act, as amended; and whenever the Secretary [of Transportation] has reason to believe that a licensee is not operating a deepwater port, any storage facility or component thereof, in compliance with its obligations as a common carrier, the Secretary shall commence an appropriate proceeding before the Interstate Commerce Commission or he shall request the Attorney General to take appropriate steps to enforce such obligation, and where appropriate, to secure the imposition of appropriate sanctions.

Notes of Decisions

Volume 1—p. 230; Volume 6—p. 4562; Volume 9—p. 6983; Volume 11—p. 8963; Volume 12—p. 10118; Volume 13—p. 10869; Volume 14—p. 11348; Volume 15—p. 11895; Volume 16—p. 12521; Volume 17—p. 13150; Volume 18—13932; Volume 19—p. 14954; Volume 21—p. 16275.

Agencies Included as Common Carriers

1. Lessors and lessees.—[Vols. 1, 9, 13, 21].—See United Transp. Union case at §1(3)(a), n. 11.

2. Receivers, trustees, fiduciaries.—[Vol. 1].—A common law business trust formed to obtain tax benefits, to acquire all outstanding stock, rail line, property and franchises of nonoperating rail carrier and to substitute itself as lessor under an outstanding 99 year lease with the operating carrier is a common carrier within the meaning of §1(3)(a) of the Act.—Pittsburgh & W. Va. R.—Pur.—Pittsburgh & W. Va. Ry. Co., 330 I.C.C. 593 (596).

Terminal Carriers

11. Wharfage and terminal companies.—[Vols. 1, 6, 9, 11, 14, 15, 18, 19, 21].—Pittsburgh & Conneaut Dock Co. (P & C), a terminal company, was found to be a common carrier under §1(3)(a). This finding was based not on the carrier's corporate charter or declared purpose but on the nature of its operations including common law concept of "holding out" its service to the public. See *Stimson*, 275 US 207, and *Bush Universal*, 342 ICC 550. P & C's services include switching, loading and unloading, storage when necessary, and actual transport of goods moving in interstate commerce with P & C equipment over track owned or leased by P & C, and thus P & C has all the necessary elements of an interstate rail carrier.—United Transp. Union v. B & L E and P & C, 342 I.C.C. 849 (855).

The fact that P & C's operations are performed pursuant to a lease agreement between affiliates does not alter applicable statutory tests nor does fact that P & C does not perform line-haul service but restricts its operations to terminal activities alter our conclusion that P & C is a common carrier. Such terminal operations are a necessary part of interstate transportation rendered by P & C and these operations are "held out" to the public as substantiated by publishing in said affiliate's tariffs of the charges for P & C's terminal services.—Id, p. 855-56

Railroad, Construed

30. "Railroad" and "railway".—[Vols. 1, 9, 19, 21].—Commission found each line involved herein to be a line of railroad, or extension thereof, as defined by criteria in *New Orleans*, 366 F. 2d. 160, especially as each line serves substantial territory, handles foreign commerce, handles traffic movements part of transportation haul from shipper to consignee, and render service to the public generally.—Missouri-Kansas—Texas R. Co. Abandonment, Okla., 338 I.C.C. 728 (748-9).

Transportation, Construed

51. Terminal and station services.—[Vols. 1, 6, 9, 14, 16].—Commission, applying standard in *Allegheny* case, 277 ICC 119, found the involved performance of carfloat, switching, classification, and delivery services as an integral part of interstate rail transportation to be that of a common carrier.—Status of Bush Terminal, Inc., 342 I.C.C. 550 (564).

Section 1. (3)(b) Control construed.[Unchanged. See vol. 11, p. 8967.]

Cross Reference

For construction of §1(3)(b), see §5(2), n. 45, 46, in volumes 12, 13, 14, 15; §20b, n. 50, Boston & M. case, v. 17.

Section 1. (4) Duty to furnish transportation and establish through routes; division of joint rates.—[Unchanged. See vol. 11, p. 8967.]

Amendments, see footnotes, vol. 1, p. 253, vol. 11, p. 8967; historical note, vol. 1, p. 253, vol. 21, p. 16276.

Notes of Decisions

Volume 1—p. 255; Volume 6—p. 4577; Volume 9—p. 6995; Volume 11—p. 8968; Volume 12—p. 10120; Volume 13—p. 10871; Volume 14—p. 11351; Volume 15—p. 11838; Volume 16—p. 12523; Volume 17—p. 13152; Volume 18—p. 13932; Volume 19—p. 14955; Volume 21—p. 16276.

Carriers to Provide and Furnish Transportation

1. General nature of duty.—[Vols. 1, 6, 9, 14, 18, 19].—Railroad, as a common carrier, is obligated to receive, carry and deliver all goods tendered to it for transportation; and, once its neglect or refusal to transport goods is shown, it must present a defense or excuse for such nonperformance. A carrier that neglects or refuses to transport goods is liable without proof of negligence unless it affirmatively proves that ensuing loss to shipper resulted from one of the causes which will ordinarily relieve it from liability for failure to fulfill its obligation. Thus, in shipper's action to recover for loss it suffered when defendant railroad discontinued service to its lumber mill, and in which railroad's defense was that tunnel cave-in (resulting in suspension of service) was an act of God, defendant had the burden of affirmatively proving that the cave-in was caused by a massive earth movement which, itself, was an act of God; that cave-in was not due to further deterioration of the tunnel; and that defendant had not been negligent in its maintenance of the tunnel.—Johnson v. Chicago, N., St. P. & P.R. Co., 400 F. 2d 968 (971-2).

Furthermore, railroad cannot be excused from failure to fulfill its duty to deliver all goods tendered, if the interference in its service could have been avoided by forethought, carrier must anticipate problems and provide against them and, in performance of its duties, it must exercise care and diligence. Accordingly, even where freight service is prevented by an act of God, or the public enemy, there must be an affirmative showing that carrier did everything in its power to carry out its absolute obligation to transport goods since, although shipper's loss due to nondelivery is caused by an act of God, or other excepted cause, there is liability on the carrier if its own negligence is so mixed with the excepted cause as to be an active or cooperating cause of the failure to perform its carrier obligation.—Id., pp. 972-4.

See also Coal, Ky., Tenn. and Va. to North Carolina, at §15(3), n. 2.

4. Jurisdiction of Commission and of courts. —[Vols. 1, 6, 13-15, 17].—Based upon views expressed by the Supreme Court in *Pennsylvania*, 242 US 208, the Commission has taken the position that enforcement of railroads' §1(4) duties, except as entrusted to us by other provisions of the statute, rests with the Courts and not with us. Complaint dismissed for lack of jurisdiction by this Commission.—Duralite Co., Inc. v. Erie Lackawanna Ry. Co., 339 I.C.C. 312 (314).

Although the Commission has limited jurisdiction to enforce the common carrier duty required by section 1(4) [Duralite Co., 339 ICC 312; U.S. v. Pennsylvania R. Co., 242 US 208], there is no jurisdictional obstacle in proceedings which also involve resolution of issues under other sections of the Act.—Cancellation of CRI & P & Soo Line Rates—Livestock, 340 I.C.C. 463 (467)*.

See also Asbury v. Chesapeake & O. Ry. Co., §8, n. 111.

For Whom Transportation to be Provided

9. Shippers.—[Vol. 1].—A shipper has the right to rail service to the point such rail service ends (herein Flexi-Flo terminals) and shipper may designate any authorized motor carrier to take delivery of lading at the terminal for ultimate distribution. Rail carriers may not deny a shipper use of its services because shipper does not desire to avail itself of so-called through route arrangements between railroad and certain "favored" motor carriers.—Mutrie Motor Transportation, Inc., Ext.-Ex-Rail, 111 I.C.C. 251 (269-70)*

What Embraced in Transportation to be Furnished

25. In general.—[Vols. 1, 6, 14, 19, 21].—In this proceeding, Commission instituted an investigation into deficiencies of railroad freight service especially as regards the failure to meet schedules, terminal delays, erratic deliveries, bunching of deliveries, and placing of cars unfit for use which were considered in some detail in *Increased Freight Rates*, 1970 and 1971, 339 ICC 125.—Investigation of Railroad Freight Service, 341 I.C.C. 1 (3-8).

Exceptions to Duty to Furnish Transportation

51. Embargoes, Power to lay—[Vols. 1, 6].—The right of carrier to determine in the first place the need for a freight embargo and to place such embargo for the proper conduct of its business is well settled. Thus, when physical deterioration of tunnel on railroad's branch line made it impossible to provide service over that branch, which plainttiff mine operator used to ship his coal to market, defendant railroad has a right to place an embargo against all freight shipments and suspend all operations over the branch line. Accordingly, in action seeking, in addition to previously denied injunction, damages for violation of the carrier's duty under §1(4), considered embargo having been lawfully invoked there are no damages to be recovered.—Asbury v. Chesapeake & O. Ry. Co., 314 F. Supp. 310 (312, 313).

54. Jurisdiction of the Commission.—[Vol. 1].—The validity or reasonableness of embargoes is usually for the Commission's determination; however, since plaintiff elected not to file the complaint as to considered embargo with the Commission but instead sued in court to recover damages, it could not challenge the embargo before the Commission.—Asbury v. Chesapeake & O. Ry. Co., 314 F. Supp. 310 (313).

55. Notices.—[Vols. 1, 12, 13, 15].—Notice of an embargo does not have to be published in the same manner as tariffs are promulgated. As was done in instant case, the carrier need only notify shipper that it is physically unable to accept future shipments.—Asbury v. Chesapeake & O. Ry. Co., 314 F. Supp. 310 (312-3).

Through Routes

61. In general.—[Vols. 1, 6, 9, 12, 13, 15, 17, 18, 21].—Commission held that if application of the proposed reduced proportional rate herein is restricted against use with reshipping proportionals through Chicago, Ill., the result would be the commercial closing of the competitive route taking higher rates which would violate §1(4) of the Act.—Corn and Corn Products, Illinois to Official Territory, 332 I.C.C. 485 (489-90)*.

Complainant and defendant already maintain through routes inasmuch as they publish tariffs in which they hold themselves out as maintaining such routes. See *Denver*, 351 US 321, Therefore, Commission cannot prescribe through routes.—Missouri Pac. R. Co. v. Louisiana & A. Ry. Co., 332 I.C.C. 569 (582-3)

73. Necessity for agreement.—[Vols. 1, 9, 17].—Since the Commission found that the failure of the carriers to agree on the minimum capacity of the cars to which reduced joint rates from two points would be applicable precluded shippers at those origins from competing for traffic at a third point, and further found that, in the circumstances of this case and on the record before it, that the refusal of plaintiffs to enter into reduced joint rates conditioned on the use of cars having a minimum capacity of 70-tons was unjust and unreasonable, while the refusal of defendant to join in rates applicable to cars with a capacity of less than 70-tons was lawful, the Commission properly concluded that it was the conduct of plaintiffs which had closed the routes in a commercial sense in contravention of the obligation of carriers under section 1(4) to provide reasonable facilities for the operation of through routes.—Chesapeake & O. Ry. Co. *v.* United States, 298 F. Supp. 734 (741)*.

81. Circuity.—[Vols. 1, 9, 19].—See Interpretation of Piggyback Service Regulations, at §216(c), n. 12.

Divisions

123. Reasonableness; in general.—[Vols. 1, 6, 9, 14-19, 21].—Northern lines' 1956 revenues from joint official-southern territory rates were but 6 percent of their total freight revenues, whereas southern lines' percentage was 21.4; and northern lines' share of revenue from the issue traffic was 44.64 percent, while incurring 46.35318 percent of the costs. Adjustment of existing primary divisions is therefore required to compensate the respective groups according to their expenditures in the joint effort of handling this interterritorial traffic; no affirmative reasons appear for any adjustment of the divisional basis over and above relative costs of service, on grounds of greater revenue needs, economic trends, or otherwise. Divisional mileage scales prescribed, dividing revenue in proportion to fully distributed costs, and reflecting a 3.590 percent increase in revenue accruing to the northern lines and a 2.908-percent decrease in that accruing to the southern lines, will be just, reasonable, and equitable for the future.—Official-Southern Divisions, 325 I.C.C. 1 (49-50)*.

There is no convincing showing that changed conditions warrant reversal of conclusion in 289 ICC 4 that the divisions should be uniform for service south of any given gateway and that the primary dividing points should be actual points of interchange between northern and southern lines, except that territorial border points should be used instead of points north of Ohio River in Indiana or Illinois. Revised divisions prescribed should therefore continue to be made applicable only to and from existing primary dividing points; thus, railroads assigned in entirety to southern territory for statistical purposes will continue to be treated as southern lines for service south of the border dividing points and, in accordance with geographical fact, as northern lines to extent they operate north of the primary dividing points. Under the general basis prescribed, observance of present dividing points should not result in any unjust inflation of southern lines' revenues.—Id., pp. 28-31.

There is no basis for finding that western railroads interchanging traffic directly with southern lines at points in official territory, without northern lines' participation, should be accorded the same divisions as the northern lines, absent a showing of present divisions on that traffic and the relative services performed by each group. But the revised divisional scale prescribed for the northern lines should apply to traffic interchanged between western trunklines and southern lines in which there is participation by a northern line or lines; such traffic is now subject to the general prescribed basis and is embraced in southern lines' traffic study.—Id., pp. 31-2.

124. Arbitrary allowances before prorating.—[Vols. 1, 9].—In applying scales prescribed for dividing official-southern interterritorial rates, differentials or arbitraries which are included in the joint rates so as to cause them to exceed standard rates, whether for hauls by short or weak lines or otherwise, shall be deducted before prorating and added to the share of the carrier or carriers in the territory in which the differentials apply, provided that, in case of rates on citrus fruit from Florida to official territory which include an arbitrary, one percentage point shall be deducted from the northern division and added to the southern division in lieu of specific apportionment of the arbitrary.—Official-Southern Divisions, 325 I.C.C. 1 (52-3)*.

Northern railroads introduced no specific evidence in support of their request for exclusion of per-car rates on vegetables from the South to New York City from the general divisional basis prescribed and for application thereto of a special provision that the excess of $57 per car in the New York City rates over those to Jersey City continue to accrue to the delivering lines before prorating. Moreover, the per-car rates were found unlawful in 321 ICC 738, but the Commission's order requiring removal of the unlawfulness was restrained and the matter is now being litigated in the courts. In the circumstances the relief requested does not appear appropriate and is denied.—Id., p. 35.

126. Elements considered affecting reasonableness.—[Vols. 1, 6, 9, 11, 14-17, 19, 21].—Commission order prescribing new divisions of joint rail rates on traffic between official and southern territories, on finding that (based on relative costs of the service as between the groups of carriers) northern lines' higher costs warranted an increased share of the revenues, is not supported by substantial evidence and reasoned findings when, though divisions in issue pertain only to north-south traffic, costs of that traffic are not isolated in the findings. Having stated that its standard for resolving question of the divisions was the relevant costs of handling specific traffic to which they apply, the Commission relied on Rail Form A territorial costs as reflecting northern lines' higher costs on north-south traffic without any adjustment relevant to that traffic. District court judgment that use of the unadjusted territorial average costs could not be consistent with statutory requirements for precise and relevant findings without any evidence relating such average costs to the north-south traffic, and remanding cause for further proceedings, affirmed as modified.—Baltimore & O. R. Co. v. Aberdeen & R.R. Co., 393 U.S. 87 (89-92, 96)*.

No adjustment of present official-southern divisions of interterritorial rates is required as result of competition from other modes of transport. Factors concerning motor and water competition, including truck registration, highway construction, truck versus rail tonnage, revenues, and ton-mile revenue, waterborne diversions, and competitive rate reductions are not shown to have a measurably greater effect on one group of railroads as against the other on interterritorial traffic. However, inequities shown to result from differences in cost of service warrant prescription of a revised divisional basis for the future.—Official-Southern Divisions, 325 I.C.C. 1 (16, 28)*.

127. Public interest.—[Vols. 1, 6, 9, 11, 21].—The public interest must be considered in determining lawfulness of divisions of official-southern interterritorial rates, and importance to the public of the railroads' transportation services is not a sectional concept; the Commission is required under the Act to preserve an adequate national transportation system and must therefore consider the public interest of all concerned. However, such consideration does not require uniformity of divisions, and no affirmative virtue in uniform divisions of official-southern freight rates appears of record. Moreover, §15(6) was designed to help the weak by preventing needed revenue from passing to more prosperous connections, and adherence to uniformity as such, without a careful evaluation of the statutory criteria and the evidence of record, would hardly result in fixing just, reasonable, and equitable divisions. Although there are no differences in importance to the public as between northern and southern lines, inequities in present divisions due to relative costs of service are manifest, and divisions correcting them can result in no unlawful injury to the South.—Official-Southern Divisions, 325 I.C.C. 1 (27-8)*.

128. Efficiency and economy of carrier.—[Vols, 1, 6, 9, 11, 15, 16, 21].—Though southern lines argue that, because of greater traffic density in the North than in the South, unit costs shown in Rail Form A for northern lines for recent years should be lower than for the southern lines, and contend that cost savings are available to the northern lines through elimination of excess and duplicate facilities, many factors other than density affect operating expenses of a group of railroads, and northern roads, including the larger ones, are shown to be in process of eliminating unnecessary facilities and services. And though southern lines question wisdom of northern lines' use of available funds to reduce debt instead of making capital improvements in their transportation plant, evidence shows that the northern lines exercised their best managerial judgment, when faced with rising debt, in dealing with problems affecting cost of service at time they were encountered; giving effect to criticism of such action is not warranted.—Official-Southern Divisions, 325 I.C.C. 1 (17)*.

Nor is there a basis for criticizing southern lines' judgment in expanding and developing their operations. Record does not establish that northern lines' costs of service are overstated relative to those of southern lines as result of differences in timing of their modernization programs, or that their costs are affected by asserted waste or inefficiency. And while savings expected from mergers and consolidations proposed or going forward in both territories are not reflected in the cost studies, they are not ascertainable for future operations to the degree required for any specific adjustment of the costs shown of record, but will be reflected in unit costs if and when such transactions are ultimately approved and consummated. Both groups of carriers are being operated efficiently and neither should be considered more or less efficient than the other.—Id., pp. 17-8.

129. Originating, intermediate, or delivering carriers.—[1, 6, 9, 11, 12, 14, 15, 16, 21].—The Commission is required by §15(6) to consider whether any participating carrier is an originating, intermediate, or delivering line, and has frequently found that intermediate carriers having no service to perform in originating or delivering shipments are for that reason entitled to a lesser proportion of joint rates. Though northern lines urge that, because of circumstances peculiar in part to New England territory such as lower traffic density, higher level of costs, multiline hauls north of the gateways, and lower rates of return, Canadian-northern Maine traffic should not be excepted from the general basis prescribed for official-southern divisions, the facts establish that on most of such traffic moving to or from the South the northern lines perform purely intermediate service with no terminal service involved. In the circumstances the intermediate scale of divisions prescribed in ultimate finding 3, modified to exclude any allowance for terminal service, will be just, reasonable, and equitable for the future on Canadian-northern Maine traffic.—Official-Southern Divisions, 325 I.C.C. 1 (33-4)*.

Although Norfolk Southern has in the past been classed as a weak line, and the general divisional basis prescribed will result in some reduction of its revenues on traffic in which it participates as an intermediate carrier, such reductions do not appear excessive, and no circumstances are shown differentiating that traffic from traffic interchanged with other intermediate lines. Moreover, revenue accruing to Norfolk Southern on such traffic is a matter of subdivisions, which are not in issue and should not be made subject to a special basis.—Id., pp. 39-40.

Traffic originated and terminated by Norfolk Southern and moved to or from official territory on northern lines, except that moving via Norfolk, also presents a subdivisional question, but record demonstrates that it cannot afford the substantial loss of revenue (especially on Norfolk gateway traffic) which would result from application of general divisional basis prescribed. Norfolk Southern originates and terminates traffic of significant importance to itself, other carriers, and the shipping public; and prescribed divisional scale, based on southern lines' study which excluded that carrier, would have an unjust and unwarranted impact on it to a degree not permitted by holdings in 265 US 274 and 225 F. Supp. 584. Therefore, special scale of divisional factors is prescribed for Norfolk Southern's traffic interchanged at Norfolk which will give it about the same revenue therefrom as it now enjoys and maintain its relative position compared with other southern lines. All its other traffic will be subject to prescribed general basis of divisions.—Id., pp. 44-5; on reconsideration, and upon northern lines' consent, each prorating factor in the special scale of divisions is increased.—Id., 325 I.C.C. 449 (451-2)*.

131. Financial needs of carriers.—[Vols. 1, 6, 9, 11, 12, 15-19, 21].—In every divisions case evidence relating to revenue need is material because §15(6) requires due consideration to be given to the amount needed to pay the carriers' respective operating expenses, taxes, and a fair return on their railway property held for and used in transportation service. The Commission is thereby authorized to give due weight to revenues from all transportation service, the operating expenses and taxes chargeable thereto, and the amounts available as compensation for use of all carrier property, as well as the revenues, expenses, taxes, and returns attributable to the service covered by the divisions under consideration; and it is free to give such evidence the weight which the particular circumstances appear to justify. Prescription of primary divisions of official-southern interterritorial rates based on relative costs, including allowances for overhead and return, reflects a due proportion of the burden of maintaining the financial integrity and credit of both northern and southern lines, and no present justification appears for favoring one group over the other on ground of greater revenue need.—Official-Southern Divisions, 325 I.C.C. 1 (49)*.

However, application of the prescribed general divisional basis to traffic originated or terminated by Norfolk Southern, especially that interchanged with northern lines at Norfolk gateway, would result in such substantial loss of revenue as to create substantial operating deficits. Norfolk Southern is shown to be in pressing need of sufficient revenues to improve its physical plant and provide additional rolling equipment, and determination of its divisions on its Norfolk gateway traffic on the general basis prescribed would consign it to a deficit position so serious as to impair its rendition of adequate and continuous service to the public. This special situation justifies prescription of increased divisional factors for that traffic that will give it approximately the same total revenue therefrom as it now enjoys.—Id., pp. 42, 44; on reconsideration, each factor in the special scale of divisions is increased, upon consent of the northern lines.—Id., 325 I.C.C. 449 (451-2)*.

134. Cost of service.—[Vols. 1, 6, 9, 11, 12, 14-17, 19, 21].—Order prescribing new divisions of Official-Southern joint rail rates, on finding that northern lines' higher costs of handling the traffic justified a larger share of the revenues, was not based on reasoned findings or supported by substantial evidence when the Commission, having stated that sole standard for new divisions was relevant costs of handling the north-south traffic involved, relied on unadjusted Rail Form A average costs of the two groups of railroads on all traffic handled in their respective territories as reflecting the higher costs of northern lines. The Commission's judgment on subject of transport economics is entitled to great weight; appraisal of cost figures is a task for experts and, unlike a mathematical problem, it cannot be precisely right or wrong. However, the Rail Form A formula was designed to measure the cost of handling all traffic in two or more territories, and cannot appropriately be accepted without further evidence of mechanical application to particular segments of traffic in a divisions case.—Aberdeen & R. R. Co. v. United States, 270 F. Supp. 695 (707, 709-10)*.

Following establishment of the uniform scale of class rates, the Commission prescribed divisions of Official-Southern joint rates on an equal factor basis and, while it is not perpetually bound by that decision, it has a special responsibility in a case of the magnitude of instant proceeding when it departs from its prior findings. There can be no doubt as to the Commission's statutory powers to require development of adequate and comparable cost data; and it has a duty to use those powers to obtain the cost evidence deemed necessary to assure an adequate record. That duty was violated when the Commission failed to take affirmative action to require development of an adequate record as to actual costs of handling the specific north-south involved, and merely relied on unadjusted territorial averages to reflect the average cost of that traffic.—Id., pp. 710-12.

Overall territorial averages can and should be considered in determining equitable divisions of joint rates on specific traffic, but as to specific important cost items the Commission should not wholly and exclusively rely on such averages. The Commission's conclusions as to northern lines' higher costs of handling the north-south traffic, based on its use of territorial averages on such important items as suburban commuter passenger service deficits, box car empty return ratios, and switching costs, are not supported by reasoned findings and based on substantial evidence of record. Order set aside and the case remanded to the Commission for further study, explicit development of adequate and comparable evidence respecting costs on specific traffic in issue, and further proceedings consistent with the court's opinion.—Id., pp. 709-10, 712-13.

136. Mileage; mileage prorates.—[Vols. 1, 6, 9, 11, 14, 15, 16, 17, 19].—New evidence adduced on further hearing supports southern lines' contention that existing scale for dividing official-southern interterritorial rates is unfair to them, since they have the longer average hauls, and is defective in that (1) it contains an excessive allowance for short hauls; (2) its progression unlawfully depresses revenue of the long-haul carriers; (3) value of each 50-mile block reflects services not performed because of application of the scale to the upper limit of the block; and (4) value of the initial mileage block is excessive. Accordingly, and in light of finding that equitable divisions should be based on relative costs of service, the general divisional factors are revised to reflect warranted adjustments; resulting scales give adequate consideration to terminal, way train, through train, and interchange costs incurred for the respective lengths of haul, and the factor for each 50-mile block is computed at the midpoint of the block.—Official-Southern Divisions, 325 I.C.C. 1 (39)*.

Retention of the 15-percent minimum division applicable to the present scale is not warranted, since a proper divisional scale reflects full credit for the services performed, including terminal and interchange services. The prorating factors prescribed give full credit for terminal costs, thus protecting the very-short-haul carriers which perform principally originating or terminating service. Unlike the existing scale, which is weighted in favor of the very short haul, the scale prescribed, reflecting the cost and service involved, gives each type of haul its proper share and no special protection for short hauls is warranted.—Id., p. 38.

141. Contracts of carriers,—[1, 6, 15, 18, 19, 21].—Although the principal northern lines that originally participated in a pooling agreement with southern lines (including Norfolk Southern) providing for distribution of annual net loss or gain realized in furnishing protective service have withdrawn from the arrangement, and as a result Norfolk Southern estimates it is losing an average of $49 on each originated car of fruits and vegetables given protective service, its request that the prorating divisional factor prescribed for its originated and terminated traffic interchanged with northern lines at Norfolk be increased 4 percentage points as a temporary measure until the pooling situation is adjusted cannot be granted, since it would penalize the carriers for withdrawing from the agreement, despite the permissive character of the order approving it.—Official-Southern Divisions, 325 I.C.C. 1 (45-6)*

148. Contracts fixing divisions.—[1, 6, 9, 15].—Although divisional mileage scales prescribed for primary divisions of official-southern interterritorial rates will be just, reasonable, and equitable for the future, the parties are free to negotiate and agree upon any other modified scales, devised on same basis but with different mileage blocks and factors, or pursuant to any other method they may deem appropriate. However, should they fail to reach agreement before effective date of the Commission's order, the scales set forth in appendix C are prescribed to apply thereafter.—Official-Southern Divisions, 325 I.C.C. 1 (51)*.

Section 1. (5) Just and reasonable charges.—[Unchanged. See vol. 11, p. 8973, vol. 15, p. 11901].

Amendments, see footnotes, vol. 1, p. 307, vol. 6, p. 4596, vol. 11, p. 8973; historical note, vol. 1, p. 307; vol. 21, p. 16287.

Notes of Decisions

Volume 1—p. 313; Volume 6—p. 4596; Volume 9—p. 7008; Volume 11—p. 8973; Volume 12—p. 10122; Volume 13—p. 10872; Volume 14—p. 11354; Volume 15—p. 11901; Volume 16—p. 12528; Volume 17—p. 13156; Volume 18—p. 13936; Volume 19—p. 14959; Volume 21—p. 16287.

In General—Definitions

2. Carrier's right to initiate rates.—[Vols. 1, 6, 9, 11-19, 21].—Since the mandatory rate-break rule established by orders entered in 1934 and 1936 runs contrary to the freedom of the railroads to negotiate and establish rates to meet the needs of the shipping public, and the action taken in the instant proceeding does not alter a single existing freight rate, the orders were vacated and set aside to the extent that they require observance of rate-break combinations and of proportional rates therein prescribed as the exclusive basis of charges on shipments of grain and grain products at points from which proportional rates are applicable.—Rate Structure Investigation, Part 7, 329 I.C.C. 824 (845)*.

22. Flexible limits of judgement in determining reasonableness.—[Vols. 1, 6, 9, 11, 12, 14, 15, 21].—While rates which exceed out-of-pocket costs by only slight margins have been approved when required by special circumstances, the Commission has never taken the view that any particular margin must be set. Logic dictates that each rate must be judged in light of the facts and circumstances surrounding it. Furthermore, the level of a rate is essentially a matter for managerial discretion. There is no magic formula to insure the automatic approval or disapproval of any specific rate.—Sea-Land Service, Inc., v. New York Central R. Co., 329 I.C.C. 589 (596).

Test of Reasonableness

23. In general.—[Vols. 1, 6, 9, 11, 12, 15-19, 21].—Though the Commission found that rate structure on soybeans from southern Illinois to Chicago, for export, was just and reasonable and not otherwise unlawful, so long as rate to Chicago was no higher than that to New Orleans, the reports failed to set forth any criteria, findings or supporting rationale for its conclusions other than to find that Chicago was not competitively disadvantaged by such rates. At best, considered rates have little relation to services and distances involved; and, while the Commission urges that export rates should be fixed so as to encourage port competition, it is clear that competition between Chicago and New Orleans for the traffic is affected by many factors other than rail rates; but no evidence of record shows the basis for concluding that approved rate structure will encourage, or result in greater, competition between those ports. While there may be a sound economic basis therefor, The Commission failed to make adequate findings to justify its conclusion that rates evincing as much as a 2-percent differential between the two ports are reasonable in light of all relevant factors; case remanded for further proceedings consistent with the court's opinion.—City of Chicago v. United States, 291 F. Supp. 858 (860-63)*.

Proposed rates on phonograph records and jackets from Richmond, Ind. to indicated destinations found just and reasonable as such rates are shown to exceed out-of-pocket costs, allow proponent Railway Express to obtain a portion of such traffic, and will benefit the public generally.—Phonograph Records-REA-Richmond, Ind., to U.S. Points, 329 I.C.C. 391 (396).

Assailed combination through rates on clay or shale cinders from Erwinville, La., to southern territory destinations found unjust and unreasonable as the cost data submitted by defendant railroads was defective, as specified herein, and not determinative of this issue in the face of probative prima facie showing of unreasonableness and unlawfulness of such rates.—Big River Industries, Inc. v. Aberdeen & R. R. Co., 329 I.C.C. 539 (541-4)*.

Increased refrigeration charges on perishable freight authorized although they exceed the level of previously authorized increases on such freight. Commission found that no inference can be drawn from such a condition as to reasonableness of rates but must be based on the evidence of record in support of a particular proposal.—Charges for Protective Service to Perishable Freight, 332 I.C.C. 136 (151)*.

Commission found proposed rates per car to be unjust and unreasonable because they were based on impractical load projections made by respondents. Shippers and receivers would be forced to revamp their entire producing, packaging, and marketing practices in order to accommodate carriers' desire to use one type of car with a standard size load. The costly burden thus imposed on shippers and receivers, and consequently the general public, would be too great to warrant our approval of these schedules.—Vegetables & Melons Bet. W. & Southwest, Midwest & S., 341 I.C.C. 597 (613-16)

Proposed rates based on the size of car furnished to shipper not shown just and reasonable. Respondents failed to provide, in accordance with rule 66(a) of our Tariff Circular No. 20 that if a car larger than the one ordered were furnished, the charge for the car ordered would apply. It is manifestly not equitable or proper to require a shipper to pay additional transportation charges for the use of a car of different dimensions or capacity from that which would suit his shipments. Schedules ordered canceled.—Citrus Fruits, Ariz. and Calif. to Eastern States, 341 I.C.C. 622 (632)

24. Determination not matter of formulas or rules.—[Vols. 1, 6, 9, 11, 16, 17, 21].—Reasonableness of rates should not be determined by unalterable statistical computations.—Baltimore & O. R. Co. v. Chicago & E. I. R. Co., 322 I.C.C. 572 (574)*.

25. Method or basis of construction.—[Vols. 1, 6, 9, 11-19, 21].—Shipment consigned to a warehouse putatively located in Williamsburg, Va., was delivered to the appropriate warehouse which is actually located in Penniman, 2 miles farther than Williamsburg. The rate to Penniman was 19 cents more than to Williamsburg, and complainants were charged the Penniman rate. Although the Commission determined that the applicable rate was charged, the rate was held to be unjust and unreasonable, because: (1) no specific proof of record that competitive situation is different at Penniman than at other points in the same general area taking lower rates; (2) subsequent reduction of the Penniman rate to the lower level is a factor, among others, tending to show that the prior basis exceeded a maximum reasonable level; and (3) the defendants were not guilty of misrouting, because, in spite of ambiguous routing instructions, delivery was made to the warehouse of consignment.—Cardinal Meat Co. v. Colo. & Southern Ry. Co., 329 I.C.C. 622 (623-5)*.

Analysis of reasonableness of proposed revised fare structure on interstate passenger service on New Haven Division of respondent railroad must begin with the basic, single-trip, one-way fare and not with an estimated apportionment of prices of monthly tickets and must be compared with fares charged for substantially similar traffic. Protestants' theoretical, alternate structures for fares provide no basis for finding of unreasonableness herein.—Penn Central Fare Revision—1969, 335 I.C.C. 720 (730, 736)

28. Reasonableness relatively.—[Vols. 1, 6, 9, 11-19, 21].—Complaint alleging unreasonableness of rates on grain from central territory to interior group points in trunkline territory because they bear higher percentage relations to rates on grain to New York City key group than percentage relations of corresponding first-class rates does not assail the quantum of the rates per se and concerns relative reasonableness solely. However, the Commission has held in 264 ICC 593 and 321 ICC 519 that relative unreasonableness may not be considered under §1; and while relative reasonableness may be a consideration in retaining an existing rate relationship, it is not a basis for destroying relationship of longstanding groups, as would occur if complainant were to succeed. Complaint dismissed.—Cooperative Grange League Fed. Exc. v. Akron, C. & Y. R. Co., 323 I.C.C. 174 (178).

Complainant's allegation that the milling-in-transit charge assessed against it at Indianapolis and not assessed against shippers at points west of the Illinois-Indiana border is relatively unreasonable is without merit since relative unreasonableness cannot be considered under § 1.—National Starch & Chemical Corp., v. A., T. & S. F. Ry., 325 I.C.C. 658.

The Commission has generally declined to consider under §1(5) the concept of relative unreasonableness of rates in relation to their effect on market competition. Complainant's contention that the 67-cent rate to East St. Louis and St. Louis from points in Canada is too high in comparison with the 57.5-cent rate applying from the same origins to Chicago, resulting in undue prejudice to complainant and undue preference of its competitors in the Chicago area, is to be considered under §2 or §3, not §1 (321 ICC 519, 545).—Sulphur, Canadian Origins to East St. Louis, Ill., 326 I.C.C. 288 (289, 304-5).

Profit to the Carrier

51. Consideration given value of property.—[Vols. 1, 6, 9, 11, 13, 21].—Though out-of-pocket costs determined under Rail Form A formula include a return of 4 percent on all investment in freight equipment and one-half of investment in road properties assigned to freight service, reasonableness of rates should not be determined by unalterable statistical computations. Since investment in property and equipment will be incurred whether or not particular traffic moves, amount of such expenditures properly allocable to various costs should be determined on the circumstances surrounding movement of the considered traffic. When defendant earned no return on investment during the study year, and assailed proportional rate has been in effect some 10 years, the rate should not be condemned on mere showing that it barely fails to cover estimated out-of-pocket costs determined by rigid application of statistical cost formulas. Allowance for return on investment is therefore excluded from recomputation of defendant's costs on involved traffic.—Baltimore & O. R. Co. v. Chicago & E.I. R. Co., 322 I.C.C. 572 (574-5)*.

Cost of Service

72. Applied specifically.—[Vols. 1, 6, 9, 11, 12, 14-16, 18, 19, 21].—As stated in 259 ICC 475, 538, when the lawfulness of rates is under attack on the ground that they are lower than a minimum reasonable basis, whether the rates are reasonably compensatory is an important element to be considered. Rates in question not found to be a burden on other traffic where the actual divisions received by the United States carriers exceed their costs for performing the service.—Sulphur, Canadian Origins to East St. Louis, Ill., 326 I.C.C. 288 (298).

78. Costs related to particular rates or set of rates.—[Vols. 1, 6, 11, 12, 18, 19, 21].—Assailed rates on sugar from western producing points to central territory destinations are compensatory when, on complainants' own cost evidence, they exceed out-of-pocket costs in all instances and in a few exceed fully distributed costs, even including expense of transit where accorded sugar beets.—American Sugar Refining Co. v. Ahnapee & W. Ry. Co., 322 I.C.C. 717 (722).

80. Rates below cost of service.—[Vols. 1, 11, 19, 21].—While certain of proposed reduced incentive package wine rates would be below restated out-of-pocket costs, they were approved when most of considered incentive package and bulk rates on wine (proposed to enable western shippers to compete in eastern markets) were compensatory; all the proposed rates would alternate with corresponding present rates; and, since proposed below out-of-pocket cost rates would yield greater revenue than corresponding present rates, they would serve to reduce revenue burden on respondents' operations under the corresponding present rates.—Wine, Pacific Coast to East, 326 I.C.C. 119 (136-9, 156)*.

Proposed rates, to extent they apply on soybeans in boxcars subject to 100,000 pounds minimum weight, would fall below current variable cost levels and are thus not compensatory and not shown just and reasonable. However, rates applying on wheat, 120,000 pounds minimum weight, and soybeans and wheat, 180,000 pounds minimum weight, exceed variable costs by margin sufficient to indicate that they would be compensatory and they are approved.—Soybeans & Wheat, Ark. & La. to La. Ports, 341 I.C.C. 898 (902)

81. Wages, taxes, and interest.—[Vols. 9, 11, 19, 21].—Although petitioner-respondent railroads' evidence as to wages and wage-related items are so overstated as to bring all evidence into doubt, the Commission finds that cost increases in the constructive year 1967 will substantially approximate the aggregate rate increases authorized herein. Increased freight rates authorized on an interim basis found just and reasonable.—Increased Freight Rates, 1967, 332 I.C.C. 280 (287-88)*.

Taxes: See also Baltimore & O. R. Co. v. Chicago & E.I.R. Co., n. 85 below.

What Constitutes Cost of Service

85. Out-of-pocket cost.—[Vols. 1, 6, 9, 11-19, 21].—Although Rail Form A formula for determining out-of-pocket costs includes a return of 4 percent on all investment in freight equipment and one-half of investment in road property assigned to freight service, computed after allowance for Federal income taxes, defendant did not earn any return on investment in the study year, and assailed proportional rate has been in effect some 10 years; in the circumstances, the rate should not be condemned merely because it barely fails to cover out-of-pocket costs determined by rigid application of statistical cost formulas. Defendant's composite out-of-pocket costs on considered coal traffic, recomputed to exclude allowance for Federal income taxes and return on investment, are 22.33 cents per ton below the assailed rate, which is therefore reasonably compensatory. Such treatment of costs is in harmony with precedents established in 318 ICC 371 and cases cited therein.—Baltimore & O. R. Co. v. Chicago & E.I. R. Co., 322 I.C.C. 572 (574-5, 576-7)*. [But see dissent.]

Complainant shipper's contention that out-of-pocket rather than fully distributed costs are meaningful in determining maximum reasonable rates on iron ore from Pilot Knob, Mo., to Granite City, Ill., is fallacious as it wrongfully assumes that the defendant railroads are not entitled to compensation for their fixed costs as well as to a reasonable profit.—The Hanna Mining Co. v. Missouri Pac. R. Co., 332 I.C.C. 166 (170).

Ascertainment of Cost

90. Principles involved, generally.—[Vols. 1, 6, 9, 11-14, 17-19, 21].—Cost data presented to justify proposed new or increased per-car transit charges should cover various commodities moving varying distances in different territories with different size transit points. Since carloads contain mixtures of transited and nontransited goods, or mixtures of goods subject to various transit charges, or no charges at all respondent railroads should have submitted a sampling of through traffic to draw a cost-to-revenue comparison for traffic on which line-haul rates are presumed to cover transit.—Transit Charges, USA, 339 I.C.C. 45 (58).

94.—Localization of items to particular service costs.—[Vols. 1, 6, 9, 12-15, 16, 17, 19, 21].—In restatement of costs of transporting wheat and flour from midwestern and southwestern origins to gulf ports for export, respondents' determinations are generally accepted as the most reliable; protestants' higher cost figures are due primarily to use of relatively higher factors for switching at country origins and transit stations and for clerical costs and freight-train expense for car detention at country origins, which were obtained from studies submitted in another proceeding involving interterritorial domestic movements of all grain and products from entire western territory; application of such studies to considered traffic, without elimination of traffic of railroads not parties to instant proceeding, does not provide significant cost computations.—Wheat and Flour, Midwest & S.W. to Gulf-Chicago—Export, 322 I.C.C. 581 (603).

95.—Apportionment of joint costs; system average costs.—[Vols. 1, 6, 9, 11, 13, 15-19, 21].—Upon further investigation in this general revenue proceeding, Commission found that territorial average costs used by respondent railroads are not determinative of the precise costs of particular movements and are not sufficient, standing alone, to show additional increases just and reasonable.—

Increased Freight Rates, 1967, 332 I.C.C. 280 (296)*.

Distance as Measure of Cost

104. Distance, computation; circuity.—[Vol. 21].—Circuity factor of 43.5 percent used by protestants in computing cost of transporting wheat and flour from midwestern and southwestern origins to gulf ports for export is based on movements from Santa Fe origins only and therefore would not be representative even if accurately derived; that factor was obtained from data for traffic not subject to limited transit and restricted off-line movements authorized under the proposed rates. Respondents' method of increasing the docket 28300 distances by 13 percent is a more acceptable measurement of line-haul miles.—Wheat and Flour, Midwest & S.W. to Gulf-Chicago—Export, 322 I.C.C. 581 (603).

Cost of Particular Services

120. Special equipment required.—[Vols. 1, 6, 11, 13, 14, 19, 21].—If railroads, in meeting their statutory service obligations, are required to make substantial investments in building specially equipped cars, the shippers should not be permitted to use either carriers' cars or their own. Railroads are entitled to assurance of a chance to recoup money they are forced to invest and, when obliged to provide special equipment, that fact is weighed in fixing their charges; thus, ordinarily, the per diem car rental charge included in cost data (on which rates are based) is the same whether shipper uses carriers', or his own equipment. In Commission case under review, however, large investment in multilevel cars specially designed for transporting boats was made by protesting shippers; and plaintiffs (rail respondents) have made no investment which must be protected by increased charges (based on costs of moving boats on carrier-owned cars) on movements for shippers who use their own cars. Since plaintiffs were seeking to recoup costs which they never expended, and there is precedent for lower rates to reflect shipper supplied equipment, the Commission did not err in finding that railroads failed to prove that proposed rates would be just and reasonable.—Southern Pacific Co. v. United States, 298 F. Supp. 971 (973-4)*.

124.—Switching.—[Vols. 1, 6, 9, 11, 12, 14, 15, 18, 19, 21].—While there are weaknesses in cost evidence supporting proposed flat general increases in charges for intraterminal, interterminal, and intraplant switching, this is due at least partly to inherent difficulty of isolating actual costs in a proposal of nationwide scope. Even with increases sought, the charges generally are on the out-of-pocket level and do not appear to exceed a maximum reasonable leavel.—Increased Switching Charges, 322 I.C.C. 560 (563)*.

125.—Refrigeration.—[Vols. 1, 6, 9, 11, 12, 14, 17, 19].—Increased refrigeration charges on perishable freight found justified as petitioner Louisville & Nashville R. Co. has shown that total revenues from line-haul rates and the protective charges fail to cover total cost of handling such freight by more than $120,000. Proposed increased charges will reduce petitioner's overall loss thereby casting less burden on other traffic.—Charges for Protective Service to Perishable Freight, 332 I.C.C. 136 (146-51)*.

Grade and State or Condition of Commodity

192. Raw vs. finished or partially finished products.—[Vols. 1, 6, 9, 12, 13, 15-19, 21].—Though historically wheat and flour have taken the same rail rates, and in fixing maximum reasonable rates the Commission has prescribed the same basis for both, where railroads have reduced rates to meet competition of other modes lower rates have been approved on wheat than on flour for similar movements. Though the handicap of a 10-cent difference in rates that would result from approval only of proposed barge-and-truck-competitive export rates on wheat to gulf ports (like rates on flour being found to violate §3), when coupled with the 7-cent port handling charge on flour, could well operate to restrict exportation of commercial flour, the significant factor is that the present rates on flour are below the maximum basis fixed by the Commission and above a reasonable minimum level. Before the Commission may properly find rates on flour unreasonable to extent they exceed those for like movements of wheat, a clear showing that transportation factors affecting rail movement of both are identical or sufficiently similar to require application of the same rates is essential; no such showing has been made.—Wheat and Flour, Midwest & S.W. to Gulf-Chicago—Export, 322 I.C.C. 581 (605).

193.—Raw material not entitled to lower rate as of right.—[Vols. 1, 9, 11, 16, 17].—See Matthiessen & Hegeler Zinc Co. case, n. 250, below.

Comparison of Rates

210. In general.—[Vols. 1, 6, 9, 11, 13-19, 21].—Where complainant's shipment moved over nontariff routes because of clearance difficulties, shipper is still entitled to a reasonable rate over the route used. In such a case, the Commission is not called upon to establish a new route, but rather to determine what was a reasonable rate over the route used. In determining the reasonableness of the assailed rate, therefore, the routing restrictions do not affect the validity of the rate comparisons offered by complainant.—Westinghouse Electric Corp. v. Pennsylvania R. Co., 323 I.C.C. 503 (506)*.

As stated in 276 ICC 621, 626, what constitutes a minimum reasonable rate is a matter to be determined in the light of the facts of record in each proceeding. Mileages over tariff routes from the Alberta origins are greater in a number of instances than corresponding mileages from southwestern origins to the same destination. The applicable rate is 57.5 cents from both groups of origins. Some variations in distances are usual when rates are established on a group to group basis. Moreover, as stated in 310 ICC 408, 410: "Where market competition is a factor, carriers may provide rates from competing origins which ignore, to some extent, relative distances."—Sulphur, Canadian Origins to East St. Louis, Ill., 326 I.C.C. 288 (299-300). See also same case under n. 303, below.

Complainant shipper's contention that c.l. rates on silica sand, from Guion, Ark. to Southeastern points are unjust and also unreasonable found not proven. Complainant's rate comparisons do not sustain burden of proof as the assailed rates are already below compared opposite direction and Commission prescribed rates; comparison with intraterritorial rates ignores different operating conditions; and comparison with rates on quick lime ignores factor of competitive depression.—Silica Products Co., Inc. v. Gulf, M. & O. R. Co., 329 I.C.C. 181 (183-7)

Earnings Compared

211. Comparisons of earnings.—[Vols. 1, 6, 9, 12, 13, 15-19, 21].—Comparison of assailed rates on feed and industrial grade ureas, and earnings thereunder based on average loading of all shipments combined, with rates and earnings on fertilizer grade urea based on the minimum weight was improper when the assailed rates were subject to three different minimum weights. Minimum weights published in connection with rates are a part thereof, and both must be considered together in determining their reasonableness.—W. R. Grace & Co. v. Illinois Central R. Co., 323 I.C.C. 102 (110-11).

Since earnings on all commodities except animals and animal products exceed those on grain and grain products, present rates on grain cannot be said in general to exceed a reasonable maximum level.—Cooperative Grange League Fed. Exc. v. Akron, C. & Y. R. Co., 323 I.C.C. 174 (177).

213. Car-mile earnings compared.—[Vols. 1, 6, 9, 11, 12, 15-18, 21].—Establishment of assailed proportional rate on ex-river coal from Mount Vernon, Ind., to Chicago district was influenced by defendant's participation in the traffic then moving under joint all-rail rates from eastern Kentucky via Evansville, Ind. Considering the level of defendant's division for the haul from Evansville to destinations served by it, the proximity of Evansville to Mount Vernon as related to the distance from Mount Vernon to Chicago, and car-mile earnings realized under that division, the car-mile earnings of 46.60 cents a ton under the assailed proportional appear amply remunerative.—Baltimore & O. R. Co. v. Chicago & E.I. R. Co., 322 I.C.C. 572 (576)*.

Similarity of Services and Circumstances

221.—Rates over other routes.—[Vols. 1, 6, 9, 11, 12, 14-19, 21].—Multiple-carload rates on iron ore from Pilot Knob, Mo. to Granite City, Ill. found just, reasonable, and otherwise lawful. Defendant railroads' analysis of probable time factors, services, and costs is based on testimony of witnesses familiar with comparable movements over other routes of their lines. Complainant's analysis is unacceptable as it includes no significant allowances for contingencies and delays that inevitably occur in actual operation.—The Hanna Mining Co. v. Missouri Pac. R. Co., 332 I.C.C. 166 (170-1)

See also Westinghouse Electric Corp. v. Pennsylvania R. Co., n. 227, below.

223. Differences in rates warranted when transportation conditions dissimilar.—[Vols. 1, 6, 9, 11-19, 21].—Complainant's allegation of unreasonableness is based entirely on the premise of similarity in the transportation characteristics of freight trailers and farm trailers. A comparison of these characteristics, set forth herein, proves complainant's premise clearly erroneous. Assailed rates on freight trailers not shown unjust or unreasonable or otherwise unlawful.—United States v. Union Pac. R. Co., 341 I.C.C. 22 (26-27)

225. Comparisons not showing circumstances of compared rates, of little value.—[Vols. 1, 6, 9, 12-19, 21].—Comparison of applicable rates and earnings on feed and industrial ureas with those on chemicals and such products as crude rubber, woodpulp, sugar, and plastics have little value when neither volume of traffic moving under the compared rates nor conditions of their establishment are shown, there is no showing that the compared commodities have transportation characteristics like those of urea, and their value, to extent shown, is considerably higher than that of urea.—W. R. Grace & Co. v. Illinois Central R. Co., 323 I.C.C. 102 (112).

227.—Operating difficulties considered.—[Vols. 1, 6, 9, 12, 18, 21].—The fact that complainant's shipments required special care and handling does not remove them from the dictates of the Bucyrus-Erie line of cases. Had the traffic moved over normal tariff routes, the same type of special care and handling would have been provided by the defendants at the $3.85 joint commodity rate or the $4.14 joint class rate. Moreover, many of the services were provided while the shipments were moving over portions of the normal tariff routes.—Westinghouse Electric Corp. v. Pennsylvania R. Co., 323 I.C.C. 503 (506)*.

228. Depressed or subnormal rates.—[Vols. 1, 6, 9, 11-19, 21].—Applicable rates on shipments of poles and piling are not shown to be unreasonable by comparison with lower lumber rates when complainant has not effectively rebutted defendants' evidence that the lumber rates are depressed to meet competition—Atlantic Creosoting Co., Inc. v. Southern Ry. Co., 323 I.C.C. 533 (538).

229.—Compelled or competitive rates.—[Vols. 1, 6, 9, 11-19, 21].—Rates depressed to meet competition are not an acceptable standard for measuring maximum reasonableness of other rates; moreover, fact that carriers have accorded one article a basis of rates below normal is in itself no reason, absent unjust discrimination or undue prejudice, for requiring establishment of the same rates on analogous articles, especially where shipper is directly benefited by the lower rate basis already in effect. Rates applicable on complainant's shipments of feed and industrial grade ureas are not unreasonable because they are higher than rates on fertilizer grade urea which it also ships, when latter rates are on depressed basis due to competition from import traffic, market competition, and private- and common-carrier truck competition.—W. R. Grace & Co. v. Illinois Central R. Co., 323 I.C.C. 102 (110, 111).

231. Substantial similarity.—[Vols. 1, 6, 9, 14, 15-17].—A class rate normally provides the highest rates and charges for a commodity and application of a higher "exception" rate is an abnormality requiring special justification. Defendant has not shown that transportation characteristics of the excepted article (used passenger automobiles) here involved differ substantially from common characteristics of similar articles generally or that special circumstances peculiar to the particular area warrant the higher exceptions ratings. Assailed rates are shown not just and reasonable to extent they exceed charges based on class ratings and actual weights.—United States v. Western Gillette, Inc., 341 I.C.C. 889 (893).

Rates in Opposite Direction

250. Comparison not generally a controlling test.—[Vols. 1, 6, 9, 12-16, 17-19] Rates on commodities from and to certain points need not be the same as in the opposite direction, since varying circumstances may account for the difference, and a showing that assailed import rates on iron or steel articles from the ports of Philadelphia, Baltimore, and Norfolk to destinations in trunkline and southern territories are higher than export rates from latter territories to those and other north Atlantic ports does not establish that the higher import rates are unreasonable.—Southern States Cooperative, Inc. v. Baltimore & O. R. Co., 323 I.C.C. 400 (405).

While the Commission has generally held that rates in one direction higher than in the other on the same commodity require special justification, a different view has long prevailed with respect to zinc and zinc byproducts. In prescribing reasonable maximum rates on zinc byproducts in 204 ICC 319, the Commission held that there was no connection between movements of zinc and byproducts making it either necessary or desirable to create and maintain a rate relation between them. Assailed rates charged on the bulk of complainant's inbound shipments of zinc dross are well below maximum level prescribed in that case, and therefore are not unreasonable, notwithstanding that in some instances they are the same as, and in the majority of instances higher than, the rates in reverse direction on the finished product, zinc spelter.—Matthiessen & Hegeler Zinc Co. v. Baltimore & O.R. Co., 323 I.C.C. 601 (606, 609).

Territories Compared

261. Rates in different territories.—[Vols. 1, 6, 9, 11-19, 21].—Though respondent railroads have shown a substantial and compelling need for immediate revenue relief, the general deficiency in evidentiary support with respect to higher levels of proposed selective increases in rates and charges warrants uniform maximum increase limitations within and between the major districts. Therefore, considering the relative revenue needs of carriers operating within those districts, increases not in excess of 4 percent within the South, 5 percent within the West 6 percent within the East, and 6 percent interterritorially, are authorized.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (332, 336, 528-9)*.

Interterritorial: [Vols. 11-15, 16].—The Commission determined that to the extent the defendants' rates for movements from Erwinville, La. (in southwestern territory) to destinations they control are higher, distance considered, than the prevailing level of rates from that origin to all other southern destinations and also higher than the rates defendants publish for comparable movements, distance considered, within the South, the assailed level of rates from Erwinville was unjust and unreasonable in violation of §(5) of the Act.—Big River Industries, Inc. v. Aberdeen R. R. Co., 329 I.C.C. 539 (547).

Kinds of Rates Compared

271. Through or proportional rates and local rates.—[Vols. 1, 6, 9, 13, 15, 16, 18, 19]/—Complainant's claim for reparation, based on excess of charges over joint commodity rate of $3.85 or, in the alternative, excess over joint class rate of $4.14, both of which were in effect on transformers from Sharon, Pa. to Beverly, Wash. at the time of the movements in question, is valid. Because of insufficient clearances, the shipments did not move over the routes authorized in connection with above rates, and no joint through rate was published over the routes of movement. A combination rate of $4.98 was charged, composed of a joint commodity rate of $3.85 from Sharon to Newport, Wash., and a class rate of $1.13 from Newport to Beverly. The principle of the Bucyrus-Erie line of cases is applicable here, and shipper is entitled to a reasonable rate over the route used.—Westinghouse Electric Corp. v. Pennsylvania R. Co., 323 I.C.C. 503 (503-4, 506)*.

On this record, there is no showing that the $3.85 rate sought by the complainant is a maximum reasonable rate. The alternative class rate sought, however, does appear to be a maximum reasonable basis for the purpose of reparation. It is a well-established principle that a class rate based on the rating of a commodity in the governing classification is ordinarily the highest rate that may be deemed reasonable for that commodity.—Id., pp. 506-7.

275. Interstate and intrastate rates.—[Vols 1, 6, 9, 11, 17, 18, 19].—See Silica Products Co., Inc., v. Gulf, M. & O. R. Co., §1(5), n. 210.

280. Direct vs. circuitous hauls.—[Vols. 1, 6, 9, 11, 13, 15, 16, 18].—The fact that the nontariff routes used because of clearance difficulties were slightly circuitous as compared with the distances over the tariff routes from Sharon, Pa. to Beverly, Wash., and involved an interchange at Newport, Wash., does not serve to distinguish the instant case from the Bucyrus-Erie line of cases. The distance over the route used is shorter than the routes authorized to other western destinations in connection with the $3.85 joint commodity rate. Moreover, the class rate exceeds the commodity rate by 29 cents. This excess should, as shown by the car-mile earnings comparisons, adequately compensate the defendents for the extra interchanges required, the circuitous routing as compared to tariff routes from Sharon to Beverly, the destination carrier's loss of its long haul, and any extraordinary services that might have been furnished.—Westinghouse Electric Corp. v. Pennsylvania R. Co., 323 I.C.C. 503 (507)*.

Competition

286. How far competition considered in determining reasonableness; by Commission.—[Vols. 1, 6, 9, 11-14, 16-19, 21].—Although proposed reduced rail-motor rates are justified as a means to prevent diversion of traffic considered herein by equalization of respondent's rates with protestant rail carrier's rates on such traffic, the proposed rates, with few exceptions, are not compensatory and thus are not shown to be just and reasonable.—Motor Vehicles, Kansas City, Mo., to Southwest, 335 I.C.C. 253 (286)*.

Commission ordered cancellation of assailed rates as they were based on a minimum annual-volume requirement found to be an unlawful destructive competitive practice in violation of the national transportation policy.—Great Lakes Ship Owners Assn. v. Chicago & N.W. Ry., 337 I.C.C. 287 (290-2)

289. Extent to which carriers may consider.—[Vols. 1, 6, 9, 11, 12, 16-19, 21].—Carriers are at liberty to reduce their rates to meet competition of other carriers so long as the reduced rates are reasonably compensatory and not otherwise unlawful. In recent years respondents have been steadily losing high-rated merchandise and l.c.l. traffic, while private carriage has grown and tonnage handled by regulated motor carriers in the southern region has steadily increased. Proposed reduced rates on all freight, minimum 10,000 pounds in straight or mixed shipments, are reasonably designed to attract this lost traffic; as they exceed respondents' fully distributed costs by substantial margins and offer greater flexibility to shippers, it is reasonable to expect that they will produce a substantial net increase in revenues; approved.—Freight, All Kinds, Southern and IFA Territories, 323 I.C.C. 730 (737, 739).

Although Commission recognizes rights of rail carriers to voluntarily reduce rates to meet carrier and market competition, such rights are not absolute. Approval of proposed rates would be a sanction of a destructive competitive practice inasmuch as such rates often fail to meet carriers' out-of-pocket costs and will inevitably lead to counter reduction by intramodal competitor resulting in a useless waste of needed carrier revenues. Proposed rates not shown lawful; ordered canceled.—Motor Vehicles, Kansas City, Mo., to Southwest, 332 I.C.C. 615 (625-26).

See also Sulphur, Canadian Origins to East St. Louis, Ill., n. 303, below.

303. Market competition.—[Vols. 1, 9, 11, 12, 14, 15, 17-19, 21].—Assailed rates on sugar from western producing points to central territory destinations were established to enable western shippers to compete in the central territory market following reduction of rates from eastern producing points to meet motor competition. In such circumstances carriers have the right to meet the market competition thus created.—American Sugar Refining Co. v. Ahnapee & W. Ry.

Co., 322 I.C.C. 717 (721); assailed rates are not lower than necessary to meet such competition when, under prepay arrangement whereby shipper must absorb all of the rate from a given origin which exceeds the rate from Baltimore to same destination, the reduction in prepay resulting from reduction of the eastern rates equaled or exceeded the rate reduction to 4 of 5 representative points, and assailed rates from Greeley, Colo., reflect reductions less than those from eastern points to 4 of such representative points and less than the prepay to 3 of them.—Id., p. 722.

Competing carriers may meet a reduced level of rates, thus creating market competition (296 ICC 747, 752). Regarding minimum reasonable rates, it may be said that there is no distinction between the two types of competition since competition between rival producing centers is at the same time competition between the railroads or other carriers serving the different producing areas. A carrier's right to meet market competition is therefore no more restricted than its right to meet carrier competition.—Sulphur, Canadian Origins to East St. Louis Ill., 326 I.C.C. 288 (302-3). See also same case under n. 210, above.

Proposed rent-a-train plan herein was motivated by a desire to make it possible for corn from land-locked area of east central Illinois to compete in the export market with corn having access to water transportation. It would not constitute an unlawful exclusive patronage contract since no regulated carrier would be precluded from competing for said traffic.—Grain by Rent-A-Train, IFA Territory to Gulf Ports, 339 I.C.C. 579 (590-91)*.

See also Wine, Pacific Coast to East case, NTP, n. 5 *Destructive*.

305. Competition with carriers not subject to Act.—[Vols. 1, 6, 9, 11, 13, 16-19, 21].—Carriers not subject to Commission's regulation are not entitled to claim protection of the national transportation policy. However, complainants hold certificates under Part III of the Act and are entitled to protection from destructive competition.—Great Lakes Ship Owners Assn. v. Chicago & N.W. Ry., 337 I.C.C. 287 (293)

308. Water-motor competition.—[Vols. 11, 12, 16-19].—Because of loss of traffic since initiation of defendant railroads' plan II TOFC rate of 163 cents on activated carbon, minimum weight 60,000 pounds per shipment loaded in 2 trailers, from Marshall, Tex., to New York, N.Y., and related points, complainant Sea-Land insists that the coastwise water carriers must have a rate differential in order for them to share in the traffic. Railroads' TOFC fully distributed cost, excluding deficits, is 158.5 cents per 100 pounds, and including deficits is 165.3 cents per 100 pounds; its rate level is above complainant's out-of-pocket costs. Where complainant fails to prove that it is the low-cost mode of transportation either on an out-of-pocket or fully distributed basis of comparison, and that the assailed rate is below defendants' out-of-pocket cost for the movement involved, the principles of the *New Haven* case have no application. The rate assailed is therefore not shown to be unjust and unreasonable, or in contravention of the national transportation policy.—Sea-Land Service, Inc. v. Baltimore & O. R. Co., 326 I.C.C. 708 (709-11, 712).

Presumptions, Evidence, and Admissions as to Reasonableness

310. Rates prescribed by authority of law; the Commission or other Federal authority.—[Vols. 1, 6, 9, 11-19, 21].—Rates prescribed as reasonable maxima on zinc by-products in 1934 can hardly be considered reasonable maxima 30 years later in view of all the inflation and subsequent increases in carrier operating expenses that have since occurred. Assailed rates are in a majority of instances well below those originally prescribed, as adjusted by subsequent general increases, and it is well settled that such rates do not exceed reasonable maxima and afford no basis for reparation.—Matthiessen & Hegeler Zinc Co. v. Baltimore & O. R. Co., 323 I.C.C. 601 (610).

318. Presumption as to voluntarily established rates.—[Vols. 1, 6, 9, 12, 13, 17, 21].—Although fact that assailed rates on zinc dross to Meadowbrook, W. Va., do not exceed reasonable maxima when measured by rates on percentage basis prescribed as reasonable maximum in 204 ICC 319, as adjusted by subsequent general increases, would not preclude prescription of rates below the maximum basis for the future if there had been a general and uniform reduction by defendants from practically all origins in official territory to competing destinations other than Meadowbrook, such is not the case. While reductions have been numerous and cover much of official territory, the reduced rates to destinations where plants of complainant's competitors are located reflect no uniform relation to first class. Assailed rates therefore cannot be found unreasonable.—Matthiessen & Hegeler Zinc Co. v. Baltimore & O. R. Co., 323 I.C.C. 601 (610).

319. Evidentiary effect of subsequent reduction.—[Vols. 1, 6, 9, 11, 12, 14-19, 21].—Reduction of a rate after shipments have moved is sufficient to establish that the prior rate charged was unjust or unreasonable.—Atlantic Creosoting Co., Inc. v. Southern Ry. Co., 323 I.C.C. 533 (538).

322. Admissions by carrier.—[Vols. 1, 6, 9, 13, 15-18].—Any party which claims an inherent cost advantage is required to develop costs in an intermodal competitive situation if it wishes to be successful in its claim. Here, complainant seeks to use, and indeed restate to its own purposes, cost data prepared, yet not introduced into evidence by defendants, to support its claim. This is tantamount to compelling defendants to make out a case against themselves.—Sea-Land Service, Inc. v. New York Central R. Co., 329 I.C.C. 589 (592).

The evidence in question is not an admission against interest on the part of the defendants. On its fact it is favorable to defendants, but owing to complainant's failure to make out a case, it was not necessary for defendants to introduce it. Viewed differently, admissions are the prior assertions of a party, which, being inconsistent with its present claim, may be used to discredit it because of a discrepancy. But here, the evidence is in no way inconsistent with any other evidence or statements of defendant. Additionally, it seems clear that complainant is in no position procedurally to "sponsor" such data in an attempt to correct defects in its own case. The evidence should not have been received by the examiner, and is not to be considered here.—Id., p. 592.

Rates by Commodities

350. Rates prescribed or approved.—[Vols. 9, 11-19, 21].—Part II, see §216(b), n. 125; Part III, §305(a), n. 125; Part IV, §404(a), n. 125.

Alcoholic beverages: [Vols. 11, 12, 15-18, 21].—Transcontinental incentive package rates ranging from 128 to 149 cents, minimum 85,000 pounds, on champagne, vermouth, and wine, including sparkling wine, in boxcars, and incentive bulk wine rates ranging from 149 to 170 cents, minimum actual weight per gallon, but not less than 150,000 pounds, in tank cars, to alternate with corresponding present rates, from origins in Arizona, California, Nevada, New Mexico, Oregon, and Utah to points in rate groups in official and southern territories, found to be no lower than necessary to meet competitive situation presented and to be just and reasonable and otherwise lawful; approved.—Wine, Pacific Coast to East, 326 I.C.C. 119 (121-4, 135-9, 151, 154-6)*.

Proposed increase in rates on wine and malt liquors, to the extent it exceeds 4 percent, maximum 4 cents per 100 pounds (the same basis authorized generally for processed foods), is not shown to be just and reasonable.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 28(448-50, 466-8, 529)*.

Automotive vehicles, parts, accessories: [Vols. 9, 11, 13-19, 21].—Proposed increases in rates on automobiles, automotive parts and tractors are approved, except to extent that they exceed the overall limitation of 5 percent within the West and 4 percent within the South, and except that no increase is authorized within the South on farm tractors.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (348-51)*.

Bagasse: [Vols. 9, 14].—Both bagasse and limerock are low grade commodities on which rates would likely exceed their value if increased by 10 percent as proposed; increase in rates on those commodities, not in excess of 4 percent, approved.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (455, 457-8, 459, 529)*.

Chemicals: [Vols. 11, 15-19].—Proposed percentage increases on certain chemicals and related products are found unwarranted to the extent that they exceed 3 percent on fluorocarbons, acyclic organic ethers and propylene oxide.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (416-18, 518-21, 529)*.

Coal: [Vols, 9, 11-19, 21].—It has been the Commission's general policy since the decision in 69 ICC 11 to determine the reasonableness and nonprejudicial character of rates on coal on the basis of the distance over short tariff routes. This policy is especially appropriate where the nontariff route would short-haul the originating carrier which would be the case in the instant proceeding.—Coal, Ky., Tenn. and Va. to North Carolina, 329 I.C.C. 572 (578)*.

Percentage increases sought on bituminous are generally warranted and, subject to the overall limitation of 5 percent within the West, rates on coal may be increased as proposed except for proposed interterritorial increases. There being no justification for the higher increases proposed, increases on coal are limited to 5 percent, maximum 30 cents per ton, from East or South to Transcontinental Freight Bureau territory, or from West to East; and as to unit-train movements within the East and to or within the South—no more than 15 cents per ton.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (372-86, 529)*.

Coke: [Vols. 9, 11, 12, 18, 19, 21].—Proposed increases in rates on petroleum and coal coke, lignite, and petroleum, coal or coke briquettes are not shown to be just and reasonable to the extent they exceed the increases proposed and authorized on bituminous coal.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (386-8, 529)*.

Containers, cores, etc.: [Vols. 9, 11, 12, 14, 15, 17].—Proposed percentage rate increases of 6 percent on glass containers, 10 percent on returned empty shipping containers, and 10 percent on metal cans and metal shipping containers, found just and reasonable except to extent that they exceed overall limitation of 6 percent within the East, 5 percent within the West, 4 percent within the South, and 6 percent interritorially. Though imposed for reasons other than environmental, that overall limitation will benefit shippers of returnable glass bottles.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (354-8)*.

Copper: Proposed rate increases on primary copper smelter products will be just and reasonable except to the extent that they exceed 4 percent on copper ores, concentrates and precipitates within the South and 3 percent on copper bars and billets, rough cast, within the East.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (371-2, 529)*.

Feed: [Vols. 15, 17].—Under the circumstances shown of record, general level of rate increases sought on animal and poultry feeds are too high; therefore, a uniform 3-percent increase on those commodities is approved.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (459-66, 529)*.

Fertilizer, materials: [Vols. 9, 11-19]. —Record does not justify proposed increases, ranging up to 10 percent, in rates on fertilizer and fertilizer materials; overall 3-percent increase on those commodities, except that no increase is authorized on phosphate fertilizer, approved.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (471-9, 529)*.

Fish: [Vols. 9, 11, 17].—Since proposed rate increases on southbound Alaskan fish products came almost immediately on the heels of the selective and substantial increases on the same products of February, 1971, and respondents did not meet their burden of showing that the revenue contribution of fish products traffic is so poor as to justify another increase, the Commission's order excluded the products from the effect of the proposed increases.—Increased Rates and Charges, the Alaska Railroad, 340 I.C.C. 129 (162-163).

Flour: Rates on flour, whether moving in bulk or in bags, may be increased not more than 11 percent over the base rates in effect prior to increases authorized in Ex Parte No. 262, and in place of said Ex Parte No. 262 increase. The tariffs publishing such increases to small progress in one-half cent steps as provided herein.—Increased Freight Rates, 1970 and 1971, 339 I.C.C. 125 (221-28).

Fly ash: [Vols. 17, 18].—In Ex Parte No. 267, rates on fly ash and petroleum waste products may be increased not more than 8 percent.—Increased Freight Rates, 1970 and 1971, 339 I.C.C. 125 (209).

Fruits, berries, melons: [Vols. 9, 11, 12, 14, 15, 17-19, 21].—In Ex Parte No. 265, rates on eastbound transcontinental TOFC fresh fruits and vegetables where the rate includes a factor for protective service may be increased not more than 5 percent.—Increased Freight Rates, 1970 and 1971, 339 I.C.C. 125 (195); In Ex Parte No. 267, rates on eastbound transcontinental TOFC fresh fruits and vegetables where the rate includes a factor for protective service may be increased not more than 9 percent.—Id., 195; In Ex Parte No. 267, rates on fresh fruits and vegetables, edible nuts, processed foods and beverages, other than TOFC traffic, may be increased not more than 22 cents per hundredweight.—Id., p. 197.

Proposed 4-percent rate increase on processed fruits and vegetables, subject to a maximum of 4 cents per 100 pounds on both canned and frozen fruits and vegetables, approved. However, record fails to justify proposed 6-percent increase in rates on fresh fruits, vegetables, and edible nuts to the extent that it exceeds 4 percent, maximum 4 cents per 100 pounds, on fruits and vegetables (including citrus pomace, potatoes, and onions), and 3 percent, maximum 3 cents per 100 pounds, on shelled and unshelled walnuts.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (436-48, 529)*.

Grain, grain products: [Vols. 9, 11, 18, 19, 21].—Reduced export commodity rates on bulk wheat from origins in 8 western or midwestern States and East St. Louis, Ill., to gulf ports, ranging from 40 to 68 cents and reflecting a uniform 10-cent reduction in rates in effect prior to June 1962, found compensatory for average loading of 115,000 pounds and otherwise lawful; §4 relief granted. Like rates, made 7 cents higher to include port handling charge, on flour and bulgur, in packages, minimum 90,000 pounds, from origins in same territory on Chicago, B. & Q. R. to the gulf ports, also export rates from Burlington origins to Chicago, reflecting reductions in present rates of 6 cents on wheat and 10 cents on flour and bulgur (thereby restoring parity), approved as just, reasonable, and otherwise lawful.—Wheat and Flour, Midwest & S.W. to Gulf-Chicago—Export, 322 I.C.C. 581.

Reduced limited-transit grain rates from northern Idaho, Wash., and Oreg., to north Pacific coast ports, found just and reasonable and not destructively competitive as to low-cost all-barge movement; §4 relief granted in connection with such rates to Seattle and Tacoma, Wash.—Grain from Idaho, Oreg. & Wash. to Ports in Oreg. & Wash., 326 I.C.C. 358 (366, 369)*.

Rates on grain and grain products in the West may be increased not more than 11 percent over the base rates in effect prior to the increase authorized in Ex Parte No. 262, and in place of said Ex Parte No. 262 increase. The tariffs publishing such increases to small progress in one-half cent steps as provided herein.—Increased Freight Rates, 1970 and 1971, 339 I.C.C. 125 (219-28).

In view of increasing competition of both trucks and barge lines, a general increase in rail rates on grains and grain products that is too high would be self-defeating. Therefore, a 3-percent rate increase on those commodities, subject to a maximum of 3 cents per 100 pounds on prepared flour mixes, is authorized. Tariffs publishing authorized grain rates must observe a 1/2-cent progression.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (459-66, 529)*.

Household goods: [Vol 9].—Proposed percentage increases in rates on household appliances, lamps, and lighting fixtures, except to extent that they exceed 5 percent within the West, found just and reasonable.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (351)*.

Iron and steel; articles: [Vols. 9, 11-19, 21].—Proposed 3-percent rate increase on primary iron and steel products, except on finished iron and steel articles within the East, and 6-percent rate increase on semifinished iron and steel (billets, blooms, ingots, etc.), authorized. No increase is proposed from, to, or within the South.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (343-8)*.

Lumber, timber, logs; products: [Vols. 9, 11-19, 21].—In Ex Parte No. 267, rates on lumber and forest product may be increased not more than 15 cents per hundredweight.—Increased Freight Rates, 1970 and 1971, 339 I.C.C. 125 (228-32).

Proposed rate increases on lumber, plywood, and hardwood flooring are found just, reasonable, and otherwise lawful. However, rate increase on millwork is limited to 4 percent, maximum 4 cents per 100 pounds; no increase is authorized on woodpulp; and proposed increases on pulpwood and wood chips, subject to overall limitations in the major rate territories, but authorizing a nationwide interritorial increase not exceeding 5 percent, are approved.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (481-510, 529)*.

Machinery, machines, parts: [Vols. 9, 13, 17, 18].—Proposed percentage increases in rates on heavy electrical machinery and in detention charges on heavy duty flatcars required for movement thereof, except to the extent they exceed 5 percent on movements within the West and 4 percent within the South, approved.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (242-3)*.

Newsprint paper: [Vols. 17, 19, 21].—Proposed rate increases on newsprint, found not shown to be just and reasonable to the extent they exceed 5 percent to and within mountain Pacific territory, or include any increase within Southwestern Freight Bureau territory or from that territory to the South.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (515-6, 529)*.

Nuts: [Vols. 9, 11-14, 17, 18].—See *Fruits, berries, melons,* this note heading.

Processed foods: *See Fruits, berries, melons,* this note heading.

Sugar: [Vols. 9, 11, 12, 14-19, 21].—In Ex Parte No. 267, rates on sugar may be increased not more than 10 cents per hundredweight.—Increased Freight Rates, 1970 and 1971, 339 I.C.C. 125 (253-56)

Increase of 4 percent in rates on beet and cane sugar, subject to holddown of 3 cents per 100 pounds, except that no increase would apply in CFA territory, authorized; and same basis of increased rates is approved for corn syrup and corn sugar. However, proposed increases in rates on sugar beets and sugar cane, to the extent that they exceed a flat 3 percent nationwide, are shown to be justified.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (450-9, 529)*.

Sulphur, compounds, products: [Vols. 9, 11, 12, 14-19, 21].—Proposed reduced rate of 57.5 cents on dry bulk sulphur in closed or open-top cars, minimum 100,000 pounds, and molten sulphur in tank cars, minimum 140,000 pounds from indicated Canadian origins to Streator, Ill. found compensatory and lawful.—Sulphur, Canadian Origins to Streator, Ill., 332 I.C.C. 130 (134)*.

Vegetables: [Vols. 9, 11-19].—See *Fruits, berries, melons,* this note heading.

Waste, scrap, junk: [Vols. 14, 15, 18].—In Ex Parte No. 267, rates on scrap iron and steel, nonferrous and alloy scrap, textile and paper scrap, pig iron and iron pellets having iron unit content (Fe) comparable to pig iron or iron and steel scrap may be increased not more than 11 percent.—Increased Freight Rates, 1970 and 1971, 339 I.C.C. 125 (205-219).

Although, on the record, considered secondary materials should not be exempted from any increase in rates, the low value of such articles, the relatively high percentage of freight charges to sales price, and their generally favorable transportation characteristics warrant some limitation on proposed increases. Balancing those factors against carriers' need for additional revenue, an increase of not more than 3 percent is authorized on paper waste or scrap, textile waste, nonferrous metallic scrap, and glass, rubber or plastic scrap or waste. While secondary materials will continue to move despite proposed increases, the holddown imposed should encourage the movement and recycling of such commodities.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (358-69, 529)*.

Proposed 5-percent increase in rates on ferrous scrap, except 4 percent within the East and from the South to the East, and except 3 percent to or within the South, minimum 15 cents per ton, authorized. Unlike the situation found to exist with respect to secondary materials generally, level of prices for ferrous scrap has no discernable relation to freight rates and rate increases; and since authorized increases will not inhibit movement of that commodity, a limitation on the increases for purpose of encouraging movement would serve only to deprive the railroads of needed additional revenue.—Id., pp. 392-413.

Local, Through, Joint, and Proportional Rates

400. Through rates; relation to local rates.—[Vols. 1, 6, 9, 11-19, 21].—Charges on a carload of a freight automobile, old, used, from Lathrop, Calif., to Fort Benning Junction, Ga., found not shown unjust or unreasonable. Such movement is a portion of a through movement originating at Oakland, Calif., and the Commission in evaluating the reasonableness of a rate under §1 cannot relate its finding to only a portion of a through movement.—United States v. Central of Georgia R. Co., 332 I.C.C. 33 (36)

See also Corn and Corn Products, Illinois to Official Territory, at §15a(2), n. 1.

402. Proportional rates.—[Vols. 1, 6, 9, 11-19, 21].—Although the publication of joint intermodal TOFC rates for the movement of commodities the motor transportation of which is exempt from economic regulation is not possible, the transportation of such commodities in piggyback service may still be accomplished by a motor carrier through the use of open-tariff rates when they are made available by the railroads. It would also be possible for a rail carrier, even though it may not participate in a joint through rate, to establish a proportional rate on traffic moving in part by a nonregulated motor carrier—Substituted Service—Piggyback, 322 I.C.C. 301 (354)*.

Assailed proportional rate on coal in multiple-car lots from Mount Vernon, Ind., to Chicago district had its inception in longstanding competition; as originally approved in 1953, as one factor in total charges via the rail-river-rail route from inner and outer crescent mines, it was designed to enable defendant to participate in the traffic over a circuitous route whose primary function was to serve as alternative to the all-rail route when the rail-lake route is closed, and which was not expected to attract much over a million tons annually. Since inception of that rate an average of some 950,000 tons a year has moved via the Mount Vernon route, or an average of about 6.5 percent of the total competitive tonnage moving to Chicago over all routes. As before 1953 from 80 to 95 percent moved via the all-rail route, the alleged diversion subsequent to 1953 does not appear attributable to the assailed proportional. Since that rate covers estimated out-of-pocket costs and makes a contribution to the overhead burden, it is reasonably compensatory and is not shown to be otherwise unlawful.—Baltimore & O. R. Co. v. Chicago & E. I. R. Co., 322 I.C.C. 572 (575, 576)*.

Proposed rail multiple-car proportional rates on canned foodstuffs from the Pacific coast to points east of the Rocky Mountains found just and reasonable. Respondents have shown a competitive need for such rates, have proven such rates are not discriminatory as to single-car shipments, and have limited such rates to transited movements over through routes.—Canned Foodstuffs, Pacific Coast to the East, 335 I.C.C. 612 (617-22).

See also Corn and Corn Products, Illinois to Official Territory, at §15a(2), n. 1.

Group Rates

460. Disruption of groups.—[Vols. 1, 6, 9, 11, 12, 14, 15, 17-19, 21].—Group relations of long standing, especially in the sensitive grain-rate structure, should be disturbed only on a comprehensive record showing a distinct and compelling need therefor. To find that assailed rates on grain from central territory to interior group points in trunkline territory are unreasonable because they bear higher percentage relations to grain rates from same origins to New York City key group than percentage relations of corresponding first-class rates would disrupt group relations in effect for many years, would penalize some shippers of grain transited at interior points, and would create numerous fourth-section departures. Moreover, the rates to new York City are depressed by water competition, and no clear and convincing reason appears for extending that depressed level to the considered area. Assailed rates are not shown to be unjust and unreasonable.—Cooperative Grange League Fed. Exc. v. Akron, C. & Y. R. Co., 323 I.C.C. 174 (178-9).

Differential Rates and Routes

485. Water and rail.—[Vols. 1, 6, 9, 11, 12, 14-16, 18, 19, 21].—See Sea-Land Service, Inc. v. Baltimore & O. R. Co., n. 308, above.

All-Commodity Rates

495. In general.—[Vols. 9, 11, 12, 14-19, 21].—Proposed reduced commodity column rates on all freight, minimum 10,000 pounds, in straight or mixed shipments, within southern territory and between points in that territory or St. Louis and intermediate points in Indiana, Illinois, and Missouri, approved as just and reasonable. Proposed rates are reasonably designed to recapture some of high-rated merchandise and l.c.l. traffic lost to common, contract, and private motor carriers and will apply on a large number of commodities rated class 50 to 400; they will alternate with respondents' existing rates, and absence of a mixing rule offers more flexible rates to shippers, allowing them to accumulate and ship small-quantity lots; and evidence indicating that they exceed average fully distributed costs for the southern region by substantial amounts warrants conclusion that they are compensatory.—Freight, All Kinds, Southern and IFA Territories, 323 I.C.C. 730 (731, 737).

Equalization of Ports or Markets

503. North Atlantic ports adjustment.—[Vols. 1, 6, 9, 11, 12, 15, 17-19, 21].—Proposed reduction on carload rates on paper and paper articles, for export, from origins in central freight association territory to Baltimore, Md., is lawful although representing a departure from formerly equalized rates from central territory to the North Atlantic ports. Evidence shows not only that the proposed rates are reasonably compensatory but that there is a need for the proposed rates; Baltimore carriers have a competitive disadvantage, and there is need for reasonable and lawful carrier competition. But, similar rates applying from same origins to other North Atlantic ports are not shown just and reasonable since cost evidence pertaining to rates proposed to ports other than Baltimore lack a relationship of unit cost to export traffic; costs based on territorial service units are not representative of the handling of export traffic.—Paper, Central Territory to North Atlantic Ports, 329 I.C.C. 281 (289-90).

Rates Based On Quantity of Traffic

514. In general.—[Vols. 19, 21].—Commission ordered assailed rates on coal canceled as they were based on a tariff provision requiring a minimum annual-volume tender of coal and said provision was found to be a destructive competitive practice.—Great Lakes Ship Owners Assn. v. Chicago & N.W. Ry., 337 I.C.C. 287 (290-93).

Reduced local rail rates and charges not shown to be just and reasonable to the extent such rates are subject to an annual-volume requirement but otherwise just and reasonable. The annual-volume requirement was found to produce unjust discrimination between shippers using substantially similar transportation service and is violative of §2. Ordered canceled without prejudice to filing of new schedules.—Wheat & Wheat Flour, Westbound, 337 I.C.C. 858 (877-81).

518. Trainload rates.—[Vols. 1, 6, 9, 11, 15-19, 21].—Rent-a-train rates are a form of annual volume discount rates approved or found not shown to be unlawful in *Coal,* 311 ICC 355, and *Natural Gas,* 323 ICC 75, cases. In latter case tariffs providing unit train rates were found not to create contract rates such as were condemned in the *Guaranteed Rates* case, 315 ICC 311, and a like finding is warranted herein.—Grain by Rent-A-Train, IFA Territory to Gulf Ports, 335 I.C.C. 111 (125).

Commission approved reduced all-rail multiple-car rate herein even though the proposed rate exceeds the variable costs excluding profit and income taxes. Recent rate increases on issue traffic in Ex Parte No. 267 will improve compensativeness and while only a single rate is proposed it will apply from a large origin area and is, in effect, a group or blanket rate. Proposed rate is adequately compensatory and will aid farmers, elevator operator and other interests located on respondent's tracks.—Corn & Soybeans, Midwest to Pacific Northwest, 339 I.C.C. 465 (472-3).

The rent-a-train concept, as embodied in tariff herein, is analagous to multiple-car and trainload volume rates. Commission found tariff herein not shown just and reasonable with respect to the minimum speed and refund provisions and when applying to carrier-owned cars. Tariffs ordered canceled with prejudice to filing of amended tariffs.—Grain by Rent-A-Train, IFA Territory to Gulf Ports, 339 I.C.C. 579 (592-3)*.

In view ot the provision for a guaranteed minimum number of trips, it is unnecessary to provide for alternation with other rates or for a specific minimum tonnage.—Id., p. 587-8*.

Respondents' rationale for proposed cancellation of multicar rates on kaolin clay, that there was no competitive necessity for retention of a discount rate and that there were no cost savings experienced by them in the movement of large volumes of clay at one time as opposed to single-car shipments, traditionally has provided a basis for disapproval of multicar rates *when initially filed*. However, under §15(7) of the Act, it is incumbent upon respondents, as proponents of a change in a rate or practice, affirmatively to meet the full burden of proof that the proposed change is just and reasonable. See also, §15(7), n. 35.—Clay, Points in Georgia to Savannah & Port Wentworth, 340 I.C.C. 377 (383)*.

Line-haul, Terminal, and Switching Services Included

521. Line-haul rates and terminal services.—[Vols. 1, 6, 9, 11-19, 21].—Present line haul rates which include the loading and unloading of the carrier's vehicle "when this service can be performed by one man" are vague and indefinite since no provision is made as to who is to decide when a shipment can be loaded or unloaded by one man; indefiniteness is even more pronounced in that respondents' rules also provide that shipments which cannot be handled by one man because of weight, dimensions or physical characteristics are not entitled to loading and unloading service. The lack of certainty is not cured by respondents' proposed alternate rule whereby an additional man would be provided only at the carrier's option, since the shipper or consignee would be unable to determine when and under what circumstances this service would be furnished. However, rules providing that the line-haul rate includes loading and unloading service unrestricted as to the number of laborers, or which provide for one man per vehicle or those which make provision for additional labor at an extra charge are clear and definite.—Detention of Vehicles & Loading and Unloading Provisions—Investigation, 329 I.C.C. 220 (227-30).

Respondent line-haul railroads were ordered to cease and desist generally from rendering switching service of giving allowances to shippers for intraplant switching on shipper's tracks in prior report, 209 ICC 787. An exception to the general rule is when the line-haul carrier can perform such a spotting and switching of cars at its operating convenience in continuous movement as defined in prior report. But here, because of complexity of intraplant track layout and extra switching demands of petitioner shipper, the exception does not apply and cancellation of cease and desist order is not justified.—Detroit Harbor Terminals, Inc., Terminal Allowance, 332 ICC 635 (638-39).

522. Switching and spotting.—[Vols. 1, 6, 9, 11, 13-19, 21].—Proposed general increases of $7.50 in intraterminal and interterminal switching charges and $3 in intraplant switching charges in western and southern districts and Pocahontas region approved as just, reasonable, and otherwise lawful. Though respondents' switching charges vary at the different terminals and within terminals, so that the flat increases result in varying levels of increase, resulting charges generally are on the out-of-pocket level and do not exceed a maximum reasonable level.—Increased Switching Charges, 322 I.C.C. 560 (562, 563)*.

Commission found proposed increased interterminal, intraterminal, and reciprocal switching charges not shown to be just and reasonable. Because there is no substantial reciprocity of switching herein, the cost of service is the most important factor in determining reasonableness of rates and respondents' costs were found so substantially overstated as to warrant a conclusion that proposed charges have not been justified.—Switching Charges and Absorption, 399 I.C.C. 65 (77-81).

Commission found rates charged for rail switching movements from East St. Louis to Sauget, Ill., applicable and not shown to be unlawful. Although such switching movements occurred within a single State, they followed exempt for-hire barge transportation in interstate commerce and are thus themselves in interstate commerce and the assailed interstate rates were applicable.—Monsanto Company v. Alton & So. Ry. Co., 339 I.C.C. 319 (321-3).

See also Indiana Harbor Belt v. General Amer. Transp. Co., at 28 USC §2325, n. 40.

526. Terminal services.—[Vols. 1, 6, 9, 11-13, 16, 18, 21].—See Increased Waterborne Charge, §15(7), n. 70.

Percentage Increases

540. In general.—[Vols. 15-19, 21].—Although no fixed percentage for all traffic is approved in this general revenue proceedings, increased freight rates and charges by respondent railroads tentatively approved in whole or in part by prior report are found just and reasonable with certain exceptions indicated herein as they offset increased costs and return a reasonable profit on investment.—Increased Freight Rates, 1967, 332 I.C.C. 280 (343-44)*.

General increases ranging from 3 to 10 percent on numerous commodities discussed herein found just and reasonable with certain cited exceptions. Such general increases had been previously found needed in 332 ICC 590.—Increased Freight Rates, 1968, 332 I.C.C. 714 (719-789)*.

Although the proposed 15-percent rate increase was found to be far out of line with new [1971] national economic policy, the evidence did establish that respondents do bear real and substantial risks in the Alaskan trade, that they have experienced rising costs, and that they did need additional revenues. On the state of the record regarding respondents' needs, and bearing in mind new national objectives for the economy, the Commission was persuaded that respondents should be allowed to implement an increase of 2 percent, rather than the 15-percent rise initially proposed.—Increased Rates and Charges, the Alaska Railroad, 340 I.C.C. 129 (162).

Commodity Rates

573. Considerations bearing on reasonableness, generally.—[Vols. 1, 9, 17, 19, 21].—Assailed rates applied during interim increase period on ammonium sulphate found unjust and unreasonable. Ammonium sulphate has historically had a rate parity relation to fertilizer and defendant's charges were based on higher interim increases on chemicals thus disturbing preexisting rate relation between fertilizer and ammonium sulphate. Refund due to extent that interim increases on chemicals exceeded those on fertilizer.—Allied Chemical Corp. v. Norfolk & Western Ry. Co., 341 I.C.C. 266 (269-70).

574. Relation to class-rate structure.—[Vols. 1, 6, 9, 12, 14, 15, 17-19, 21]. Assailed rates on technical and feed grades of urea are not shown to have been unreasonable when those on technical urea, during period covered by the complaint, ranged from 32.5 percent of docket 28300 first class rates down to present 15 percent, and those on urea feed compound from 25 percent of first class down to present 15 percent, with transcontinental rates on both grades substantially lower than the 32.5-percent basis; fifth-class rates (35 percent of first class) were found not unreasonable on industrial urea in 287 ICC 175 and 236, and low present levels of the assailed rates result from various voluntary reductions made by defendants to meet competition.—W. R. Grace & Co. v. Illinois Central R. Co., 323 I.C.C. 102 (113-4).

While class rates are made primarily with relation to distance, going rates on high volume traffic like grain are influenced by a variety of factors, including carrier and market competition, and in Docket No. 28300, wherein uniform class-rate scales were prescribed, neither exceptions nor commodity rates were in issue. If no other factors than distance were involved in a particular situation, first-class rates could serve as a standard for measuring rate relations, but such is not the case where destination groups that have been in effect for many years would be disrupted. Assailed rates on grain from central territory to interior group points in trunkline territory are not unreasonable merely because they bear higher percentage relations to grain rates from same origins to New York City key group than percentage relations of corresponding first-class rates.—Cooperative Grange League Fed. Exc. v. Akron, C. & Y. R. Co., 323 I.C.C. 174 (178).

Protective Services

594. Icing and re-icing; refrigeration.—[Vols. 1-16, 18, 19].—Increased refrigeration charges for perishable freight sought by petitioner Louisville & N. R. Co. found just, reasonable, and authorized even though the Commission has in the past generally dealt with such charges on a nationwide basis. Petitioners' evidence proves such increases are necessary to partially offset greatly increased costs and would not be inconsistent with national transportation policy. Similar petitions by Eastern railroads denied for absence of cost evidence.—Charges for Protective Service to Perishable Freight, 332 I.C.C. 136 (151-2)*.

Export and Import Rates

601. Propriety of maintenance on different basis than domestic rates.—[Vols. 1, 6, 9, 11-14, 16, 18].—There is no general principle that import rates must be less than, or even the same as, corresponding domestic rates. Complainant has not shown that assailed import rates on iron and steel articles are unreasonable because they exceed domestic rates reduced to meet truck competition when, though it showed that in 1 year nearly half of its import traffic moved by truck, it failed to indicate the volume which moved from the individual ports or to the respective destinations; and since compared ex-water domestic rates exist primarily to permit rail carriers to compete with domestic movements from the ports by other means, they necessarily reflect a level comparable to the other domestic rates. Likewise, comparisons based on waybill samples do not establish unreasonableness of the higher import rates since the method of sampling reflects the predominance of competitively depressed domestic rates.—Southern States Cooperative, Inc. v. Baltimore & O. R. Co., 323 I.C.C. 400 (406-7).

604. Relation to reasonable domestic rates.—[Vols. 1, 6, 9, 11-16, 18, 19, 21].—Upon complaint, rates charged on export shipments of automobile parts from Detroit, Mich., to Laredo, Tex. were not shown unlawful as such export shipments are more costly for defendant railroads to handle than domestic traffic, and thus the lower domestic rate level was not justified on exports.—Fabricas Auto-Mex., S.A. v. N.Y. Central R. Co., 332 I.C.C. 1 (9).

Evidence submitted by respondent railroads comparing domestic rates with shipside rates found inadequate to support proposed cancellations of wharfage absorption as shipside rates reflect separate rate structures in effect for many years and affected by factors peculiar to waterborne traffic which do not normally affect domestic rates.—Cancellation of Wharfage Absorption, 335 I.C.C. 477 (525).

Transit

610. Generally.—[Vols. 1, 7, 9, 11-18].—Assailed flat rates charged on carload shipments of feed from Vicksburg, Miss. to destinations in Louisiana not shown unjust and unreasonable. Such rates were applied as a result of cancellation on all transit privileges to complainant shipper of feed and such cancellation has not been shown to be unreasonable or otherwise unlawful.—The Merchants Co. v. Illinois Central R. Co., 329 I.C.C. 713 (716).

Proposed increased charges for stopping in transit for partial loading or unloading found just and reasonable. Proposed charges are compensatory over and above costs involved in such service and do not violate §§ 2 and 3.—Stopping-in-Transit Charges & Restrictions, 337 I.C.C. 605 (609-10).

Proposed new minimum and increased rail transit and track storage charges not shown to be just and reasonable due to deficiencies in respondents' cost evidence. Respondents failed to draw a cost-to-revenue comparison for traffic on which line-haul rates are presumed to cover transit and also failed to develop representative costs for sample movements of various commodities moving varying distances in different territories with different size transit points.—Transit Charges, USA, 339 I.C.C. 45 (58-60).

District court remanded this case in 301 F. Supp. 328 to the Commission because in considering the compensativeness of charges based on proposed provisions for milling-in-transit of flour in 332 ICC 432, the Commission had erroneously failed to consider the revenue realized from non-transit flour, which is required to accompany each flour shipment. Upon reconsideration including the revenues on non-transit flour, the proposals must be deemed compensatory, just, reasonable, and otherwise lawful.—Transit Provisions on Wheat at Twin Cities, Minn., 341 I.C.C. 235 (237-39)*.

612. Relation of charge to level of rates.—[Vols. 1, 6, 9].—Commission concluded that a proposed $22 per car additional rail transit charge mainly on cotton and grain products in the South was not shown to be just and reasonable, largely because the respondent railroads failed to show the relationship of out-of-pocket costs (including terminal costs for transit service) to the present line-haul rates which include transit, in order to determine if transit is being provided without adequate compensation therefor.—Transit Charges, Southern Territory, 332 I.C.C. 664 (681-87).

Reasonableness of the proposed new or increased per-car transit charges cannot be determined because cost data presented failed to show representative overall movements between origin and final destination of various commodities and the total rates and charges assessed.—Transit Charges, USA, 339 I.C.C. 45 (58).

615. Inspection.—[Vols. 1, 6, 9, 12].—Sampling and inspection of grain is necessary at sometime during the marketing process because the grade must be determined prior to most sales. However, it is not essential that the grade be determined while a grain shipment is in transit since, under the revised Grain Standards Act, the inspection can take place elsewhere. Also, railroads' basic responsibility does not require them to provide service for in-transit inspection; and fact that they have provided such service, and included cost thereof in the line-haul rates, does not preclude a modification of that practice if the circumstances justify some revision. Therefore, since in-transit inspection is now permissive under Federal statutes and may be omitted or performed at origin or destination, service made available by the railroads in connection with the in-transit inspection of grain is not shown on the record to be essential in the grain marketing process. Grain inspection is an accessorial service for which a charge separate from the line-haul charges may properly be assessed.—Inspection in Transit, Grain and Grain Products, 339 I.C.C. 364 (371-2, 386)*.

Demurrage

631. Generally.—[Vols. 1, 9, 12, 14, 19].—In raising demurrage rates for undue detention of cars by shippers, Commission was acting in its legislative capacity and did not have to consider evidence as to how the rates would be applied in every possible circumstance. Order approving involved increased demurrage charges affirmed by the district court.—General Mills, Inc. v. United States, 364 F. Supp. 1278 (1284-85)*.

While some protestants did not object to proposed increased demurrage charges to remedy cases of undue detention, Commission ordered proposed schedules canceled as there is no basis in this record that such charges would promote equipment efficiency which is the primary purpose of demurrage charges. Proposed charges would only increase carrier revenues, and Commission has consistently held that demurrage charges are not to be considered as a source of carrier revenue.—Demurrage Rules and Charges, Nationwide, 339 I.C.C. 655 (668).

Demurrage charges are penalties designed to speed release of cars and obtain better car utilization. Evidence herein, especially the steady increase in undue car detention by shippers and receivers in past 10 years, strongly supports respondents' position that prior demurrage charges, established in 1964, have lost their penalty element in today's economy. Commission concluded that substantially higher charges are now needed and approved increased charges and new regulations proposed herein.—Demurrage Rules and Charges, Nationwide, 340 I.C.C. 83 (88-89)*.

Although carriers' car service leaves a lot to be desired and contributes to loss of car days, this poor service has no direct bearing on car detention by shippers. Once shipper releases a car, no charges accrue even if the responsible carrier is negligent in providing switching service for the car.—Id., p. 89*.

Commission found assailed demurrage charges to be just and reasonable inasmuch as complainant shipper failed to exercise due diligence in its efforts to release the cars. Although defendant's solicitation of more traffic than it could handle was the proximate cause of detention, complainant could have avoided detention by moving cars at single-car rate when defendant could not meet the multiple-car minimum in time to permit tender of shipment. Shippers are hereby advised that they may move multiple-car shipments piecemeal in similar situations at multiple-car rates.—Ormet Corp. v. Illinois Central R. Co. 341 I.C.C. 647 (652-55).

See also General Mills, Inc. v. United States, at §17(9), n. 2.

Rates for Special Classes of Service

659. Wharfage and dockage.—[Vols. 1, 6, 9, 11-19, 21].—Proposed cancellation of wharfage absorption at indicated Gulf and South Atlantic ports by respondent railroads found just and reasonable to extent they reduce port terminal charges by the amounts of wharfage now included but not just and reasonable as they cancel absorption of wharfage charges in connection with shipside and other rates which now include additive charges designed to defray port terminal expenses.—Cancellation of Wharfage Absorption, 335 I.C.C. 477 (526).

Proposed reduced plan II TOFC per-flatcar rate on canned goods, 2 trailers per flatcar, maximum 40,000 pounds per trailer, from Florida origins to New York City and New York and New Jersey points taking New York City rates, found just and reasonable and not otherwise unlawful when it improves railroads' overall revenue position by attracting more traffic than had previously moved by rail and, based on respondents' cost studies adjusted after prior hearing to correct deficiencies and incorporate up-to-date data, charges under proposed rate are clearly compensative on an out-of-pocket basis. Also, proposed rate does not constitute a destructive competitive practice, as argued by protestant water carrier, when protestant failed to show that motor-water-motor in the low-cost transportation mode and, as such, is entitled to protection.—Canned or Preserved Foodstuffs from Fla. to N. Y. & N. J., 326 I.C.C. 776 (777, 780-1, 783)*.

Entire Commission found proposed schedules published to comply with rules promulgated in *Piggyback* case, 322 ICC 301, just and reasonable to extent that mixed-shipment rules impose a weight limitation of not more than 60 percent of any one article (as indexed in freight classification). However, proposed higher no-mix rates found unjust and unreasonable because substantially different rate levels were proposed for each rate territory although transportation conditions in each territory were similar.—TOFC Rates and Charges Official Territory, 337 I.C.C. 557 (562-67).

On the basis of the analysis of the cost factors (appendix K) involved in instant case, Division 2 concludes that for the most part the proposed increased and revised TOFC rates on fresh or salted meats and packinghouse products exceed the out-of-pocket costs and are just and reasonable. However, no probative cost evidence was submitted as related to plan V TOFC rates, and they will not be approved.—Meat & PHP, TOFC, SWL, WTL, Official Territories, 340 I.C.C. 214 (244-46).

See also, §20(1), n. 3.

Express

709. In general; competition, etc.—[Vols. 6, 9, 13-18, 21].—Express rates proposed herein are the total of "line-haul charges" based on the cubic foot measurement and "piece charges" based on the number of pieces in the shipment. These rates embody a new method of express rate publication devised to attract traffic to express service where the transportation characteristics and handling conditions are such that respondent desires to make its service available to shippers who want express service at rates competitive with other transportation modes. The proposed rates will operate to conserve transportation facilities and reduce carrier handling costs by inducing a shipper to package its product as compactly as possible and in as few easy-to-handle packages as possible. Such carrier conservation and reduced costs must redound to the public benefit in reduced rates and the Commission feels that this method of determining express rates should be encouraged.—Phonograph Records—REA—Richmond, Ind., to U.S. Points, 329 I.C.C. 391 (392-3, 398).

Passenger Fares

760. In general.—[Vols. 1, 6, 9, 11-19].—Proposed revisions in fares applicable to interstate passenger service on the New Haven Division of respondent railroad found just and reasonable in certain respects, as specified herein, to extent that revised fares compare favorably with fares charged for similar services under substantially same transportation conditions and such other criteria as are pertinent.—Penn Central Fare Revision-1969, 335 I.C.C. 720 (736-47).

Section 1. (5 1/2) Exchange of services.[Unchanged. See vol. 11. p. 9096, vol. 15, p. 11951.]

Historical Note. See vol. 21, p. 16375.

Notes of Decisions

§1(5). n. 850: Volume 1—p. 631; Volume 6—p. 4802.

Section 1. (6) Classification of property for transportation; regulations and practices.—[Unchanged. See vol. 9, p. 7218.]

Amendments, see footnotes, vol. 1, p. 633; historical notes, p. 633, vol. 9, p. 7218.; vol. 21, p. 16375

Notes of Decisions

Volume 1—p. 640; Volume 6—p. 4803; Volume 9—p. 7219; Volume 11—p. 9096; Volume 12—p. 10185; Volume 13—p. 10909; Volume 14—p. 11390; Volume 15—p. 11951; Volume 16—p. 12587; Volume 17—p. 13237; Volume 18—p. 14007.; Volume 19—p. 15035.; Volume 21—p. 16375.

Weight as a Factor in Measurement of Transportation Charges

24. Minimum weight as factor.—[Vols. 1, 6, 9, 11-19, 21].—Refusal of the defendants to participate in reduced rates conditioned on the use of 70-ton cars was found not justified on the record. Such a refusal to supply the facilities necessary to provide service to complainant restricts the free movement of coal and access to the market at reasonable rates on a related competitive basis and has in effect, closed the routes in a commercial sense in contravention of the provisions of 1(4) and the basic purpose of 15(3) of the Act. This refusal of defendants constitutes an unjust and unreasonable practice in violation of 1(6) and must be condemned in order to provide the complainant, their shippers, with free, open, and adequate transportation service.—Coal, Ky., Tenn. and Va. to North Carolina, 329 I.C.C. 572 (587)*.

See also W. R. Grace & Co. case, §1(5), n. 211.

Carload Minimum Weights or Transportation Units

41. Larger cars furnished than ordered.—[Vols. 1, 6, 9, 12, 15, 16, 17, 19, 21].—When tariffs provide differing minimum weights depending on size of car used, but do not contain a substitution rule conforming to rule 66(a) of Tariff Circular 20, charges based on the minimum weight applicable to a car larger than the one ordered, furnished for carrier's convenience, will be presumed unreasonable insofar as they exceed those which would apply if a car of size ordered were used. Publication of charges based on particular equipment constitutes an open offer by carrier to the public, and, having tendered the rate, it must protect the public in its use. Where a reasonable demand is made for a particular car, and carrier for its own convenience furnishes a larger car, shipper should not be subjected to higher rates based on the larger car.—United States v. Southern Pac. Co., 325 I.C.C. 200 (201, 206).

Rule 66(a) is directed primarily to carriers and not to shippers; it provides that capacity of the car ordered, date of such order, and the number, initials, and capacity of the car furnished "should be" stated on the bill of lading and carrier's waybill; however, language of the rule is not mandatory. Complainant filled in all the appropriate spaces provided on the bills of lading, and fact that they do not list the dates the smaller cars were ordered does not preclude recovery of any excess charges. Issuance of the bill of lading is carrier's responsibility, not shipper's, and to regard inclusion of specific information on that document as an indispensable condition to recovery by shipper is improper; it would render form superior to substance and amount to unwarranted disregard of the other relevant evidence of record. Unrebutted testimony establishes the dates the smaller cars were ordered, and complainant's qualification of those dates by use of the words "on or about" does not materially detract from that evidence.—Id., pp. 206, 209.

Furnishing of a 50-foot flatcar instead of 40-foot car ordered for shipment of a fire truck, and of a 53-foot-6-inch flatcar instead of 50-foot car ordered for shipment consisting of a truck, a tractor tank, a set of tractor treads, an electric generator in a box, some wire rope, and four boxes stored in the truck, was for defendants' convenience when no demands for immediate loading were made and complainant's requests for the smaller cars were patently reasonable. Mere fact that the larger cars were supplied shortly after the requests were made does not establish that defendants were not given a reasonable time to supply the smaller cars ordered; nor is it of controlling importance that at time of shipment one originating carrier had only 25 40-foot flatcars and the other had no 50-foot flatcars. If carriers are unable to supply a certain type car, although they publish charges on that type, a shipper making a reasonable request for such a car should not be made to suffer higher charges.—Id., pp. 204, 207.

The 24-foot fire truck could obviously have fitted on a 40-foot flatcar, and length of the 50-foot car ordered for the other shipment would have exceeded the combined length of the articles by 9 feet 6 inches; moreover, sizes of the tractor treads, the wire rope, and the box containing the generator indicate that they need not be loaded in tandem. Such evidence, together with unrebutted testimony of expert who supervised the loading, is convincing that latter shipment would have fitted in a 50-foot flatcar with sufficient space left for the brake wheel clearance required by carriers' loading rules and for any possible tolerance required between the various items. If defendants had published a rule in conformity with tariff circular rule 66(a), the applicable charges on those two shipments would have been determined on the minimum weights for the cars ordered; their failure to do so was prima facie unreasonable, and that presumption has not been rebutted as to those shipments; reparation awarded.—Id., pp. 208, 210.

But charges based on 50-foot car furnished in lieu of 40-foot flatcar ordered to be furnished next day for a shipment of two motor vehicles and four boxes from Aberdeen, Md., are not shown to have been unreasonable. Defendants had no 40-foot flatcars in yard which usually supplies cars for Aberdeen, and unrebutted testimony that when complainant was so informed it indicated that the smaller car was required for immediate loading is convincing that defendants had no opportunity to furnish such a car within the allotted time, and precludes finding that the larger car was furnished for their convenience. Moreover, it is not convincingly shown that shipment could have been loaded on a 40-foot car and comply

with carriers' loading rules; although combined length of the vehicles was 35 feet 4 inches, without a showing of dimensions of the individual boxes it cannot be assumed that they would have fitted in the remaining space or on the vehicles themselves, and mere fact that shipment was loaded within 40 feet of the larger car does not establish that a 40-foot car would have been adequate in view of the clearance requirements.—Id., pp. 202, 205, 206-8.

Respondent railroads' proposed reduced rates on canned goods between Pacific coast and eastern points found not just and reasonable to the extent schedules containing such rates fail to contain a provision protecting minimum weight applicable to the car ordered by shipper in violation of rule 66(a) of Tariff Circular No. 20.—Canned Goods, Between Pacific Coast and the East, 332 I.C.C. 55(64-5)

43.—Two cars furnished for one ordered.—[Vols. 1, 6, 9, 11-13, 15, 19].—Respondent railroads' proposed reduced rates on canned goods between Pacific coast and eastern points found not just and reasonable to the extent schedules containing such rates fail to contain a limited two-for-one rule to apply over northern routes from October 15 to April 15 in violation of rule 66(a) of Tariff Circular No. 20.—Canned Goods, Pacific Coast to the East, 335 I.C.C. 55(65-6).

Computation of Charges According to Weight

62.—Origin weights.[Vols. 1, 6, 9].—See Coal, Weighing and Computation of Freight Charges, n. 74, below.

64.—Destination weights.—[Vols. 1, 6, 9].—See Coal, Weighing and Computation of Freight Charges, n. 74, below.

65. Bills of Lading act—Shipper's weight, load, and count.[Vols. 1, 6, 9, 17, 19, 21].—

Action for nonreceipt of part of goods: [Vols. 1, 9, 16].—In consignee's suit against delivering carrier for damages resulting from alleged deficient interstate motor transportation of goods, introduction of bill of lading issued by initiating truck line and containing notation "S L & C" which means "shipper's load and count" did not meet the burden of proving that 305 fan coil units (which plaintiff ordered from consignor) were actually loaded in good condition at the start of shipment. As stated in 100 F. Supp. 595, a "shipper's load and count" in a bill of lading has the effect of placing the burden on shipper who loads the goods to prove that the amount specified was loaded and that a less amount was unloaded by consignee; whereas in the case of a receipt not so qualified the burden is on carrier to prove that amount shown on bill of lading was either not in fact loaded, or was delivered, or otherwise to settle for the full value thereof. Therefore, a "shipper's load and count" bill of lading places on shipper the burden of proof of proper and correct loading, and such bill of lading without additional evidence does not fulfill that burden; district court decision, denying plaintiff's claim for damages, affirmed.—Dublin Co. v. Ryder Truck Lines, Inc., 417 F. 2d 777 (778).

In general: [Vols. 1, 6, 9, 19, 21].—Under §8 of the Bills of Lading Act, carrier is not obligated to make delivery except upon production and surrender of the bill of lading; but it is not prohibited from doing so. And defendant railroads did not violate Uniform Bill of Lading provision which prohibits inspection without written consent of shipper by delivering plaintiff's shipments (moved on order bills of lading stating there was no right of inspection prior to surrender) to consignee without surrender of the bills of lading; that provision was adopted for the benefit of carriers and can be waived by them at any time. Similarly, while carrier's liability to the holder of an order bill of lading elevates the order bill to the status of a negotiable document, and that status is not undermined by the liability of carriers under §20(11), the provision in an order bill of lading requiring its surrender protects carrier from further liability on the negotiable instrument and carrier may waive that right so long as it protects negotiable-instrument character of the order bill.—Iowa Beef Packers, Inc. v. Chicago G. W. Ry. Co., 402 F. 2d 930 (934).

In addition, provisions of §3 of Uniform Freight Classification 6 (under which consignee of shipment of perishable goods can receive the goods without delay) were adopted to protect the carrier from loss resulting from delays in transportation because of the use of bills of lading and, also, to protect carrier in instant limited situation from possible subsequent holders of the bills of lading; however, by complying with those provisions, the railroad does not assume any other risks. Therefore, defendant railroads which delivered plaintiff's shipments to consignee without surrender of order bills of lading and which instead took consignee's blanket indemnity bond are not liable for the damages which consignee collected from shipper because the shipments did not conform to agreed specifications.—Id., pp. 934-5.

Weighing Practice

67. In general.—[Vols. 1, 6, 9, 13, 14, 16].—While rules governing weighing of carload freight provide that initial weighing must be at origin and that reweighing must be performed at convenient points, in actual practice all cars are not weighed and a train is billed on basis of initial weighing of representative cars or on basis of the cars' marked capacity. However, when requested, carloads are weighed individually by consignors, consignees, or participating railroads, and a 7-cent per ton charge is assessed for that service when performed on railroad scales. Respondents anticipate loss of weighing-service revenues on unit-train operations if forced to meet protestant railroad's charge of 2 cents a ton for weighing on its recently installed electronic scale (capable of weighing trains in motion), but lawfulness of protestant's tariff is not in issue. Proposed amended tariff rules, which respondents interpret as a clarification of an intent to limit weighing to origin carriers, are unjust and unreasonable because they limit weighing for billing purposes to specified scales.—Coal, Weighing and Computation of Freight Charges, 326 I.C.C. 382 (383-5).

Tariff rule requiring acceptance by consignor of consignee's weights for assessment of freight charges, under terms of weight agreements between consignee and defendant railroads, not shown unjust, unreasonable, or otherwise unlawful. It is neither unreasonable nor inequitable to require shipper too rely upon certified destination weights found by authorized weighmasters operating industry-owned tracks. Privately owned equipment is regularly inspected and tested to assure accuracy in same manner as railroad track scales.—Institute of Scrap Iron & Steel v. Aberdeen & R. R., 341 I.C.C. 771 (776)

74. Reweighing.—[Vols. 1, 6, 9, 12-14, 16].—Proposed changed tariff rules, providing that origin waybilling carrier's scales or the scales of consignor or consignee (certified by a railroad party to the respective tariff) must be used for determining actual weights of bituminous steam coal in cars for the purpose of assessing freight charges on trainload consignments, found not just and reasonable within meaning of §1(6). To insure that shipper pays freight charges assessed on correct weights, he should be permitted to show by reweighing that the weights initially ascertained were not accurate. Shipper may want to reweigh because of the possibility of loss or theft en route or inaccuracy of the origin scales. The instant proposal, allegedly for the purpose of preserving the custom of origin-carrier weighing, is unjust and unreasonable because it limits weighing for billing purposes to specified scales.—Coal, Weighing and Computation of Freight Charges, 326 I.C.C. 382 (382-3, 385-6).

Classification Structure

126. In general.—[Vols. 1, 11, 12, 14, 17, 19, 21].—Argument that all-commodity rates which are not subject to a mixing rule and thus apply on straight as well as mixed shipments are a drastic departure from existing l.c.l. rate structure and therefore violate §1(6), is untenable in view of holding in 379 US 343 that §1(6) does not apply to all-commodity rates.—Freight, All Kinds, Southern and IFA Territories, 323 I.C.C. 730 (737).

See also Price-Watson Company v. I.C.C., §6(7), n. 260.

131. Descriptions of commodities.—[Vols. 1, 6, 9, 13-19, 21].—De-icers and decontaminators are each specifically designed articles which consist of a spray unit and a truck chassis, where the chassis has been so altered that considerable changes would be required to reconvert it to use in the carriage of freight, and are found to be separate entities and to fall within the classification description "sprayers, noibn." Applicable rating on past shipments of both articles, therefore, is the class 45 rating on sprayers, noibn, despite carrier's contention that higher class 85 rating provided in the classification on freight chassis or, in the alternative, class 85 rating on a combination article under rule 18 thereof was applicable thereon. That considered articles are commercially known and sold as de-icers or decontaminators are factors which weigh heavily in determination of the proper classification rating.—Classification Rating of De-Icer—Seaboard A. L. R., 326 I.C.C. 389 (392, 395-6)*.

171.—Use to which article is put.—[Vols. 1, 6, 9, 11-17, 19, 21].—Predominant use of a commodity, not its isolated or sporadic use, determines its character for transportation purposes.—Classification Rating of De-icer—Seaboard A. L. R., 326 I.C.C. 389 (396)*.

174.—Trade representations by manufacturer or shipper.—[Vols. 1, 6, 9, 12-14, 16, 18].—See Classification Rating of De-icer—Seaboard A.L.R., n. 131, above.

Specific Rules

215. Rule 14. Application of carload ratings or rates.—[Vols. 1, 6, 9, 14-19].—Rules 14, 27, and 30 of the Uniform Freight Classification, and exceptions thereto as published in various tariffs of the Nation's railroads, placing upon consignees the duty to fully unload carloads of freight, impose upon such consignees the duty to remove all dunnage, debris, and other foreign matter connected with inbound carload shipments, but does not include the removal of paper and wooden grain doors, and other grain door debris, in the unloading of boxcars used for the transportation of bulk grain or grain products.—Consignees' Obligation to Unload, 340 I.C.C. 405 (411).

The term "freight" as used in rules 14, 27, and 30, in essence, refers to shipments which move under contracts of carriage as evidenced by bills of lading, the terms and conditions of which are governed by the ratings, rules, and regulations of the Uniform Freight Classification.—Id., p. 410.

See also Notification of Unloaded Car, By Consignee to R., at §1(6), n. 261.

219a. Rule 18. Combination articles.—[Vols. 6, 9, 12-15, 16, 19].—Since the application of classification rule 18 is limited to a combination of articles (not specifically classified) that are suitable or readily adaptable to separate uses, that rule is not applicable on past shipments of de-icers and decontaminators which moved as a complete unit on Government bills of lading describing each commodity as "Sprayers, NOIBN," or "Spray Outfit." Both commodities, each consisting of a truck chassis and a spray unit, are specifically designed and constructed to operate as a unit; each is a single article and not a combination of separately usable articles; and, though not specifically classified by name, each is embraced in the classification as sprayers, noibn.—Classification, Rating of De-icer—Seaboard A.L.R., 326 I.C.C. 389 (391-2, 396)*.

225. Rule 24. Follow lots—minimum weight for single carload shipments when more than one car required.—[Vols. 1, 6, 9, 11, 12, 14, 15, 17, 18, 21].—Classification Rule 24, §§ 1 and 2 of which are before the court for interpretation in railroad's action against shipper to recover freight charges on multi-car shipments, contemplates shipments where more than one car is used and the last, or "trailer," car is not loaded to capacity. The parties agree on the meaning of §1 of the rule which pertains to proper charge on "lead" car or cars, but each urges a different interpretation of a part of §2 thereof; thus, the issue concerns proper charge for the trailer car which, under §2(a), must be at the "CL rate or rating on entire shipment," and on a 10,000-pound minimum. No cases are cited which interpret disputed portion of the rule; however, applying well-established rules of construction generally adhered to by the courts, lower court properly held that the rational and logical meaning of the quoted clause is that the entire shipment should receive the c.l. rate of the lead car even though the trailer car is not full and that, in absence of that clause, the trailer car could be charged a higher rate.—Penn Central Co. v. General Mills, Inc., 439 F. 2d 1338 (1339, 1341-2).

See also Freight in Excess of Full Carload, at §6(3), n. 1.

228. Rule 27. Owners to load and unload carload freight and heavy or bulk less-than-carload shipments.—[Vols. 1, 6, 9, 11, 12, 14-17, 19, 21].—Rules 14, 27, and 30 of the Uniform Freight Classification, and exceptions thereto as published in various tariffs of the Nation's railroads, placing upon consignees the duty to fully unload carloads of freight, impose upon such consignees the duty to remove all dunnage, debris, and other foreign matter connected with inbound carload shipments, but does not include the removal of paper and wooden grain doors, and other grain door debris, in the unloading of boxcars used for the transportation of bulk grain or grain products.—Consignees' Obligation to Unload, 340 I.C.C. 405 (411).

The term "freight" as used in rules 14, 27, and 30, in essence, refers to shipments which move under contracts of carriage as evidenced by bills of lading, the terms and conditions of which are governed by the ratings, rules, and regulations of the Uniform Freight Classification.—Id., p. 410.

See also Notification of Unloaded Car, By Consignee to R., at §1(6), n. 261.

231. Rule 30. Dunnage allowances.—[Vols. 1, 6, 9, 12, 13, 16, 17].—As defined in rule 30 of the Uniform Freight Classification, the term "dunnage" does not include excelsior, hay, sawdust, shavings, shredded paper, straw, packing cushions or pads or similar packing material. Except for an allowance at actual weight, but not in excess of 2,000 pounds, transportation charges for dunnage shall be at the rate applicable on freight which it accompanies,—Consignees' Obligation to Unload, 340 I.C.C. 405 (406, note).

See also, §1(6), n. 228.

Demurrage

258.—Partly compensatory, partly penal.—[Vols. 1, 6, 9, 11, 13-19, 21].—Carriers are entitled to receive demurrage charges for undue detention of their equipment. Court, quoting *Turner*, 271 US 259, reiterated that the purpose for imposing demurrage charges is to "secure compensation for use of the car" and "to promote car efficiency by providing a deterrent against undue detention".—General Mills, Inc. v. United States, 364 F, Supp. 1278 (1282)*.

Protestants' claim that proposed increased demurrage charges may prove onerous to those who do not release cars in the allotted free time is correct but that is as it should be. Purpose of demurrage is to provide a penalty for such undue detention beyond free time, thus encouraging speedy release of cars and consequent improved car utilization. There is no point in providing a penalty unless it is effective.—Demurrage Rules and Charges, Nationwide, 340 I.C.C. 83 (88-89)*.

261. Reasonableness of rules in general.—[Vols. 1, 6, 9, 15, 17, 18].—Proposed changes in car demurrage rules and charges seeking to reduce free time period allowed for loading and unloading from 48 to 24 hours are not shown to be just and reasonable where it is clear from the evidence that many of the receivers of freight on respondent's rail line would be unable to unload within the free time proposed and the proposed reduction is to increase respondent's net revenue by a reduction in its per diem expenses and additional demurrage received; while the Commission recognizes the pressing need to explore every avenue to cut expenses and to increase revenues, this does not comport with the purpose of demurrage; additionally, demurrage rules in effect throughout the country provide a minimum of 48 hours free time and the Commission has long recognized that uniformity in demurrage rules is desirable.—Reduced Free Time At Points on Long Island R., 325 I.C.C. 714 (720).

Proposed rules governing detention of freight cars not shown just and reasonable inasmuch as respondents failed to establish that proposed rule changes will actually result in better car utilization which is the primary goal of such rules. On contrary, protestants provided numerous examples of inefficient, erratic, and unreliable service by carriers which prevented the shipper from releasing cars during free-time periods. Schedules ordered canceled.—Demurrage

Rules and Charges, Nationwide, 339 I.C.C. 655 (667-8).

Proposed new rule providing that telephonic or written notice that a car has been unloaded be made by consignee to carrier upon receipt of which notice the car would be released from accrual of demurrage charges not shown just and reasonable. There are no safeguards to prevent a consignee from terminating demurrage charges by furnishing false information thus depriving the carrier of lawful demurrage charges and violating rules 14 and 27 of the Uniform Freight Classification governing release from demurrage.—Notification of Unloaded Car, By Consignee to R., 341 I.C.C. 811 (816-19).

Cars Held for Consignor or Consignee

280. Holding short of destination.—[Vols. 1, 6, 9, 14-16, 21].—See Ft. Worth & D. Ry. Co. v. Goodpasture, Inc., §6(7), n. 263.

Cars Held Other Than for Consignor or Consignee

291. Strikes.—[Vols. 1, 9, 11, 13-19].—The Commission consistently has prescribed that a strike reimbursement should be based on the applicable per diem charge plus an additive to cover incidental expenses resulting from a car being held because of strike interference. The just and reasonable additive, as established in Chrysler Corp. v. New York Central R. Co., 234 ICC 755 (762), is 20 percent. Since the current charge of $3.29 per car-day, increased by 20 percent, provides for a total charge of $3.95, and the present strike rate is $4.00 per day, proposed increased demurrage assessed against cars detained due to strikes was found not shown to be just and reasonable.—Strike Demurrage Charge, Nationwide, 340 ICC 179 (188).

Free Time

298. Prescription by Commission.—[Vols. 1, 18].—The Commission found that rules providing 5 days free time, excluding Saturdays, Sundays, and holidays, at all ports in continental U.S., on all commodities to be moved in coastwise, intercoastal, and export service, except coal, coke, phosphate rock, several forms of potash, grain, and commodities having lesser free time in connection with specific rates, are just and reasonable. It was further found that on grain for coastwise, intercoastal and export movement, rules providing less than 7 days free time, excluding Saturdays, Sundays, and holidays, are not shown to be just and reasonable, or are unjust and unreasonable, at all ports in continental United States other than Pacific coast ports at which 5 days free time is now provided and except where special rates are provided in connection with reduced free time.—Free Time In-Car Storage at U.S. Ports, 329 I.C.C. 763 (771).

300. Line-haul rate contemplates free time.—[Vols. 1, 6, 9, 12].—See Southern Ry. Co. v. Champion Papers, Inc., §6(7), n. 217.

Computation of Time

312. In general.—[Vols. 1, 6, 9, 14-17].—In railroad's action against shipper to recover demurrage charges allegedly due for detention of refrigerated "piggyback" trailers, where demurrage tariff allowed 10 hours free time from time of actual or constructive placement and defined actual placement as the placing of a vehicle at the place designated by consignor or consignee for loading or unloading, free loading time of 10 hours began to run at the time that defendant shipper took affirmative action to appropriate any given trailer to its own use, i.e., whenever it began loading operations. Since railroad's practice of placing trailers in loading slots at shipper's dock whenever an opening occurred was not at shipper's order or request, but its own convenience and benefit, applicable tariff cannot reasonably be construed to mean that the free time began to run at the time an unordered trailer was positioned in a loading slot.—Chicago & N.W. Ry. Co. v. Union Packing Co., 326 F. Supp. 1304 (1307-8).

313. Exclusion of Sundays and Holidays.—[Vols. 1, 6, 14, 16].—Proposed changed provisions provide that Saturdays, Sundays, and holidays are chargeable days immediately following the day on which the last day of free time begins to run, rather than after the first 2 chargeable days. The record shows that many industries do not operate on weekends and holidays. Consequently, many companies are offered little or no rail service on Saturdays, Sundays, and holidays. Respondents have not shown that these changed demurrage provisions will result in increased utilization of freight cars and have not met their burden of showing that the changed provisions are just and reasonable.—Demurrage Rules and Charges, Nationwide, 340 I.C.C. 83 (93)*.

Causes Relieving from Demurrage Charges

374. Act of God.—[Vol 1].—In railroad's suit against shipper to collect demurrage charges resulting from latter's failure to unload and return rail cars within 2-days "free time" after placement for unloading at its Chicago lumber yard, as required by governing demurrage tariff, a snowstorm of sudden and unprecedented severity (which hit during time the cars accumulated) was an act of God which excuses defendant from liability for demurrage charges which accrued as a consequence of the storm. A demurrage tariff confers rights and imposes duties as a matter of law; and there being no freedom of contract between carrier and shipper to vary or modify the tariff as they might desire, shipper may not stipulate circumstances that would relieve him from liability and those he would assume. The duty to pay demurrage being imposed by law, an intervening act of God excuses the duty; and the "great Chicago blizzard" was an act of God which excuses defendant, who acted reasonably in the circumstances, from liability for demurrage which accrued as a consequence of the blizzard. Summary judgment for defendant.—Chicago, B. & Q. R. Co. v. Edward Hines Lumber Co., 320 F. Supp. 194 (195-6).

381. Bunching.—[Vols. 1, 6, 17, 18, 19].—Under the straight demurrage plan relief from bunching of cars is available under rule 8 and upon failure to obtain satisfaction from the carriers the Commission can be appealed to. Average agreements are designed to take care of bunching and no changes are being made. If a shipper who normally receives two cars at one time is confronted with four cars at the same time, the credits earned on the one or two cars unloaded diligently can be used to offset the debits incurred by detaining the extra cars. If the shipper finds that the average plan is inequitable because of poor rail service, he can always switch to the straight demurrage plan and use rule 8.—Demurrage Rules and Charges, Nationwide, 340 I.C.C. 83 (89)*.

Reconsignment and Diversion

Nature and Function

441. General definitions.—[Vols. 1, 6, 9].—Diversion, when used in the context of transportation, means "the act or process of changing the route or destination of a shipment while in transit." Therefore, when considered shipment had reached the billed Texas destination and consignee exercised such substantial control over the cars as amounted to a delivery which terminated the bill of lading contract, subsequent movement therefrom to California (pursuant to consignee's direction) was not a diversion or reconsignment as contemplated by statutes pertaining to payment of freight charges.—Southern Pac. Co. v. Brown, Alcantar & Brown, Inc., 404 F. 2d 187 (190).

Transit

Legality of Practice

510.—Restriction of practice.—[Vols. 1, 6, 9, 11-13, 21].—Commission found that cancellation of transit privileges is not per se unlawful. Such cancellation may or may not be unreasonable, depending on circumstances. Complainant shipper has not shown sufficient relevant facts to make a prima facie case of unreasonableness of such cancellation on movements of feed from Vicksburg, Miss. to destinations in Louisiana.—The Merchants Co. v. Illinois Central R. Co., 329 I.C.C. 713 (716).

Jurisdiction of Commission

520. Strict construction of rules.—[Vols. 1, 9, 13, 15].—See Atchison, T. & S. F. Ry. Co. v. John Sexton & Co., n. 538, below.

Manner of Assessing Charges

538. Rates and regulations applicable.—[Vols. 1, 6, 9, 11-19, 21].—The refusal of the L & N, C & O, and Clinchfield railroads to participate in reduced joint rates conditioned on the use of cars having a minimum capacity of 140,000 pounds and to furnish such cars from their existing car fleets, was an unjust and unreasonable practice in violation of §1(6), and the Commission's order directing plaintiffs and Southern to enter into joint rates restricted to movements in such cars, is not inconsistent with or in contravention of the decision of the Supreme Court in U.S. v. Pennsylvania R. R. Co., 242 US 208, 37 S. Ct. 95, 61 L. Ed. 251 and are in accord with the interpretation of that opinion enunciated by the Commission in Trogan Scrap Iron Corp. *v.* Boston & M. R., 270 ICC 727. See also, §1(4), n. 74.—Chesapeake and Ohio Railway Company *v.* United States, 298 F. Supp. 734 (740)*.

Under railroad's tariff permitting lumber (boards and sheets) to be stopped in transit for "facing or finishing with decorative or protective covering" and, later, "manufacturing," the only privileges granted defendant shipper were to "vinyl laminate" and then "manufacture" boards and sheets; thus, shipper exceeded transit privilege of "manufacturing" by including metallic resting glides, plastic edgings, and printed assembly instructions in individually packaged cartons containing all the component parts of various articles of furniture, since those items were not part of its manufacturing process. Therefore, though shipper described the shipments in bills of lading as "boards and sheets," commodities shipped in each instance were "furniture, knocked down flat" and the tariff rate on furniture, rather than lower "Boards and sheets" rate, applied. Railroad is entitled to recover from shipper freight charges on considered shipments at the higher furniture rate applicable.—Norfolk & W. Ry. Co. v. Permaneer, Inc., 320 F. Supp. 749 (753-4)*.

In railroad's suit seeking determination of the proper rate to apply on defendant's shipments from Kansas City, Kans., to various points, where the shipments moved from various origins to shipper's storage facilities at Kansas City from which, after periods of storage, they were reshipped to final destinations and, at time of reshipment, carrier's agent did not require, and shipper did not furnish, the shipper's certificate and other documents required by the transit tariff (but such documents were furnished to carrier a few days later) shipper violated the tariff as a matter of law and does not qualify for the storage-in-transit privilege. Accordingly, the lower "through" or "in-transit" was not applicable and, thus, shipper must pay the higher "flat" rate on its reshipments from Kansas City.—Atchison, T. & S. F. Ry. Co. v. John Sexton & Co., 339 F. Supp. 1202 (1203-5).

Stipulated facts show that shipper could not supply the required records at time of reshipment because of its computer record keeping and that a practice had developed, in which carrier acquiesced, wherein shipper would provide carrier with a "memorandum billing" containing enough information for delivery at desired destination, and would provide the "transit billing" on later date when the computer had produced it; however, contrary to defendant's argument, that does not make the tariff provision that transit billing be presented at time of reshipment unjust or unreasonable such as to be unlawful. Also, fact that tariff has since been changed to give a transit shipper a period after reshipment within which to surrender the transit billing documents does not make the previous tariff unreasonable.—Id., pp. 1205-6.

Furthermore, fact that plaintiff had knowledge of defendant's "memorandum billing" and acquiesced is of no consequence; a carrier cannot waive a tariff provision and estoppel cannot be applied against it. While the equities of the dispute are undoubtedly with defendant, the tariff involves the public interest which is paramount; and public interest demands that tariffs be strictly construed. Therefore, plaintiff's motion for summary judgment is sustained; defendant's motion for summary judgment is overruled.—Id., p. 1206.

Transit rates claimed under substitution provisions of tariff, not applicable where no transit services were in fact performed on rail shipments; lack of any services as provided by the transit tariff precludes its application on considered shipments. Also, since transit tariff concerned only carload shipments, rates could not be applied to shipments moving by truck to transit point.—Substitution Provisions From Four Holes, S.C., 326 ICC 736 (740).

Particular Transit Services

563. Milling.—[Vols. 1, 6, 9, 12, 14, 17].—See Transit Provisions on Wheat, at §1(5), n. 610.

566. Stopping to partially load or unload.—[Vols. 1, 6, 9, 11, 12, 14-17, 19, 21].—Commission found that when a carrier elects to provide a service for stopping in transit for partial loading or unloading, its charges for such service must in themselves be not less than its cost if §§ 2 and 3 of the Act are not be violated. The carrier is entitled to some compensation in addition to its costs and cost evidence herein establishes that proposed increased charges met those criteria and that the charges do not exceed a maximum reasonable level. Approved.—Stopping-in-Transit Charges & Restrictions, 337 I.C.C. 605 (609-10).

Additionally, Commission approved tariff provision limiting the number of stops for partial loading and unloading. Stopping in transit for such loading and unloading is a service additional to line-haul transportation. As such, management in its discretion may grant or withhold such service and, barring showing of unlawfulness, limiting the number of stops is also within managerial discretion.—Id., p. 609.

567. Storage.—[Vols. 1, 6, 9, 11, 12, 14, 15, 17, 19].—The temporary holding of boxcars on private siding of shipper, without more, is not storage-in-transit, so as to enable shipper to take advantage of claimed transit rates. Shipper's unnecessary holding of lumber cars results in undue detention to provide free warehousing, which Commission condemns.—Substitution Provisions From Four Holes, S.C., 326 ICC 736 (740-1).

Carrier's Duty as to Routing

573. Responsibility as between carrier and shipper.—[Vols. 1, 6, 9, 12].—Complainant's contention that defendant railroad's failure to call attention to conflict between the rate and route on the bill of lading is evidence of misrouting is without merit as the rates based on the applicable combination constitute the lowest possible charges.—Lincoln Grain, Inc. v. Missouri Pacific R. Co., 335 I.C.C. 779 (782).

574. Forwarding by cheapest reasonable available route.—[Vols. 1, 6, 9, 12, 14, 17-19].—Carrier is not in violation of §1 of the Act if, all things considered, it would be unreasonable to ship by the cheaper route. Since shipper requested expeditious service and accepted bills of lading without protest, resort to the more expensive short route was justified. It is the duty of the carrier to deal justly with the shipper and ordinarily this requires that shipments be routed over the cheapest route. But when, as in this case, the reasonable interpretation of the shipper's instructions indicates desire for expedition, the use of the higher-rated route may be justified.—Peter Kiewit Sons' Co. v. Chicago, B. & Q. R. Co. 329 I.C.C. 239 (242).

576. Reasonable and unreasonable routes.—[Vols. 1, 9, 12, 14].—Defendants could reasonably interpret that routing over the shorter, more expensive route was desired in view of the general instructions of complainant for expeditious service. The route of movement was substantially less circuitous than the lower rated route claimed by the complainant. Furthermore, only triweekly local service is available over the claimed route, and the additional miles and handling would entail at least 4 more days in transit and additional switching charges. All defendant's agents have standing instructions to send any unrouted traffic over the route which would give defendant its longest haul. In this instance, it would have been the claimed route; therefore, in routing the shipments the defendant, in effect, short-hauled itself. The applicable rate was charged.—Peter Kiewit Sons' Co. v. Chicago, B. & Q. R. Co., 329 I.C.C. 239 (242-3).

Terminal Services and Facilities

663. Express, pickup and delivery.—[Vols. 1, 14, 16, 17, 19].—Since under §1(6) carriers subject to part I are charged with the duty, among others, of establishing reasonable regulations and practices concerning receipt and delivery of property, and every unreasonable regulation or practice is declared unlawful, the Commission has implied authority to determine reasonableness of a terminal area established by Railway Exp. Agency for pickup and delivery service wholly incidental to its rail operations; and the reasonableness of such terminal area must be determined by substantially the same criteria as are used in establishing terminal areas of motor and water carriers, so as to regulate fairly and impartially the different modes of surface transportation. Population density and industrial development of the area, as well as geographical location of boundaries, distance involved, and quality of service rendered, are all factors to be considered.—Barton Truck Line, Inc. v. Railway Exp. Agency, Inc., 95 M.C.C. 625 (629).

Although REA's extension by tariff publication of its terminal area at Salt Lake City to include Tooele Ordnance Depot, some 36 miles distant, has enabled it to render a better service, such extension is unreasonable when a wide expanse of undeveloped wasteland separates the ordnance depot from Salt Lake City and there is insufficient homogeneity between the two communities in terms of geography, population density, or commercial development to justify its action.—Id., p. 630.

680. Terminal railroads; Absorptions.—[1, 6, 9, 11, 12, 14, 16, 21].—Defendants' practice of absorbing a greater portion of switching charges for shippers and consignees of freight on certain lines than is absorbed for those located on complainant Belt Railroad is unjust and unreasonable. Failure to absorb switching charges for some carriers has been found unreasonable because of prevailing practice to absorb similar charges for other carriers and the consequent discrimination for some shippers.—Public Belt R. Comm. v. Aberdeen & R. R. Co., 335 I.C.C. 162 (168-72).

Complainant shippers have clearly established that refusal of defendant line-haul carriers to absorb fully the interline switching charges is an unreasonable practice in violation of §1(6) inasmuch as it is defendant's prevailing practice to absorb similar charges for other connecting carriers and failure to do so in this instance results in unjust discrimination against complainants. See *Public Belt*, 335 ICC 162, 168. Defendant line-haul carriers must absorb fully the involved switching charges.—Armour & Co. v. Sioux City Term. Ry. Co., 341 I.C.C. 118 (126-27).

In absence of violations of §§2 and 3(1), Commission cannot require line-haul carrier to absorb a connection carrier's switching charge. Here, however, failure to absorb such charges was found unduly prejudicial and discriminatory. Complaints against defendant connecting terminal railroad have been abandoned and its switching charges remain fully effective and unassailed. Defendant line-haul carriers are obliged to pay defendant terminal carrier all unpaid switching charges to date.—Id., p. 126-27.

Loss and Damage Claims

731. In general.—[Vols. 1, 6, 9, 11-13, 16, 17].—Commission prescribed certain regulations (49 CFR 1005.1 and 1005.2 in appendix E hereto) as to the processing of loss and damage claims including a prescription of minimum filing requirements; specification of operations and carriers to which said regulations are applicable; the manner and form in which claims may be properly filed by claimants and accepted by carriers; the acknowledgement, investigation, and disposition of claims; and the processing of salvage.—Loss and Damage Claims, 340 I.C.C. 515 (554-577).

Observance of a proposed claims rule providing a 24 hour "grace period" for delivery above and beyond the time usually required for the involved transportation would be an unreasonable practice contrary to section 1(6), since the rule is inconsistent with carriers' liability under established law.—Provisions on Vegetables & Melons, Transcontinental, 340 I.C.C. 807 (815).

Regulations of the Commission

39 FR 12753, April 8, 1974, Part 1037: Handling of Bulk Grain and Grain Products in Interstate Commerce. Regulations promulgated as to Practices and Policies in Settlement of Loss and Damage Claims on Grain and Grain Products, effective May 23, 1974.

Section 1. (7)—Free transportation for passengers prohibited; exceptions; penalty.—[Unchanged. See footnotes, vol. 1, p. 850, vol. 11, pp. 9116-9118, vol. 15, p. 11974.]

Historical notes, see vol. 1, p. 851, vol. 9, p. 7277.

Notes of Decisions

Volume 1—p. 852; Volume 6—p. 4913; Volume 9—p. 7277; Volume 12—p. 10203; Volume 13—p. 10925; Volume 14—p. 11405; Volume 15—p. 11974; Volume 17—p. 13261; Volume 21—p. 16394.

Regulations of the Commission

36 FR 23068, Dec. 3, 1971, Part 1270: Rail and Water Carrier Passes, §1270.4 title and text deleted and section reserved; §§ 1270.1, 1270.12, 1270.34, 1270.53 and 1270.70 amended; §1270.85 revised, effective on publication in Federal Register.

Section 1. (8) Transportation of commodity manufactured or produced by railroad forbidden.—[Unchanged. See vol. 9, p. 7279.]

Amendments, see footnotes, vol. 1, p. 862; historical notes, vol. 1, p. 862, vol. 9, p. 7279.

Notes of Decisions

Volume 1—p. 863; Volume 6—p. 4916; Volume 9—p. 7279; Volume 14—p. 11405; Volume 15—p. 11975; Volume 16—p. 12611; Volume 17—p. 13263; Volume 18—p. 14019; Volume 18—p. 15058; Volume 21—p. 16395.

Section 1. (9) Switch connections and tracks.—[Unchanged. See vol. 9, p. 7282.]

Amendments, see footnotes, vol. 1, p. 877; historical note, vol. 1, p. 877.

Notes of Decisions

Volume 1—p. 878; Volume 6—p. 4917; Volume 9—p. 7282; Volume 11—p. 9118; Volume 12—p. 10204; Volume 13—p. 10925; Volume 14—p. 11407; Volume 15—p. 11975; Volume 16—p. 12612; Volume 19—p. 15059; Volume 21—p. 16396.

15. Conditions upon which connection may be ordered.—[Vols. 1, 6, 12, 16].—Section 1(9) requires a rail carrier to install switch connections upon application of any lateral branch line of railroad. Complainant herein is not a lateral branch line, *Baltimore*, 226 US 14, but is, in effect, an independent and competing line. Commission cannot require construction of such switching connection.—Missouri Pac. R. Co. v. Louisiana & A. Ry. Co., 332 I.C.C. 569 (581-2)

Section 1. (10) "Car service" defined.—[Unchanged. See vol. 9, p. 7284.]

Amendments, see footnotes, vol. 2, p. 887; historical note, vol. 2, p. 887; vol. 17, p. 13263.

Notes of Decisions

Volume 2—p. 887; Volume 6—p. 4918; Volume 15—p. 11976; Volume 16—p. 12613; Volume 18—p. 14020; Volume 21—p. 16397.

Section 1. (11) Duty to furnish car service; rules and regulations.—[Unchanged. See vol. 9, p. 7284.]

Amendments, see footnotes, vol. 2, p. 889; historical notes, p. 887, vol. 11, p. 9119.

Notes of Decisions

Volume 2—p. 890; Volume 6—p. 4919; Volume 9—p. 7284; Volume 11—p. 9119; Volume 12—p. 10205; Volume 13—p. 10926; Volume 14—p. 11407; Volume 15—p. 11976; Volume 16—p. 12613; Volume 17—p. 13263; Volume 18—p. 14020; Volume 19—p. 15060; Volume 21—p. 16398.

Ownership of Cars Supplied

35. In general.—[Vols. 2, 6, 11, 14].—The provision of car-ownership formula approved in revised prior reports, 335 ICC 264 and 335 ICC 874 which provides credit toward car ownership responsibility be accorded interline car-days accumulated by foreign cars loaded and delivered to connections in compliance with car service rules was deleted. Petitioner has shown that application of test data produced certain inequitable results and negated the credit provision's intended purposes.—Investigation of Adequacy of Freight Car Ownership, 341 I.C.C. 64 (65-67)*.

Shipper's Obligations

65. Improper use as warehouse or for peddling.—[Vols. 2, 6, 12, 15, 17].—See Substitution Provisions From Four Holes, S. C., 326 ICC 736, §1(6), n. 567.

Regulations of the Commission

39 FR 1047, Jan. 4, 1974, Part 1124: Regulations Governing the Adequacy of Intercity Railroad Passenger Service promulgated herein and such regulations to be numbered 49 CFR §1124.1, effective upon publication.

Section 1. (12) Distribution of coal cars; failure to prorate; penalty.—[Unchanged. See vol. 9, p. 7289.]

Historical notes, see vol. 2, p. 887.

Notes of Decisions

Volume 2—p. 925; Volume 6—p. 9425; Volume 9—p. 7289.

Section 1. (13) Rules and regulations as to car service to be filed, etc.—[Unchanged. See vol. 9, p. 7290.]

Amendments, see footnotes, vol. 2, p. 950; historical notes, vol. 2, p. 887.

Notes of Decisions

Volume 2—p. 950; Volume 6—p. 4927; Volume 14—p. 11408; Volume 18—p. 14022.

Section 1. (14) (a) Establishment by Commission of rules, etc., as to car service.—[Unchanged. See vol. 11, p. 9120; vol. 21, p. 16399.]

Notes of Decisions

Volume 2—p. 951; Volume 6—p. 4928; Volume 9—p. 7290; Volume 11—p. 9121; Volume 12—p. 10206; Volume 13—p. 10927; Volume 14—p. 11408; Volume 15—p. 11978; Volume 16—p. 12614; Volume 17—p. 13265; Volume 18—p. 14022; Volume 19—p. 15061; Volume 21—p. 16400.

1. **Establishment of reasonable car-service rules, regulations, and practices.**—[Vols. 2, 6, 9, 11, 13, 14, 17, 18, 21].—In judicial review of Commission actions, particularly actions taken under authority of the Esch Car Service Act, the court does not weigh evidence adduced before the Commission, does not inquire into the wisdom of regulations promulgated, and inquiries into soundness of the Commission's reasoning only to ascertain that is conclusions have rational support. And in reviewing car service rules prescribed after notice of proposed rulemaking and hearing, the court must observe the differing standard governing review of the Commission's exercise of its rulemaking authority, on one hand, and its adjudicatory function, on the other. As stated in 274 US 564, the Commission's authority to legislate is limited to establishment of reasonable rules; but in establishing a rule of general application, it is not essential that evidence of its appropriateness be adduced with respect to every railroad to which it will apply since, like other legislators, the Commission may reason from the particular to the general.—United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (748-9)*.

Commission findings as to nationwide freight car shortage were based primarily on data submitted by the railroads which, together with a prior finding of inadequate freight car ownership by railroads as a group, depict a gradually worsening ratio of carrying capacity to revenue tons originated. And since evidence and data of record showed that car shortages occurred chronically and that an amazingly low percentage of cars was actually on owning road's lines at any given time, the Commission promulgated as its own the two AAR car service rules in question, to require that freight cars after unloading be dispatched in direction of owning road's lines, with sanctions attached for noncompliance. Thus, based on the fact that railroads often were unable to supply shippers with cars and the statistics before it, the Commission concluded that an important underlying cause of car shortages was that the railroads did not jointly own sufficient freight cars to adequately serve hippers on their lines, and it reasoned that long-term result of prescribed rules would bring that fact home to those roads who had an inadequate car supply to serve on-line shippers and, without doubt, furnish them incentive to augment their supply of freight cars.—Id., pp. 749-52.

Moreover, while immediate effect of enforcing compliance with the rules would be to disrupt some established car handling and routing practices, and on occasion cause serious inconvenience to both shippers and railroads, the Commission's finding as to recurring long periods when there is an inadequate freight car supply to service shippers is supported by substantial evidence. Also, neither the language nor legislative history of the Esch Act indicates that Congress intended that the only criterion which the Commission might consider in establishing "reasonable" car service rules was the optimum use of an existing fleet of freight cars, however numerically inadequate that fleet might be. Thus, while the present flexible system of routing cars may have short-term advantages for some shippers and roads, the Commission could quite reasonably conclude that it has long-term drawbacks as well and, undoubtedly, it felt that rules designed only for most efficient use of existing car fleet would have little or no effect on the nationwide freight car shortage.—Id., pp. 752-4.

Record before the Commission justified its decision that the railroads and shippers were afflicted with an economic illness that might have to get worse before it got better; and that present car service practices tended to destroy any incentive of railroads to acquire new cars, and resulting failure to acquire new equipment contributed to the overall nationwide freight car shortage which prevented the rail industry from adequately serving shippers. And under those circumstances, car service rules which would tend to restore incentive to roads to augment their car supply, even at the temporary expense of optimum use of existing car fleet, conform to the statutory requirement of reasonableness. The Commission's conclusions, and the facts of record on which it relied, substantively support its action under authority of the Esch Act in prescribing the car service rules; and the proceedings being an exercise of legislative rulemaking power rather than adjudicatory hearings, the procedure fully compiled with Administrative Procedure Act. District court's judgement that Commission order prescribing the rules does not meet statutory requirements of reasonableness, and is invalid, reversed.—Id., pp. 744, 754-8.

In railroads' suit to enjoin, annul and set aside Commission orders requiring mandatory compliance with AAR car service rules already voluntarily in effect, the court takes note of three-judge Pennsylvania court's decion in the *Allegheny Ludlom* case, 325 F. Supp. 352; however, with deference to that court, the reviewing court disagrees with, and declines to follow, its holding that the order prescribing considered mandatory car service rules did not meet the reasonableness requirements of the statute. The Commission found the freight car shortage was *all persuasive* throughout the United States and, considering the expertise committed to it in governing interstate carriers, it acted lawfully in instituting an equitable policy which during a shortage would operate to reward owning railroads by giving them maximum use of freight cars in which they had invested. The question is not (as the Pennsylvania court posed it) whether the car shortage is more acute on owner lines, but rather who should get first call on the use of cars during a shortage; the court views that question as properly answered in the Commission's policy decision to institute rules providing the greater usage to the owner lines.—Florida East Coast Ry. Co. v. United States, 327 F. Supp. 1076 (1083-5)*.

The court also disagrees with Pennsylvania court finding that Commission acknowledgement that exceptions would be necessary to insure proper flexibility in the use of cars, coupled with possible criminal penalty for noncompliance, rendered mandatory nature of the car service rules unreasonable. It is a rare rule which has no exceptions in practical application; and the Commission's recognition that efficient use of freight cars in specific situations might require exceptions to prescribed rules does not mean that it cannot *reasonably* proceed from a mandatory rule where, as in instant case, it has established proper machinery for allowing those exceptions; also, any "rough edges" on procedures for handling requests for exception should not be allowed to upset an otherwise reasonable Commission plan to attack one phase of freight car shortages. Finding the reasoning of the Pennsylvania court unpersuasive, therefore, the reviewing court's independent examination of the issue leads it to conclude that the mandatory car service rules constitute a reasonable exercise of the Commission's power, based on sufficient substantial evidence in the record before it. Railroads' action dismissed; and allowing a 20-day period for appeal, temporary restraining orders vacated.—Id., pp. 1085-6.

Commission has jurisdiction to prescribe specific mileage charges railroads must pay to shippers for shipper-furnished tank cars. Respondents' argument from legislative history that §1(14)(a), as amended in 1940, does not apply to compensation for shipper-furnished cars is not valid as such amendment extends Commission's jurisdiction over the relationships between carriers and car lessors but did not limit the statute in respect to shipper-owned cars. A lack of specific reference to such cars is no basis for a different conclusion.—Mileage Allowances, Tank Cars, 337 I.C.C. 23 (24-6).

2. Compensation for equipment not owned by using carrier.—[Vols. 2, 6, 9, 11, 13-15, 18, 21].—The setting of rates for future application, including compensation to be paid by railroads for the use of cars not owned by them, is within meaning of "rule" and "rulemaking" as defined in the Administrative Act; thus, the Commission had to proceed in accordance with that statute in its investigation under §1(14)(a), as amended, which was instituted by a rulemaking notice and proposed the adoption of rules and regulations establishing additional "incentive" per diem charges on freight cars. Also, since Congress attached the new authority to include an incentive element to §1(14)(a), which requires a "hearing," provisions of APA for an adjudicatory trial-type hearing—in other words a hearing "on the record"—applied. However, the APA further provides that in rulemaking, when a party will not be prejudiced thereby, and agency may adopt procedures for submission of the evidence in written form; thus, even when rulemaking must be effected by a hearing "on the record," the record does not always have to be made in the traditional form.—Long Island R. Co. v. United States, 318 F. Supp. 490 (495-8)*.

In its action to enjoin enforcement of considered Commission order adopting rules and regulations prescribing incentive per diem charges for unequipped boxcars, Long Island R. claims the order was procedurally defective because no oral hearing was held prior to the Commission's decision. While it would have been better if the agency had served a summary of the results of its freight car study on all the carriers, plaintiff had access to all the evidence on which the Commission relied and, furthermore, its request for oral hearing was silent as to any specific need to cross-examine witnesses or present live rebuttal testimony; thus, no prejudice to plaintiff is established. Under all the circumstances, the court finds no sufficient reasons for ruling that the Commission's denial of plaintiff's petition for an oral hearing significantly prevented it from fairly presenting its case; complaint dismissed.—Id., pp. 494-5, 498-500.

But facts in action by the Seaboard and the Florida East Coast to set aside the same order, because of failure to grant oral hearing, fall within exception expressed by the New York court in its *Long Island R.* opinion, and show that plaintiffs were prejudiced by the Commission's summary procedures. Seaboard stated that, due to the exclusion of all cars except unequipped boxcars, the Commission's hasty action would punish it and would cost it $1.8 million annually; FEC stated strong policy reasons for its exemption from the per diem charges and it sought to show deficiencies in the order by presenting evidence and cross-examining certain Commission employees; and, without detailing other grounds urged, those assertions demonstrate the prejudice to them arising from the Commission's failure to provide hearings. The court finds that the Commission acted illegally in denying plaintiffs a hearing before imposing the incentive per diem charges; therefore, enforcement of the Commission's order as to those railroads is enjoined, annulled and set aside, without prejudice to further Commision proceedings and findings not inconsistent with the court's opinion.—Florida East Coast Ry. Co. v. United States, 322 F. Supp. 725 (728-9, 732-3)*.

Commission herein prescribed a structure of interim allowances to be paid by railroads to shippers for use of shipper-furnished tank cars. Only the car costs of transportation use are to be reimbursed to avoid the possibility of discrimination against any shipper. Such structure does not apply to cars transported for purchase, sale, or scrap and these movements shall be charged the tariff rate for commercial movement. Respondents' proposal for either an equalization rule or a substitute equalization rule is not supported by the statistical evidence.—Mileage Allowances, Tank Cars, 337 I.C.C. 23 (29-34).

Regulations of the Commission

35 FR 7121, May 6, 1970, Part 1036: Incentive Per Diem Charges on Boxcars, new regulations, §1036.1 - §1036.6, inclusive, prescribed and new Part 1036 added, effective June 1, 1970.

36 FR 13997, July 29, 1971, Part 1036: Incentive Per Diem Charges on Boxcars, §1036.1, §1036.3, and §1036.4 amended in part, effective on date of order.

38 FR 8657, Apr. 5, 1973, Part 1036: Incentive Per Diem Charges on Boxcars, §1036.5 amended so as to make incentive per diem charges applicable until further order of the Commission, in lieu of present 6-month application period, effective May 1, 1973.

38 FR 8517, Apr. 3, 1973, Part 1036: Incentive Per Diem Charges on Boxcars, §1036.3 and §1036.4 modified, effective on date of order.

Section 1. (14)(b) Contracts for agreements for protective service.—[Unchanged. See Vol. 11, p. 9121.]

Amendment, see footnotes, vol. 11. p. 9121.

Notes of Decisions

Volume 11—p. 9122; Volume 12—p. 10207; Volume 15—p. 11979; Volume 21—p. 16401.

Section 1. (15) Powers of Commission in case of emergency.—[Unchanged. See Vol. 9, p. 7292.]

Amendments, see footnotes, vol. 2, p. 957; hisotical notes, vol. 2, p. 887, vol. 9, p. 7292, vol. 11, p. 9124, vol. 12, p. 10207, vol. 13, p. 10928, vol. 14, p. 11410, vol. 15, p. 11980, vol. 17, p. 13265.

Historical Note

By Executive Order 11490, Oct. 28, 1969 (34 FR 17567), Part 21, the President assigned to the Chairman of the Interstate Commerce Commission the responsibility for preparation of national emergency plans and development of preparedness programs covering utilization and operation of railroads, motor carriers, and inland waterways in an emergency situation, in connection with the consolidated national emergency preparedness program and assignment of functions thereunder to various Federal departments and agencies.

See also vol. 21, p. 16401.

Notes of Decisions

Volume 2—p. 958; Volume 6—p. 4932; Volume 9—p. 7293; Volume 12—p. 10208; Volume 13—p. 10928; Volume 14—p. 11411; Volume 15—p. 11981; Volume 16—p. 12616; Volume 17—p. 13265; Volume 18—p. 14023; Volume 19—p. 15062; Volume 21—p. 16402.

5. Service orders.—[Vols. 2, 12-19, 21].—When there is a conflict between the Commission's car service orders and carrier's tariffs, the service orders control. Therefore, in railroads' suits to collect storage and demurrage charges on grain shipments to elevator at Houston, Tex., the district court correctly ruled that service orders—which were also in effect—overruled contrary provisions of applicable tariff rule and allowed plaintiffs to constructively place cars short of Houston when they could not be received on defendant's interchange track.—Fort Worth & D. Ry. Co. v. Goodpasture, Inc., 442 F. 2d 1294 (1297, 1298).

Commission refused to vacate a service order granted applicant for movement of necessary mine construction equipment to supporting shipper's mine site. Even though involved trackage was constructed without Commission's approval, protestant has failed to show such order was not properly issued and was not a valid exercise of Commission's emergency powers.—Illinois Central R. Co. Operation in Jef. County, Ill., 328 I.C.C. 586 (593).

Regulations of the Commission

33 FR 9780, July 6, 1968, Part 1033: Car Service, §1033.997 Service Order No. 997, Louisville & N. R. Co. authorized to operate over trackage of Seaboard Coast Line R., Amdt. 1 extends expiration date of S.O. 997 to Dec. 31, 1968.

33 FR 10401, July 20, 1968, Part 1033: Car Service, §1033.1000 Distribution of refrigerator cars [S. O. 1000], new section added, effective until July 31, 1968.

33 FR 10727, July 27, 1968, Part 1033: Car Service, §1033.992 Service Order No. 992, Union Pac. R. Co. authorized to operate over trackage of Great Northern Ry., Amdt. 3, extends expiration date of S.O. 992 to Oct. 31, 1968.

33 FR 10800, July 30, 1968, Part 1033: Car Service, §1033.999 Service Order No. 999, Missouri-K.-T. R. Co. authorized to operate over trackage of Fort Worth & D. Ry., Amdt. 1, extends expiration date of S.O. 999 to Aug. 31, 1968.

33 FR 10864, July 31, 1968, Part 1033: Car Service, §1033. 1001 Service Order No. 1001 (St. Louis-S.F. Ry. Co. authorized to operate over trackage of Missouri Pac. R. Co.), added, effective July 29, 1968.

33 FR 11453, Aug. 13, 1968, Part 1033: Car Service, §1033.1002 Service Order No. 1002, Car Distribution Directions—Appointment of Agents, added, effective Aug. 9, 1968.

33 FR 11713, Aug. 17, 1968, Part 1033: Car Service, §1033.1000 Service Order No. 1000 (Distribution of Refrigerator Cars), Amdt. 1, sets expiration date of S.O. 1000 as Aug. 15, 1968, effective day after date of order.

33 FR 12372, Sept. 4, 1968, Part 1033: Car Service, §1033.1003 Service Order No. 1003, Illinois Central R. Co. authorized to operate over certain trackage abandoned by the Tennessee Central Ry. Co., expiration date, Dec. 31, 1968.

33 FR 12660, Sept. 6, 1968, Part 1033: Car Service, §1033.1004 Service Order No. 1004, Harriman & N. R. Co. authorized to operate over certain trackage abandoned by Tennessee Central Ry. Co., added, expiration date Dec. 31, 1968.

33 FR 12660, Sept. 6, 1968, Part 1033: Car Service, §1033.1005 Service Order No. 1005, Louisville & N. R. Co. authorized to operate over certain trackage abandoned by Tennessee Central Ry. Co., added, expiration date Dec. 31, 1968.

33 FR 12741, Sept. 7, 1968, Part 1033: Car Service, §1033.1003 Corrected Service Order No. 1003 Illinois Central R. Co. authorized to operate over certain trackage abandoned by Tennessee Central Ry. Co., expiration date Dec. 31, 1968.

33 FR 12964, Sept. 13, 1968, Part 1033: Car Service, §1033.1006 Distribution of refrigerator cars (Service Order No. 1006), added, effective day after date of order.

33 FR 14706, Oct. 2, 1968, Part 1033: Car Service, §1033.1007 Service Order No. 1007, Soo Line R. Co. authorized to operate over certain trackage of Chicago & N.W. Ry. Co. and Northern Pac. Ry. Co., added effective Sept. 30, 1968.

33 FR 14959, Oct. 5, 1968, Part 1033: Car Service, §1033.1008 Service Order No. 1008, Illinois Term. R. Co. authorized to operate over tracks of Illinois Central R. Co., added, effective Oct. 3, 1968.

33 FR 15120, Oct. 10, 1968, Part 1033: Car Service, §1033.1009 Service Order No. 1009, Railroad operating regulations for freight car movement, added, effective Oct. 7, 1968.

33 FR 15122, Oct. 10, 1968, Part 1033: Car Service, §1033.1010 Service Order No. 1010, Distribution of boxcars, added, effective Oct. 7, 1968.

33 FR 15341, Oct. 16, 1968, Part 1033: Car Service, §1033.1010 Service Order No. 1010-A, vacates and sets aside S.O. 1010 (Distribution of boxcars), effective Oct. 14, 1968.

33 FR 15341, Oct. 16, 1968, Part 1033: Car Service, §1033.1011 Service Order No. 1011, Distribution of boxcars, added, effective Oct. 14, 1968.

33 FR 15659, Oct. 23, 1968, Part 1033: Car Service, §1033.1012 Service Order No. 1012, Detroit, T. & I. R. Co. authorized to operate over trackage of Penn Central Co., effective Oct. 18, 1968, expires March 31, 1969.

33 FR 16568, Nov. 14, 1968, Part 1033: Car Service, §1033.1013 Service Order No. 1013, Illinois Central R. Co. and Louisville & N. R. Co. not to furnish boxcars for loading by Buckeye Cellulose Corp. at Memphis, Tenn., effective day after date of order.

33 FR 17144, Nov. 19, 1968, Part 1033: Car Service, §1033.1013, Service Order No. 1013-A, vacates and sets aside S.O. No. 1013, effective on date of order.

33 FR 17144, Nov. 19, 1968, Part 1033: Car Service, §1033.1011 Service Order No. 1011 (Distribution of boxcars), Amdt. 1, extends expiration date of S.O. No. 1011, effective Nov. 16, 1968.

33 FR 17178, Nov. 20, 1968, Part 1033: Car Service, §1033.1009 Service Order No. 1009 (railroad operating regulations for freight car movement), Amdt. 1, extends expiration date of S.O. No. 1009, effective Nov. 16, 1968.

33 FR 17350, Nov. 23, 1968, Part 1033: Car Service, § 1033.1014 Service Order No. 1014, St. Louis Southwestern Ry. Co. authorized to operate over trackage of Missouri-K.T. R. Co., effective Nov. 21, 1968.

33 FR 17919, Dec. 3, 1968, Part 1033: Car Service, §1033.1002 Service Order No. 1002 Car Distribution Directions; Appointment of Agents, Amdt. 1 changes expiration date of S.O. 1002 to Dec. 31, 1968, effective No. 30, 1968.

33 FR 18649, Dec. 18, 1968, Part 1033: Car Service, §1033.1009 Service Order No. 1009 (railroad operating regulations for freight car movement), Amdt. 2, extends expiration date of S.O. 1009, effective Dec. 31, 1968.

33 FR 19017, Dec. 20, 1968, Part 1033: Car Service, §1033.995 Service Order 995 (appointment of embargo agents), Amdt. 2, extends expiration date of S.O. 995, effective Dec. 31, 1968.

33 FR 19018, Dec. 20, 1968, Part 1033: Car Service, §1033.1007 Service Order 1007 (Soo Line R. Co. authorized to operate over trackage of Chicago & N.W. Ry. Co. and Northern Pac. Ry. Co.), Amdt. 1, extends expiration date of S.O. 1007, effective Dec. 31, 1968.

33 FR 19018, Dec. 20, 1968, Part 1034: Routing of Traffic, §1034.994 Service Order No. 994 (Rerouting of traffic—appointment of agents), Amdt. 2, extends expiration date of S.O. 994, effective Dec. 31, 1968.

34 FR 11, Jan. 1, 1969, Part 1033: Car Service, §1033.1004 Service Order No. 1004 Harriman & N. R. Co. authorized to operate over certain trackage abandoned by Tennessee Central Ry. Co., Amdt. 1, extends expiration date of S.O. 1004, effective Dec. 31, 1968.

34 FR 12, Jan. 1, 1969, Part 1033: Car Service, §1033.1003 Service Order No. 1003 Illinois Central R. Co. authorized to operate over certain trackage abandoned by Tennessee Central Ry. Co., Amdt. 1, extends expiration date of S.O. 1003, effective Dec. 31, 1968.

34 FR 12, Jan. 1, 1969, Part 1033: Car Service, §1033.1005 Service Order No. 1005 Louisville & N. R. Co. authorized to operate over certain trackage abandoned by Tennessee Central Ry. Co., Amdt. 1, extends expiration date of S.O. 1005, effective Dec. 31, 1968.

34 FR 206, Jan. 7, 1969, Part 1033: Car Service, §1033.1002 Service Order No. 1002 Car distribution directions—appointment of agents, Amdt. 2 extends expiration date of S.O. No. 1002, effective day after date of order.

34 FR 1729, Feb. 5, 1969, Part 1033: Car Service, §1033.1015 Service Order No. 1015, Union Pac. R. Co. to unload certain cars held at Longview, Wash., effective Feb. 4, 1969.

34 FR 1729, Feb. 5, 1969, Part 1033: Car Service, §1033.1016 Service Order No. 1016, Chicago & N.W. Ry. Co. to unload certain cars held at Kansas City, Mo., Oelwein, Iowa, and Peoria, Ill., effective Feb. 4, 1969.

34 FR 1730, Feb. 5, 1969, Part 1033: Car Service, §1033.1017 Service Order No. 1017, Minneapolis, N. & S. Ry. to unload certain cars held at Minneapolis, Minn., effective Feb. 4, 1969.

34 FR 1730, Feb. 5, 1969, Part 1033: Car Service, §1033.1018 Service Order No. 1018, Soo Line R. Co. to unload certain cars held at Glenwood, Minn., effective Feb. 4, 1969.

34 FR 1731, Feb. 5, 1969, Part 1033: Car Service, §1033.1019 Service Order No. 1019, Chicago, M. St.P. & P. R. to unload certain cars held at Kansas City, Mo., effective Feb. 4, 1969.

34 FR 2050, Feb. 12, 1969, Part 1033: Car Service, §1033.1020 Service Order No. 1020, distribution of boxcars 40 feet or longer with side-door openings of 8 feet or wider, effective Feb. 10, 1969.

34 FR 2355, Feb. 19, 1969, Part 1033: Car Service, §1033.1016 S.O. 1016 (Distribution of boxcars), Amdt. 1, sets expiration date of Service Order 1016 as Feb. 18, 1969.

34 FR 3746, March 4, 1969, Part 1033: Car Service, §1033.1021 Service Order No. 1021, Missouri-K.-T. R. Co. authorized to operate over tracks of Fort Worth & D. Ry. Co., expiration date, Sept. 30, 1969, effective March 1, 1969.

34 FR 5297, March 15, 1969, Part 1033: Car Service, §1033.1020 Service Order No. 1020, distribution of boxcars, revised service order, effective March 15, 1969.

34 FR 5298, March 15, 1969, Part 1033: Car Service, §1033.1022 Service Order No. 1022, distribution of boxcars, effective March 16, 1969.

34 FR 5380, March 19, 1969, Part 1033: Car Service, §1033.1020 Service Order No. 1020, distribution of boxcars, Corrected Rev. S.O. 1020, effective March 15, 1969.

34 FR 5604, March 25, 1969, Part 1033: Car Service, §1033.1022 Service Order No. 1022, distribution of boxcars, Rev. S.O. 1022, effective March 21, 1969.

34 FR 5997, Apr. 2, 1969, Part 1033: Car Service, §1033.1008 Service Order No. 1008, (Illinois Term. R. Co. authorized to operate over tracks of Illinois Central R. Co.) Amdt. 1, extends expiration date, effective Mar. 31, 1969.

34 FR 6281, Apr. 9, 1969, Part 1033: Car Service, §1033.1023 Service Order No. 1023, Demurrage on Freight Cars, effective Apr. 15, 1969.

34 FR 6395, Apr. 11, 1969, Part 1033: Car Service, §1033.1024 Service Order No. 1024, Union Pac. R. Co. authorized to operate over tracks of Southern Pac. Co., effective Apr. 10, 1969.

34 FR 6529, Apr. 16, 1969, Part 1033: Car Service, §1033.1003 Service Order No. 1033 (Illinois Central R. Co. authorized to operate over trackage abandoned by Tennessee Central R. Co.), vacated and set aside by Corrected S. O. 1003-A, effective Apr. 12, 1969.

34 FR 6529, Apr. 16, 1969, Part 1033: Car Service, §1033.1004 Service Order No. 1004 (Harriman & N. R. Co. authorized to operate over trackage abandoned by Tennessee Central R.), vacated and set aside by S. O. 1004-A, effective Apr. 12, 1969.

34 FR 6530, Apr. 16, 1969, Part 1033: Car Service, §1033.1020 Distribution of boxcars, 2nd Rev. S. O. 1020, effective Apr. 12, 1969.

34 FR 6587, Apr. 17, 1969, Part 1033: Car Service, §1033.1005 Service Order No. 1005 (Louisville & N. R. Co. authorized to operate over trackage abandoned by Tennessee Central R.), vacated and set aside by S. O. 1005-A, effective Apr. 12, 1969.

34 FR 6588, Apr. 17, 1969, Part 1033: Car Service, §1033.1023 Service Order No. 1023 (Demurrage on freight cars), Amdt. 1, extends expiration date of S.O. 1023, effective May 1, 1969.

34 FR 6733, Apr. 22, 1969, Part 1033: Car Service, §1033.1023 (Rev. S.O. 1023) Demurrage and detention charges on freight cars, effective May 1, 1969.

34 FR 7451, May 8, 1969, Part 1033: Car Service, §1033.1025 Regulations for return of covered hopper cars [S.O. 1025], added, effective May 6, 1969.

34 FR 7577, May 10, 1969, Part 1033: Car Service, §1033.1026 Service Order No. 1026 (St. Louis S. Ry. Co. authorized to operate over trackage of Illinois Central R. Co.) effective on day after date of order.

34 FR 8167, May 24, 1969, Part 1033: Car Service, §1033.1009 Service Order No. 1009 (Railroad operating regulations for freight car movement), Amdt. 3, extends expiration date of S.O. 1009, effective May 31, 1969.

34 FR 8204, May 27, 1969, Part 1033: Car Service, §1033.1023 Service Order No. 1023 [2d Rev. S.O. 1023] Demurrage and detention charges on freight cars, effective May 26, 1969.

34 FR 8920, June 4, 1969, Part 1033: Car Service, §1033.1020 Distribution of boxcars, 2nd Rev. S.O. 1020; Amdt. 1, extends expiration date of order, effective May 31, 1969.

34 FR 8920, June 4, 1969, Part 1033: Car Service, §1033.1023 Demurrage and detention charges on freight cars, Corrected 2nd Rev. S.O. 1023 supersedes Rev. S.O. No. 1023, effective May 26, 1969.

34 FR 8921, June 4, 1969, Part 1033: Car Service, §1033.1026 Service Order No. 1026 (St. Louis S. Ry. Co. authorized to operate over trackage of Illinois Central R. Co.) S.O. 1026-A vacates and sets aside S.O. 1026, effective on date of order.

34 FR 8921, June 4, 1969, Part 1033: Car Service, §1033.1027 Service Order No. 1027, Louisville & N. R. Co. authorized to operate over trackage of Belt Ry. Co. of Chicago and of Chicago & W. I. R. Co., effective June 2, 1969.

34 FR 9033, June 6, 1969, Part 1033: Car Service, §1033.1014 Service Order 1014 (St. Louis S. Ry. Co. authorized to operate over trackage of Missouri-K.-T. R. Co.), Amdt. 1, extends expiration date of S. O. 1014, effective May 31, 1969.

34 FR 9033, June 6, 1969, Part 1033: Car Service, §1033.1028 Service Order No. 1028, Atchison, T. & S.F. Ry. Co. authorized to operate over tracks of Fort Worth & D. Ry. Co., effective June 4, 1969.

34 FR 9870, June 26, 1969, Part 1033: Car Service, §1033.1025 Regulations for return of covered hopper cars, S. O. No. 1025, Amdt. 1, extends expiration date of S.O. 1025, effective June 30, 1969.

34 FR 9994, June 28, 1969, Part 1033: Car Service, §1033.1029 Service Order No. 1029, Delaware & H. Ry. Co. authorized to operate over tracks of Penn Central Co., effective June 29, 1969.

34 FR 11145, July 2, 1969, Part 1033: Car Service, §1033.1008 Service Order No. 1008 (Illinois Term. R. authorized to operate over tracks of Illinois Central R.), Amdt. 2, extends expiration date of S.O. 1008, effective June 30, 1969.

34 FR 11146, June 2, 1969, Part 1033: Car Service, §1033.1023 Corrected 2d Rev. Service Order No. 1023 (Demurrage and detention charges on freight cars), Amdt. 1, extends expiration date of Corr. 2d Rev. S.O. 1023, effective July 1, 1969.

34 FR 11211, July 3, 1969, Part 1033: Car Service, §1033.1029 Service Order No. 1029 (Delaware & H. Ry. authorized to operate over tracks of Penn Central Co.) revised, effective June 29, 1969.

34 FR 11211, July 3, 1969, Part 1033: Car Service, §1033.1030 Service Order No. 1030, Chicago, R.I. & P. R. authorized to operate over tracks of Atchison, T. & S.F. Ry. Co., effective June 28, 1969.

34 FR 11362, July 9, 1969, Part 1033: Car Service, §1033.1031 Service Order No. 1031 (Distribution of refrigerator cars) added, effective July 7, 1969.

34 FR 12179, July 23, 1969, Part 1033: Car Service, §1033.1029 Service Order No. 1029 (Delaware & H. Ry. authorized to operate over tracks of Penn Central Co.) vacated and set aside by Rev. S.O. 1029-A, effective on date of order.

34 FR 12180, July 23, 1969, Part 1033: Car Service, §1033.1032 Service Order No. 1032 (Great Northern Ry. authorized to operate over tracks of Chicago, R.I. & P.R. Co.) added, effective day after date of order.

34 FR 12392, July 29, 1969, Part 1033: Car Service, §1033.1009 Service Order No. 1009 (Railroad operating regulations for freight car movement) revised [Rev. S.O. 1009], effective July 25, 1969.

34 FR 13278, Aug. 15, 1969, Part 1033: Car Service, §1033.1033 Service Order No. 1033, Seaboard Coast Line R. Co. authorized to operate over tracks of Georgia R. R. & B. Co., effective Aug. 15, 1969.

34 FR 14172, Sept. 9, 1969, Part 1033: Car Service, §§1033.0, 1033.1, 1033.2, 1033.7, 1033.15, 1033.16, 1033.17, and 1033.18, railroads required to observe Rules 1, 2, 7, 15, 16, 17 and 18 of the Code of Car Service Rules—Freight promulgated by the AAR by the order in Ex Parte 241, Investigation of Adequacy of Railroad Car Ownership, Car Utilization, Distribution, Rules and Practices.

34 FR 15250, Sept. 30, 1969, Part 1033: Car Service, effective date of amendments to Part 1033 (34 FR 14172) is postponed to Nov. 10, 1969.

34 FR 15250, Sept. 30, 1969, Part 1033: Car Service, §1033.1030 Service Order 1030, Amdt. 1, postpones effective date of S. O. No. 1030 (Chicago, R.I. & P. R. authorized to operate over tracks of Atchison, T. & S.F. Ry.), effective Sept. 30, 1969.

34 FR 17334, Oct. 25, 1969, Part 1033: Car Service, §1033.1034 Missouri Pac. R. Co. authorized to operate over trackage of the Kansas City Public Service Freight Operation [S.O. No. 1034], effective Oct. 24, 1969.

34 FR 17729, Nov. 1, 1969, Part 1033: Car Service, §1033.1020 Distribution of boxcars, vacated and set aside by S. O. No. 1020-A, effective Oct. 31, 1969.

34 FR 17805, Nov. 5, 1969, Part 1033: Car Service, §1033.1032 Service Order No. 1032 (Great Northern Ry. authorized to operate over tracks of Chicago, R.I. & P. R.), Amdt. 2 extends expiration date of S.O. 1032, effective Oct. 31, 1969.

34 FR 18122, Nov. 11, 1969, Part 1033: Car Service, effective date of amendments to Part 1033 (34 FR 14172) is postponed until further order.

34 FR 19077, Dec. 2, 1969, Part 1033: Car Service, §1033.1028 Service Order No. 1028 (Atchison, T. & S.F. Ry. to operate over tracks of Fort Worth & D. Ry.), Amdt. 1 extends expiration date of S.O. 1028 until May 31, 1970, effective Nov. 30, 1969.

34 FR 19906, Dec. 19, 1969, Part 1033: Car Service, §1033.1035 Service Order 1035, Union Pac. R. Co. to unload certain cars of lumber held at Council Bluffs, Iowa, and Seattle, Wash., effective day after date of order.

34 FR 20193, Dec. 24, 1969, Part 1033: Car Service, §1033.1036 Service Order 1036, Atchison, T. & S.F. Ry. Co. authorized to operate over tracks of Missouri-K.T. R. Co., effective Jan. 3, 1970.

35 FR 45, Jan. 2, 1970, Part 1033: Car Service, §1033.1001 Service Order 1001, St. Louis-S.F. Ry. Co. authorized to operate over tracks of Missouri Pac. R., Amdt. 1 extends expiration date of S.O. 1001 to June 30, 1970.

35 FR 2868, Feb. 12, 1970, Part 1033: Car Service, §1033.1037 Service Order 1037, Distribution of Boxcars, added, effective Feb. 7, 1970.

35 FR 3813, Feb. 27, 1970, Part 1033: Car Service, §1033.994 Service Order 994 (Rerouting of traffic—appointment of agents), Amdt. 3, extends expiration date of S. O. 994 until Dec. 31, 1970, effective Dec. 31, 1969.

35 FR 3812, Feb. 27, 1970, Part 1033: Car Service, §1033.995 Service Order 995 (Appointment of embargo agents), Amdt. 3, extends expiration date of S. O. 995 until Dec. 31, 1970, effective Dec. 31, 1969.

35 FR 3813, Feb. 27, 1970, Part 1033: Car Service, §1033.1002 Service Order 1002 (Car distribution directions—appointment of agents), Amdt. 4, extends expiration date of S. O. 1002 until Dec. 31, 1970, effective Dec. 31, 1969.

35 FR 3899, Feb. 28, 1970, Part 1033: Car Service, §§1033.0 — 1033.18, inclusive, railroad car service rules prescribed for mandatory observance by order of Aug. 21, 1969 (34 FR 14172), modified by making the notes and interpretations therein part of the prescribed rules to be observed, and by adding thereto §1033.19 Exceptions [Rule 19], effective March, 27, 1970.

35 FR 4261, Mar. 7, 1970, Part 1033: Car Service, §1033.1038 Service Order No. 1038, Louisville & N. R. Co. directed to unload certain cars of machinery held at Knoxville and Nashville, Tenn., effective day after date of order.

35 FR 5041, Mar. 25, 1970, Part 1033: Car Service, §1033.0 - §1033.19, solely with respect to Rules 1 and 2 (34 FR 14172), as modified, compliance date of March 27, 1970 (35 FR 3899) is postponed until July 1, 1970. Also, data sheet (Form FCS-1) and formula for determining car ownership (Form FCS-2) are modified.

35 FR 5334, Mar. 31, 1970, Part 1033: Car Service, §1033.1024 Service Order 1024 (Union Pac. R., operation over tracks of Southern Pac. Co.) Amdt. 2 extends expiration date of S.O. 1024, effective Mar. 31, 1970.

35 FR 5334, Mar. 31, 1970, Part 1033: Car Service, §1033.1025 Service Order 1025 (Regulations for return of covered hopper cars) Amdt. 4 extends expiration date of S.O. 1025, effective Mar. 31, 1970.

35 FR 5334, Mar. 31, 1970, Part 1033: Car Service, §1033.1028 Service Order 1028 (Atchison, T. & S.F. Ry. operation over tracks of Ft. Worth & D. Ry.) vacated, effective on date of order.

35 FR 5334, Mar. 31, 1970, Part 1033: Car Service, §1033.1030 Service Order 1030 (Chicago, R.I. & P. R. operation over tracks of Atchison, T. & S.F. Ry.) Amdt. 3 extends expiration date of S.O. 1030, effective Mar. 31, 1970.

35 FR 5335, Mar. 31, 1970, Part 1033: Car Service, §1033.1037 Service Order 1037 (Regulations for return of boxcars) Amdt. 1 extends expiration date of S.O. 1037, effective March 23, 1970.

35 FR 5404, Apr. 1, 1970, Part 1033: Car Service, §1033.1033 Service Order 1033 (Seaboard Coast Line R. operation over tracks of Georgia R.R. & B. Co.) Amdt. 1 extends expiration date of S.O. 1033, effective Mar. 31, 1970.

35 FR 5586, Apr. 4, 1970, Part 1033: Car Service, §1033.1032 Service Order 1032 (Burlington N., Inc., operation over tracks of Chicago, R.I. & P. R.) vacated and set aside by S. O. 1032-A, effective on date of order.

35 FR 5814, Apr. 9, 1970, Part 1033: Car Service, §1033.1014 Service Order 1014 (St. Louis S. Ry. operation over tracks of Missouri-K.-T. R.) vacated and set aside by S. O. 1014-A, effective on date of order.

35 FR 7016, May 2, 1970, Part 1033: Car Service, §1033.995 Service Order No. 995, Rev. S.O. 995 Appointment of Embargo Agents, effective Apr. 30, 1970.

FR 7016, May 2, 1970, Part 1033: Car Service, §1033.1002 Service Order No. 1002, Rev. S.O. 1002, Car Distribution Directions; Appointment of Agents, effective Apr. 30, 1970.

35 FR 7017, May 2, 1970, Part 1034: Routing of Traffic, §1034.994 Service Order No. 994, Rev. S.O. 994 Rerouting of Traffic; Appointment of Agents, effective Apr. 30, 1970.

35 FR 8282, May 27, 1970, Part 1033: Car Service, §1033.1009 Revised Service Order No. 1009 (Railroad operating regulations for freight car movement), Amdt. 2, paragraph (a)(3) Forwarding of cars, revised, effective May 25, 1970.

35 FR 8735, June 5, 1970, Part 1033: Car Service, §1033.1040 Distribution of refrigerator cars [Service Order No. 1040], effective June 3, 1970.

35 FR 9213, June 12, 1970, Part 1033: Car Service, §1033.1037 Service Order No. 1037 (Distribution of boxcars), [Rev. S.O. 1037] revised, effective June 10, 1970.

35 FR 9858, June 16, 1970, Part 1033: Car Service, §1033.1041 Service Order No. 1041 (Distribution of boxcars), effective June 12, 1970.

35 FR 10150, June 20, 1970, Part 1033: Car Service, §1033.1041 Service Order No. 1041, (Distribution of boxcars), [Rev. S.O. 1041] revised, effective June 13, 1970.

35 FR 10150, June 20, 1970, Part 1033: Car Service, §1033.1042 Service Order No. 1042, (Chicago & N.W. Ry. authorized to operate over tracks of Chicago, R.I. & P. R.), effective June 18, 1970.

35 FR 10225, June 23, 1970, Part 1033: Car Service, §1033.1041 Second Revised Service Order No. 1041 (Distribution of boxcars), effective June 18, 1970.

35 FR 10224, June 23, 1970, Part 1033: Car Service, §1033.1043 Service Order No. 1043 (Return of hopper cars), effective June 21, 1970.

35 FR 10224, June 23, 1970, Part 1033: Car Service, §1033.1009 Revised Service Order No. 1009 (Railroad operating regulations for freight car movements), Amdt. 3, effective June 18, 1970.

35 FR 10448, June 26, 1970, Part 1033: Car Service, §1033.1044 Service Order No. 1044. Chicago & N.W. Ry. Co. authorized to operate over tracks of Burlington Northern, Inc., effective day after date of order.

35 FR 10522, June 27, 1970, Part 1033: Car Service, §1033.1045 Service Order No. 1045 (Distribution of boxcars), effective June 27, 1970.

35 FR 10661, July 1, 1970, Part 1033: Car Service, §1033.1030 Service Order No. 1030 (Chicago, R.I. & P. R. authorized to operate over tracks of Atchison, T. & S.F. Ry.), Amdt. 4, extends expiration date of S.O. 1030, effective June 30, 1970.

35 FR 10907, July 7, 1970, Part 1033: Car Service, §1033.1009 Service Order No. 1009 (Railroad operating regulations for freight car movement), Second Rev. S. O. 1009, effective June 30, 1970.

35 FR 11023, July 9, 1970, Part 1033: Car Service, §1033.1041 Service Order No. 1041 (Distribution of boxcars), Third Rev. S. O. 1041, effective July 6, 1970.

35 FR 1183, July 11, 1970, Part 1033: Car Service, §1033.1046 Service Order No. 1046, Toledo, P. & W. R. Co. authorized to operate over tracks of Peoria & Pekin Union Ry. Co., effective July 8, 1970.

35 FR 11301, July 15, 1970, Part 1033: Car Service, §1033.1046 Service Order No. 1046, [Rev. S.O. 1046) Burlington Northern, Inc., and certain other railroads authorized to operate over tracks of Peoria & Pekin Union Ry. Co., because of damage to Toledo, P. & W. R's bridge, effective July 10, 1970.

35 FR 11402, July 16, 1970, Part 1033: Car Service, §1033.1041 Service Order No. 1041 (Distribution of boxcars), [4th Rev. S.O. 1041] effective July 13, 1970.

35 FR 11402, July 16, 1970, Part 1033: Car Service, §1033.1043 Service Order No. 1043 (Return of hopper cars), Rev. S.O. 1043, effective July 14, 1970.

35 FR 11403, July 16, 1970, Part 1033: Car Service, §1033.1047 Service Order No. 1047, Illinois Term. R. Co. authorized to operate over tracks of Chicago & N.W. Ry. Co., effective July 11, 1970.

35 FR 11688, July 22, 1970, Part 1033: Car Service, §1033.1048 Service Order No. 1048, Union Pac. R. authorized to operate over tracks of Southern Pac. Co., effective July 20, 1970.

35 FR 12121, July 29, 1970, Part 1033: Car Service, §1033.1044 Service Order No. 1044 (Chicago & N.W. Ry. authorized to operate over tracks of Burlington Northern, Inc.), Amdt. 1, extends expireation date of S.O. 1044, effective second day after date of order.

35 FR 12910, Aug. 14, 1970, Part 1033: Car Service, §1033.1041 Service Order No. 1041, (Distribution of boxcars), Amdt. 1, extends expiration date of 4th Rev. S.O. 1041, effective Aug. 15, 1970.

35 FR 14217, Sept. 9, 1970, Part 1033: Car Service, §1033.1041 Service Order No. 1041 (Distribution of Boxcars), Fifth Rev. S.O. 1041, effective day after date of order.

35 FR 13837, Sept. 1, 1970, Part 1033: Car Service, §1033.1040 Service Order No. 1040 (Distribution of refrigerator cars), vacated by S. O. 1040-A, effective on date of order.

35 FR 13838, Sept. 1, 1970, Part 1033: Car Service, §1033.1044 Service Order No. 1044 (Chicago & N.W. Ry. authorized to operate over tracks of Burlington Northern, Inc.), Amdt. 2, extends expiration date of S. O. 1044, effective Aug. 31, 1970.

35 FR 15294, Oct. 1, 1970, Part 1033: Car Service, §1033.1030 Service Order No. 1030 (Chicago, R.I. & P.R. authorized to operate over tracks of Atchison, T. & S.F. Ry.), Amdt. 5, extends expiration date of S. O. 1030, effective Sept. 30, 1970.

35 FR 15294, Oct. 1, 1970, Part 1033: Car Service, §1033.1041 Service Order No. 1041 (Distribution of Boxcars), Sixth Rev. S. O. 1041, effective Sept. 30, 1970.

35 FR 15295, Oct. 1, 1970, Part 1033: Car Service, §1033.1043 Service Order No. 1043 (Regulations for return of hopper cars), corrected Amdt. 1, extends expiration date of S. O. 1043, effective Sept. 30, 1970.

35 FR 15295, Oct. 1, 1970, Part 1033: Car Service, §1033.1049 Service Order No. 1049, Regulations for Return of Hopper Cars, applicable to railroads except those named in S. O. No. 1043, effective Sept. 30, 1970.

35 FR 15394, Oct. 2, 1970, Part 1033: Car Service, §1033.1042 Service Order No. 1042 (Chicago & N.W. Ry. authorized to operate over tracks of Chicago, R.I. & P. R.), Amdt. 1, extends expiration date of S.O. 1042, effective Sept. 30, 1970.

35 FR 15395, Oct. 2, 1970, Part 1033: Car Service, §1033.1050 Service Order No. 1050, Demurrage and Detention Charges on Open-Top Hopper Cars, effective Oct. 1, 1970.

35 FR 16087, Oct. 14, 1970, Part 1033: Car Service, §1033.1041 Service Order No. 1041 (Distribution of boxcars), 7th Rev. S. O. 1041, effective Oct. 12, 1970.

35 FR 16088, Oct. 14, 1970, Part 1033: Car Service, §1033.1051 Service Order No. 1051, Distribution of Privately Owned Coal Cars, effective Oct. 12, 1970.

35 FR 16174, Oct. 15, 1970, Part 1033: Car Service, §1033.1049 Service Order No. 1049 (Regulations for return of hopper cars), vacated and set aside by S. O. 1049-A, effective Oct. 12, 1970.

35 FR 16174, Oct. 15, 1970, Part 1033: Car Service, §1033.1052 Service Order No. 1052, Regulations for Return of Open-Type Hopper Cars, effective Oct. 12, 1970.

35 FR 16933, Nov. 3, 1970, Part 1033: Car Service, §1033.1041 Distribution of boxcars, 8th Rev. S. O. 1041, effective Nov. 1, 1970.

35 FR 16934, Nov. 3, 1970, Part 1033: Car Service, §1033.1053 Distribution of boxcars, S. O. No. 1053, effective Nov. 1, 1970.

35 FR 16933, Nov. 3, 1970, Part 1033: Car Service, §1033.1050 Demurrage and detention charges on open-top hopper cars, Rev. S. O. 1050, effective Nov. 1, 1970.

35 FR 16931, Nov. 3, 1970, Part 1033: Car Service, §1033.1009 Railroad operating regulations for freight car movement, 3rd Rev. S. O. 1009, effective Oct. 31, 1970.

35 FR 17114, Nov. 6, 1970, Part 1033, Car Service, §1033.1054 Service Order No. 1054 (Distribution of boxcars), effective Nov. 4, 1970.

35 FR 17421, Nov. 13, 1970, Part 1033: Car Service, §1033.1009 Service Order 1009 (Railroad operating regulations for freight car movement) 3rd Rev. S. O. 1009. Amdt. 1, paragraph (a)(l)(i), (ii), and (vii) amended, effective Nov. 9, 1970.

35 FR 17552, Nov. 14, 1970, Part 1033: Car Service, §1033.1053 Service Order 1053 (Distribution of boxcars), S. O. 1053, Amdt. 1, amended by substituting new paragraph (a)(1), effective Nov. 11, 1970.

35 FR 17841, Nov. 20, 1970, Part 1033: Car Service, §1033.1009 Service Order No. 1009 (Railroad operating regulations for freight car movement), 3rd Rev. S. O. 1009, Amdt. 2, paragraph (a)(1)(ii) and (iv) further amended, effective Nov. 13, 1970.

35 FR 17842, Nov. 20, 1970, Part 1033: Car Service, §1033.1041 Service Order N. 1041 (Distribution of boxcars), 9th Rev. S. O. 1041, effective Nov. 17, 1970.

35 FR 17951, Nov. 21, 1970, Part 1033: Car Service, §1033.1053 Service Order No. 1053 (Distribution of boxcars), S. O. 1053, Amdt. 2, new paragraph (a)(1) substituted, effective Nov. 17, 1970.

35 FR 18468, Dec. 4, 1970, Part 1033: Car Service, §1033.1055 Service Order No. 1055, Burlington Northern, Inc. and Chicago, M. S.P. & P. R. authorized to operate over trackage abandoned by Sioux City Terminal Ry., effective Dec. 5, 1970.

35 FR 18468, Dec. 4, 1970, Part 1033: Car Service, §1033.1056 Service Order No. 1056, Distribution of boxcars, effective Dec. 1, 1970.

35 FR 18963, Dec. 15, 1970, Part 1033: Car Service: §1033.1009 Service Order No. 1009, paragraphs (a)(1)(ii) and (vii) of 3d Rev. S.O. 1009 revised by Amdt. 3, effective Dec. 8, 1970.

35 FR 19753, Dec. 30, 1970, Part 1033: Car Service, §1033.1042 Service Order No. 1042 (Chicago & N.W. Ry. Co. authorized to operate over tracks of Chicago, R.I. & P. R.), Amdt. 2, extends expiration date of S. O. 1042, effective Dec. 31, 1970.

35 FR 19753, Dec. 30, 1970, Part 1033: Car Service, §1033.1048 Service Order No. 1048 (Union Pac. R. Co. authorized to operate over tracks of Southern Pac. Co.), Amdt. 1, extends expiration date of S. O. 1048, effective Dec. 31, 1970.

36 FR 64, Jan. 2, 1971, Part 1033: Car Service, §1033.1051 Distribution of privately owned coal cars, Amdt. 1 extends expiration date of S.O. 1051, effective Dec. 31, 1970.

36 FR 772, Jan. 16, 1971, Part 1033: Car Service, §1033.1043 Service Order No. 1043 (Return of hopper cars), Amdt. 2, extends expiration date of S. O. 1043, effective Dec. 31, 1970.

36 FR 773, Jan. 16, 1971, Part 1033: Car Service, §1033.1046 Service Order No. 1046 (Burlington Northern Inc., and two other railroads authorized to operate over tracks of Peoria & Pekin Union Ry.), Amdt. 1, extends expiration date of S. O. 1046, effective Dec. 31, 1970.

36 FR 773, Jan. 16, 1971, Part 1033: Car Service, §1033.1056 Service Order No. 1056 (Distribution of boxcars), S. O. 1056-A, vacates and sets aside S. O. 1056, effective on date of order.

36 FR 1202, Jan. 26, 1971, Part 1033: Car Service, §1033.1057 Service Order No. 1057, Atchison, T. & S.F. Ry. authorized to operate over tracks of St. Louis-S.F. Ry. Co., effective on day after date of order.

36 FR 1417, Jan. 29, 1971, Part 1033: Car Service, §1033.1059 Service Order No. 1059, Pennsylvania-Reading Seashore Lines; Unloading of certain cars of beets held at Glassboro and Tuckahoe, N.J., effective on day after date of order.

36 FR 1417, Jan. 29, 1971, Part 1033: Car Service, §1033.1060 Service Order No. 1060, Reading Co.; Unloading of certain cars of beets held at Macungie, Pa., effective on day after date of order.

36 FR 1475, Jan. 30, 1971, Part 1033: Car Service, §1033.1058 Service Order No. 1058, Penn Central Transp. Co. et al., to unload certain cars of beets held at Morrisville, Pa., effective on day after date of order.

36 FR 1476, Jan. 30, 1971, Part 1033: Car Service, §1033.1061 Service Order No. 1061, Return of hopper cars, effective second day after date of order.

36 FR 3513, Feb. 26, 1971, Part 1033: Car Service, §1033.1062, Service Order No. 1062, Distribution of gondola cars, effective 3 days after date of order.

36 FR 3513, Feb. 26, 1971, Part 1033: Car Service, §1033.1063, Service Order No. 1063, Railroad operating regulations for freight car movement, effective March 1, 1971.

36 FR 3120, Feb. 18, 1971, Part 1033: Car Service, §1033.1059 Service Order No. 1059, (Pennsylvania-Reading Seashore Lines, unloading of certain cars of beets held at Glassboro and Tuckahoe, N.J.) Amdt. 1, extends expiration date of S.O. No. 1059, effective on date of order.

36 FR 3896, Mar. 2, 1971, Part 1033: Car Service, §1033.1064 Service Order No. 1064, Distribution of boxcars (specific railroads named), effective March 1, 1971.

36 FR 3897, Mar. 2, 1971, Part 1033: Car Service, §1033.1065 Service Order No. 1065, Distribution of boxcars (specific railroads named), effective March 1, 1971.

36 FR 3969, Mar. 3, 1971, Part 1033: Car Service, §1033.1065 Distribution of Boxcars, corrected Service Order No. 1064, effective March 1, 1971.

36 FR 3969, Mar. 3, 1971, Part 1033: Car Service, §1033.1065 Distribution of Boxcars, corrected Service Order No. 1065, effective March 1, 1971.

36 FR 4385, Mar. 5, 1971, Part 1033: Car Service, §1033.1062 Service Order No. 1062-A (Distribution of gondola cars), vacates and sets aside S. O. 1062, effective March 3, 1971.

36 FR 4385, Mar. 5, 1971, Part 1033: Car Service, §1033.1066 Service Order No. 1066, Distribution of Gondola Cars, effective March 3, 1971.

36 FR 4504, Mar. 6, 1971, Part 1033: Car Service, §1033.1061 Service Order No. 1061, (Regulations for return of hopper cars), Rev. Service Order 1061, effective March 5, 1971.

36 FR 4504, Mar. 6, 1971, Part 1033: Car Service, §1033.1066 Service Order No. 1066 (Distribution of gondola cars), Rev. Service Order 1066, effective March 4, 1971.

36 FR 4786, Mar. 12, 1971, Part 1033: Car Service, §1033.1065 Service Order No. 1065 (Distribution of boxcars), Rev. S. O. 1065, return empty certain cars of named railroads, effective March 8, 1971.

36 FR 5606, Mar. 25, 1971, Part 1033: Car Service, §1033.1067 Service Order No. 1067, Distribution of boxcars—return empty certain cars of named railroads, effective 5 days after date of order.

36 FR 5793, Mar. 27, 1971, Part 1033: Car Service, §1033.1067 Service Order No. 1067, Distribution of boxcars, Amdt. 1, adds new subparagraph (8.1) to paragraph (a), effective day after date of order.

36 FR 5912, Mar. 31, 1971, Part 1033: Car Service, §1033.1061 Service Order No. 1061, Regulations for return of hopper cars, Second Rev. S. O. 1061, effective April 1, 1971.

36 FR 5912, Mar. 31, 1971, Part 1033: Car Service, §1033.1068 Service Order No. 1068, Regulations for the return of gondola cars, effective April 1, 1971.

36 FR 5978, April 1, 1971, Part 1033: Car Service, §1033.1030 Service Order No. 1030 (Chicago, R.I. & P. R. authorized to operate over tracks of Atchison, T. & S.F. Ry.), Amdt. 7, extends expiration date of S.O. 1030, effective Mar. 31, 1971.

36 FR 5979, April 1, 1971, Part 1033: Car Service, §1033.1042 Service Order No. 1042 (Chicago & N.W. Ry. authorized to operate over tracks of Chicago, R.I. & P. R.), Amdt. 3, extends expiration date of S.O. 1042, effective Mar. 31, 1971.

36 FR 5979, April 1, 1971, Part 1033: Car Service, §1033.1065 Service Order No. 1065 (Distribution of boxcars), 2nd Rev. S.O. 1065, Amdt. 1, adds subparagraph (10.1) to paragraph (a) thereof, effective day after date of order.

36 FR 5979, April 1, 1971, Part 1033: Car Service, §1033.1066 Service Order No. 1066 (Distribution of gondola cars), Rev. S.O. 1066-A vacates and sets aside S.O. No. 1066, effective Apr. 1, 1971.

36 FR 6571, Apr. 7, 1971, Part 1033: Car Service, §1033.1063 Service Order No. 1063, Railroad operating regulations for freight car movement, Rev. S. O. 1063, effective third day after date of order.

36 FR 6573, Apr. 7, 1971, Part 1033: Car Service, §1033.1069 Service Order No. 1069, St. Louis-S.F. Ry. Co. authorized to operate over tracks of Texas & P. Ry. and of Missouri-K.-T. R. Co., effective Apr. 6, 1971.

36 FR 6829, Apr. 9, 1971, Part 1033: Car Service, §1033.1064 Service Order No. 1064, Distribution of boxcars, Rev. S.O. 1064, effective Apr. 5, 1971.

36 FR 7420, Apr. 20, 1971, Part 1033: Car Service, §1033.1065 Service Order No. 1065, Distribution of boxcars, 3rd Rev. S.O. 1065, effective third day after date of order.

36 FR 7507, Apr. 21, 1971, Part 1033: Car Service, §1033.1070 Service Order No. 1070, Chicago, R.I. & P. R. Co. authorized to operate over tracks of Chicago & N.W. Ry. Co., effective April 19, 1971.

36 FR 8043, Apr. 29, 1971, Part 1033: Car Service, §1033.1063 Service Order No. 1063 (Railroad operating regulations for freight car movement), Amdt. 1, exempts certain cars owned by Alaska Railroad, effective Apr. 27, 1971.

36 FR 8043, Apr. 29, 1971, Part 1033: Car Service, §1033.1057 Service Order No. 1057 (Atchison, T. & S.F. Ry. authorized to operate over tracks of St. Louis-S.F. Ry.), Amdt. 1, extends expiration date of S. O. 1057, effective Apr. 30, 1971.

36 FR 8043, Apr. 29, 1971, Part 1033: Car Service, §1033.1071 Service Order No. 1071, Distribution of boxcars, effective Apr. 27, 1971.

36 FR 8306, May 4, 1971, Part 1033: Car Service, §1033.1065 Service Order No. 1065 (Distribution of boxcars), 3rd Rev. S. O. No. 1065-A, vacates and sets aside 3rd Rev. S.O. 1065, effective Apr. 27, 1971.

36 FR 8952, May 15, 1971, Part 1033: Car Service, §1033.1073 Service Order No. 1073, Soo Line R. Co. authorized to operate over certain trackage of Burlington Northern, Inc., effective May 12, 1971.

36 FR 8673, May 11, 1971, Part 1033: Car Service, §1033.1061 Service Order No. 1061 (Return of hopper cars), 3rd Rev. S.O. 1061, effective day after date of order.

36 FR 8674, May 11, 1971, Part 1033: Car Service, §1033.1072 Service Order No. 1072, Distribution of boxcars, effective May 10, 1971.

36 FR 9870, May 29, 1971, Part 1033: Car Service, §1033.1025 Service Order No. 1025 (Return of covered hopper cars), Amdt. 6, extends expiration date of S.O. 1025, effective May 31, 1971.

36 FR 10785, June 3, 1971, Part 1033: Car Service, §1033.1061 Service Order No. 1061 (Return of hopper cars), 4th Rev. S. O. 1061, effective May 27, 1971.

36 FR 11999, June 24, 1971, Part 1033: Car Service, §1033.1030 Service Order No. 1031 (Chicago, R.I. & P. R. authorized to operate over tracks of Atchison, T. & S.F. Ry.), Amdt. 8, extends expiration date of S.O. 1031, effective June 30, 1971.

36 FR 12107, June 25, 1971, Part 1033: Car Service, §1033.1042 Service Order No. 1042 (Chicago & N.W. Ry. authorized to operate over tracks of Chicago, R.I. & P. R.), Amdt. 4, extends expiration date of S. O. 1042, effective June 30, 1971.

36 FR 12107, June 25, 1971, Part 1033: Car Service: §1033.1046 Service Order No. 1046 (Burlington Northern, Inc., et al. authorized to operate over tracks of Peoria & Pekin Union Ry.), Amdt. 2, extends expiration date of S. O. 1046, effective June 30, 1971.

36 FR 12107, June 25, 1971, Part 1033: Car Service, §1033.1070 Service Order No. 1070 (Chicago, R.I. & P. R. authorized to operate over tracks of Chicago & N.W. Ry.), Amdt. 1, extends expiration date of S.O. 1070, effective June 30, 1971.

36 FR 12167, June 26, 1971, Part 1033: Car Service: §1033.1064 Service Order No. 1064 (Distribution of boxcars), Second Rev. S. O. 1064, effective June 30, 1971.

36 FR 12168, June 26, 1971, Part 1033: Car Service, §1033.1067 Service Order No. 1067 (Distribution of boxcars), Amdt. 2, extends expiration date of S.O. 1067, effective June 30, 1971.

36 FR 12168, June 26, 1971, Part 1033: Car Service, §1033.1072 Service Order No. 1072 (Distribution of boxcars), Amdt. 1, extends expiration date of S.O. 1072, effective June 30, 1971.

36 FR 12225, June 29, 1971, Part 1033: Car Service, §1033.1074 Service Order No. 1074, Union Pac. R. authorized to operate over certain tracks of Burlington Northern, Inc., effective June 30, 1971.

36 FR 12225, June 29, 1971, Part 1033: Car Service, §1033.1061 Service Order No. 1061 (Return of hopper cars), 5th Rev. S. O. 1061, effective June 9, 1971.

36 FR 12304, June 30, 1971, Part 1033: Car Service, §1033.1051 Service Order No. 1051 (Distribution of privately owned coal cars), Amdt. 2, extends expiration date of S.O. 1051, effective June 30, 1971.

36 FR 12305, June 30, 1971, Part 1033: Car Service, §1033.1075 Service Order No. 1075, Distribution of refrigerator cars, effective June 28, 1971.

36 FR 12859, July 8, 1971, Part 1033: Car Service, §1033.1076 Service Order No. 1076, Chicago, R.I. & P. R. Co. authorized to operate over certain tracks of Union Pac. R. Co., effective July 5, 1971.

36 FR 13216, July 16, 1971, Part 1033: Car Service, §1033.1067 Service Order No. 1076-A (Distribution of boxcars), vacates and sets aside S. O. No. 1067, effective July 15, 1971.

36 FR 13388, July 21, 1971, Part 1033: Car Service, §1033.1064 Service Order No. 1064 (Distribution of boxcars), Third Rev. S. O. 1064, effective one week after date of order.

36 FR 13760, July 24, 1971, Part 1033: Car Service, §1033.1063 Service Order No. 1063 (Railroad operating regulations for freight car movement), 2nd Rev. S. O. 1063, Amdt. 1, suspends 2nd Rev. S.O. 1063 until further order, effective on date of order.

36 FR 13927, July 28, 1971, Part 1033: Car Service, §1033.1057 Service Order No. 1057 (Atchison, T. & S.F. Ry. Co. authorized to operate over tracks of St. Louis-S.F. Ry. Co.), Amdt. 2, extends expiration date of S.O. 1057, effective July 31, 1971.

36 FR 13927, July 28, 1971, Part 1033: Car Service, §1033.1077 Service Order No. 1077, Kansas City S. Ry. Co. authorized to operate over tracks of Southern Pac. Transp. Co., effective day after date of order.

36 FR 13996, July 29, 1971, Part 1033: Car Service, §1033.1075 Service Order No. 1075 (Distribution of refrigerator cars), subparagraph (6) added to paragraph (a) of S.O. 1075, and expiration date thereof extended, effective day after date of order.

36 FR 14136, July 30, 1971, Part 1033: Car Service, §1033.1064 Service Order No. 1064 (Distribution of boxcars), 3rd Rev. S.O. 1064, Amdt. 1, amending paragraph (a) (1) of 3rd Rev. S.O. 1064 by addition of subparagraph (i), effective day after date of order.

36 FR 14187, July 31, 1971, Part 1033: Car Service, §1033.1064 Service Order No. 1064 (Distribution of boxcars), 3rd Rev. S.O. 1064, Amdt. 2, amending paragraph (a)(1) of 3rd Rev. S.O. 1064 by addition of subparagraph (ii), effective day after date of order.

36 FR 14188, July 31, 1971, Part 1033: Car Service, §1033.1075 Service Order No. 1075 (Distribution of refrigerator cars), Amdt. 1, subparagraph (6) added to paragraph (a) of S.O. 1075, and expiration date extended, effective day after date of order.

36 FR 15534, Aug. 17, 1971, Part 1033: Car Service, §1033.1064 Service Order No. 1064 (Distribution of boxcars), 4th Rev. S. O. 1064, effective two days after date of order.

36 FR 15756, Aug. 18, 1971, Part 1033: Car Service, §1033.1063 Service Order No. 1063 (Railroad operating regulations for freight car movement), 2d Rev. S. O. 1063, Amdt. 2, extends expiration date of 2nd Rev. S.O. 1063, effective Aug. 23, 1971.

36 FR 16583, Aug. 24, 1971, Part 1033: Car Service, §1033.1063 Service Order No. 1063 (Railroad operating regulations for freight car movement), 2d Rev. S.O. 1063, effective one week after date of order.

36 FR 17344, Aug. 28, 1971, Part 1033: Car Service, §1033.1077 Service Order No. 1077 (Kansas City S. Ry. Authorized to operate over tracks of Southern Pac. Transp. Co.), S.O. 1077, Amdt. 1, extends expiration date of S.O. 1077, effective Aug. 31, 1971.

36 FR 17649, Sept. 3, 1971, Part 1033: Car Service, §1033.1078 Service Order No. 1078, Distribution of boxcars, effective three days after date of order.

36 FR 18403, Sept. 14, 1971, Part 1033: Car Service, §1033.1075 Service Order No. 1075 (Distribution of refrigerator cars), vacated and set aside by S. O. 1075-A, effective on date of order.

36 FR 18954, Sept. 24, 1971, Part 1033: Car Service, §1033.1072 Service Order No. 1072 (Distribution of boxcars), Amdt. 2, extends expiration date of S. O. 1072, effective Sept. 30, 1971.

36 FR 18955, Sept. 24, 1971, Part 1033: Car Service, §1033.1057 Service Order No. 1057 (Atchison, T. & S.F. Ry. authorized to operate over tracks of St. Louis-S.F. Ry.), Amdt. 3, extends expiration date of S.O. 1057, effective Sept. 30, 1971.

36 FR 19370, Oct. 5, 1971, Part 1033: Car Service, §1033.1030 Service Order No. 1030 (Chicago, R.I. & P. R. authorized to operate over tracks of Atchison, T. & S.F. Ry.), Amdt. 9, extends expiration date of S. O. No. 1030, effective day after date of order.

36 FR 20430, Oct. 22, 1971, Part 1033: Car Service, §1033.1025 Service Order No. 1025 (Regulations for return of covered hopper cars), S. O. 1025-A, vacates and sets aside S.O. No. 1025, effective Oct. 15, 1971.

36 FR 21203, Nov. 4, 1971, Part 1033: Car Service, §1033.1083 Service Order No. 1083, Southern Pac. Transp. Co. authorized to operate over tracks of Texas & P. Ry. Co., effective day after date of order.

36 FR 20756, Oct. 29, 1971, Part 1033: Car Service, §1033.1048 Service Order No. 1048-A (Union Pac. R. authorized to operate over tracks of Southern Pac. Co.), vacates and sets aside S. O. 1048, effective Oct. 26, 1971.

36 FR 20756, Oct. 29, 1971, Part 1033: Car Service, §1033.1063 Service Order No. 1063 (Railroad operating regulations for freight car movement), Amdt. 3, extends expiration date of S. O. 1063, effective Oct. 25, 1971.

36 FR 20757, Oct. 29, 1971, Part 1033: Car Service, §1033.1081 Service Order No. 1081 Union Pac. R. Co. authorized to operate over tracks of Southern Pac. Transp. Co., effective Oct. 26, 1971.

36 FR 21452, Nov. 10, 1971, Part 1033: Car Service, §1033.1077 Service Order No. 1077 (Kansas City S. Ry. authorized to operate over trackage of Southern Pac. Transp. Co.), S. O. 1077-A vacates and sets aside S. O. No. 1077, effective Nov. 1, 1971.

36 FR 22063, Nov. 19, 1971, Part 1033: Car Service, §1033.1078 Service Order No. 1078 (Distribution of boxcars), S.O. No. 1078-A vacates and sets aside S.O. 1078, effective Nov. 5, 1971.

36 FR 22063, Nov. 19, 1971, Part 1033: Car Service, §1033.1084 Service Order No. 1084, Chicago, R.I. & P. R. authorized to operate over tracks of Chicago & N.W. Ry., effective Nov. 16, 1971.

36 FR 22300, Nov. 24, 1971, Part 1033: Car Service, §1033.1085 Service Order No. 1085, Burlington Northern, Inc. authorized to operate over tracks of Decker Coal Co., Arno, Wyo.-Decker, Mont., effective on date of order.

36 FR 22751, Nov. 30, 1971, Part 1033: Car Service, §1033.1072 Service Order No. 1072 (Distribution of boxcars), Rev. S. O. No. 1072 issued, effective 5 days after date of order.

36 FR 23572, Dec. 10, 1971, Part 1033: Car Service, §1033.1063 Service Order No. 1063 (Railroad operating regulations for freight car movements), 2nd Rev. S.O. 1063-A vacates and sets aside 2nd Rev. S.O. 1063, effective second day after date of order.

36 FR 24059, Dec. 18, 1971, Part 1033: Car Service, §1033.1043 2nd Rev. Service Order No. 1043 (Regulations for return of hopper cars), Amdt. 2 extends expiration date of 2nd Rev. S.O. 1043, effective Dec. 31, 1971.

36 FR 24059, Dec. 18, 1971, Part 1033: Car Service, §1033.1083 Service Order No. 1083 (Southern Pac. Transp. Co. authorized to operate over tracks of Texas & P. Ry. Co.), Amdt. 1 extends expiration date of S.O. 1083, effective Dec. 15, 1971.

36 FR 25423, Dec. 31, 1971, Part 1033: Car Service, §1033.1030 Service Order No. 1030 (Chicago, R.I. & P. R. authorized to operate over tracks of Atchison, T. & S.F. Ry. Co.), Amdt. 10, extends expiration date of S.O. 1030, effective Dec. 31, 1971.

36 FR 25423, Dec. 31, 1971, Part 1033: Car Service, §1033.1042 Service Order No. 1042 (Chicago & N.W. Ry. Co. authorized to operate over tracks of Chicago, R.I. & P. Co.), Amdt. 5, extends expiration date of S.O. 1042, effective Dec. 31, 1971.

36 FR 25424, Dec. 31, 1971, Part 1033: Car Service, §1033.1051 Service Order No. 1051 (Distribution of privately-owned coal cars), Amdt. 3, extends expiration date of S.O. 1051, effective Dec. 31, 1971.

36 FR 25424, Dec. 31, 1971, Part 1033: Car Service, §1033.1055 Service Order No. 1055 (Burlington Northern, Inc. and Chicago, M. S.P. & P. R. authorized to operate over trackage abandoned by Sioux City Term. Ry.), Amdt. 1, extends expiration date of S.O. 1055, effective Dec. 31, 1971.

36 FR 25424, Dec. 31, 1971, Part 1033: Car Service, §1033.1057 Service Order No. 1057 (Atchison, T. & S.F. Ry. authorized to operate over tracks of St. Louis-S.F. Ry.), Amdt. 4, extends expiration date of S.O. 1057, effective Dec. 31, 1971.

36 FR 25424, Dec. 31, 1971, Part 1033: Car Service, §1033.1074 Service Order No. 1074 (Union Pac. R. authorized to operate over certain trackage of Burlington Northern, Inc.), Amdt. 1, extends expiration date of S.O. 1074, effective Dec. 31, 1971.

36 FR 25425, Dec. 31, 1971, Part 1033: Car Service, §1033.1076 Service Order No. 1076 (Chicago, R.I. & P. R. authorized to operate over certain trackage of Union Pac. R.), Amdt. 1, extends expiration date of S.O. 1076, effective Dec. 31, 1971.

36 FR 25425, Dec. 31, 1971, Part 1033: Car Service, §1033.1086 Service Order No. 1086, Chicago, R.I. & P. R. Co. authorized to operate over tracks of Peoria & Pekin Union Ry. Co., effective Dec. 31, 1971.

36 FR 25425, Dec. 31, 1971, Part 1033: Car Service, §1033.1087 Service Order No. 1087, Burlington Northern, Inc. authorized to operate over tracks of Peoria & Pekin Union Ry. Co., effective Dec. 31, 1971.

37 FR 934, Jan. 21, 1972, Part 1033: Car Service, §1033.1088 Service Order No. 1088, Central R. Co. of New Jersey authorized to operate over tracks of Lehigh Valley R., effective on date of order.

37 FR 1046, Jan. 22, 1972, Part 1033: Car Service, §1033.1074 Service Order No. 1074 (Union Pac. R. Co. authorized to operate over certain tracks of Burlington Northern, Inc.), Amdt. 2, extends expiration date of S. O. 1074, effective Jan. 31, 1972.

37 FR 2677, Feb. 4, 1972, Part 1033: Car Service, §1033.1089 Service Order No. 1089, New York Dock Ry. authorized to operate over trackage abandoned by Bush Terminal R. Co., effective Feb. 3, 1972.

37 FR 3354, Feb. 15, 1972, Part 1033: Car Service, §1033.1090 Service Order No. 1090, Burlington Northern, Inc. authorized to operate over tracks of Chicago & N.W. Ry., effective day after date of order.

37 FR 4429, March 3, 1972, Part 1033: Car Service, §1033.1074 Service Order No. 1074 (Union Pac. R. Co. authorized to operate over trackage of Burlington Northern, Inc.), Amdt. 3, extends expiration date of S.O. 1074, effective Feb. 29, 1972.

37 FR 4917, March 7, 1972, Part 1033: Car Service, §1033.1091 Service Order No. 1091, Norfolk & W. Ry. Co. authorized to operate over tracks of Penn Central Transp. Co., effective two days after date of order.

37 FR 5128, March 10, 1972, Part 1033: Car Service, §1033.1092 Service Order No. 1092, Missouri Pac. R. Co. authorized to operate over tracks of Illinois Central R. Co., effective March 6, 1972.

37 FR 6593, Mch. 31, 1972, Part 1033: Car Service, §1033.1042 Service Order No. 1042 (Chicago & N.Y. authorized to operate over tracks of Chicago, R.I. & P.), Amdt. 6, extends expiration date of S.O. No. 1042, effective March 31, 1972.

37 FR-6593, Mch. 31, 1972, Part 1033: Car Service, §1033.1072 Service Order No. 1072 (Distribution of boxcars), Amdt. 1, extends expiration date of S.O. No. 1072, effective March 31, 1972.

37 FR 6593, Mch. 31, 1972, Part 1033: Car Service, §1033.1076 Service Order No. 1076 (Chicago, R.I. & P. authorized to operate over certain tracks of Union Pac.), Amdt. 2, extends expiration date of S.O. No. 1076, effective March 31, 1972.

37 FR 7504, Apr. 15, 1972, Part 1033: Car Service, §1033.1030 Service Order 1030-A (Chicago, R.I. & P. R. Co. authorized to operate over tracks of Atchison, T. & S.F. Ry.), vacates and sets aside S. O. No. 1030, effective day after date of order.

37 FR 7159, Apr. 11, 1972, Part 1033: Car Service, §1033.1074 Service Order No. 1074 (Union Pac. R. Co. authorized to operate over tracks of Burlington Northern, Inc.), Amdt. 4, extends expiration date of S.O. 1074, effective March 31, 1972.

37 FR 7794, Apr. 20, 1972, Part 1033: Car Service, §1033.1030 Service Order No. 1030-A (Chicago, R.I. & P. R. authorized to operate over tracks of Atchison, T. & S.F. Ry.) vacates and sets aside S. O. 1030, effective day after date of order.

37 FR 7794, Apr. 20, 1972, Part 1033: Car Service, §1033.1096 Service Order No. 1096, Southern Ry. authorized to operate over tracks of St. Louis-S.F. Ry. and Missouri Pac. R., and Missouri Pac. R. authorized to operate over tracks of Southern Ry., effective two days after date of order.

37 FR 8950, May 3, 1972, Part 1033: Car Service, §1033.1074 Service Order No. 1074 (Union Pac. R. authorized to operate over tracks of Burlington Northern, Inc.), Amdt. 5, extends expiration date of S.O. 1074, effective Apr. 30, 1972.

37 FR 9028, May 4, 1972, Part 1033: Car Service, §1033.1093 Service Order No. 1093, Burlington Northern, Inc. authorized to operate over tracks of Minneapolis Industrial Ry., effective Apr. 1, 1972.

37 FR 9028, May 4, 1972, Part 1033: Car Service, §1033.1094 Service Order No. 1094, Lehigh Valley R. authorized to operate over tracks of Lehigh Coal & N. Co., effective Apr. 1, 1972.

37 FR 9029, May 4, 1972, Part 1033: Car Service, §1033.1095 Service Order No. 1095, Central R. Co. of New Jersey ordered to cancel certain embargoes, effective on date of order.

37 FR 9118, May 5, 1972, Part 1033: Car Service, §1033.1089 Service Order No. 1089 (New York Dock Ry. authorized to operate over tracks of Bush Term. R. Co.), Amdt. 1, extends expiration date of S. O. 1089, effective May 3, 1972.

37 FR 9119, May 5, 1972, Part 1033: Car Service, §1033.1097 Service Order No. 1097, Illinois Terminal R. Co. authorized to operate over tracks of Chicago & N.W. Ry. Co., effective May 2, 1972.

37 FR 9632, May 13, 1972, Part 1033: Car Service, §1033.1042 Service Order No. 1042 (Chicago & N.W. Ry. authorized to operate over tracks of Chicago, R.I. & P. R.), S.O. 1042-A vacates and sets aside S.O. 1042, effective May 11, 1972.

37 FR 9633, May 13, 1972, Part 1033: Car Service, §1033.1098 Service Order No. 1098, Chicago & N.W. Ry. authorized to operate over tracks abandoned by Chicago, R.I. & P. R., effective May 11, 1972.

37 FR 10505, May 24, 1972, Part 1033: Car Service, §1033.1043 Service Order No. 1043, Return of Hopper Cars, 3rd Rev. S. O. 1043, effective May 19, 1972.

37 FR 11066, June 2, 1972, Part 1033: Car Service, §1033.1094 Service Order No. 1094 (Lehigh Valley R. Co. authorized to operate over tracks of Lehigh Coal & Nav. Co.), Amdt. 1, extends expiration date of S. O. 1094, effective on date of order.

37 FR 11336, June 7, 1972, Part 1033: Car Service, §1033.1090 Service Order No. 1090-A (Burlington Northern Inc. authorized to operate over tracks of Chicago & N.W. Ry.), vacates and sets aside S.O. No. 1090, effective May 31, 1972.

37 FR 11336, June 7, 1972, Part 1033: Car Service, corrected S. O. 1094, Amdt. 1, effective on date of order.

37 FR 11336, June 7, 1972, Part 1033: Car Service, §1033.1099 Service Order No. 1099, Delray Connecting R. Co. authorized to operate over tracks of Detroit, T., & I. R. Co., effective two days after date of order.

37 FR 12324, June 22, Part 1033: Car Service, §1033.1100 Service Order No. 1100, Union Pacific R. Co. authorized to operate over certain tracks of Agricultural Products Corp., effective three days after date of order.

37 FR 12497, June 24, 1972, Part 1033: Car Service, §1033.1087 Service Order No. 1087 (Burlington Northern Inc. authorized to operate over tracks of Peoria & P. U. Ry.), Amdt. 1 extends expiration date of S.O. 1087, effective June 30, 1972.

37 FR 12497, June 24, 1972, Part 1033; Car Service, §1033.1091 Service Order No. 1091 (Norfolk & W. Ry. authorized to operate over tracks of Penn Central Transp. Co.), Amdt. 1 extends expiration date of S.O. 1091, effective June 30, 1972.

37 FR 12726, June 28, 1972, Part 1033: Car Service, §1033.1055 Service Order No. 1055 (Burlington Northern, Inc., et al, authorized to operate over trackage abandoned by Sioux City Term. Ry.), Amdt. 2 extends expiration date of S.O. 1055, effective June 30, 1972.

37 FR 12726, June 28, 1972, Part 1033: Car Service, §1033.1081 Service, Order No. 1081 (Union Pac. R. authorized to operate over tracks of Southern Pac. Transp. Co.), Amdt. 1 extends expiration date of S.O. 1081, effective June 30, 1972.

37 FR 12726, June 28, 1972, Part 1033: Car Service, §1033.1083 Service Order No. 1083 (Southern Pac. Transp. Co. authorized to operate over tracks of Texas & Pac. Ry.), Amdt. 2 extends expiration date of S.O. 1083, effective June 30, 1972.

37 FR 12726, June 28, 1972, Part 1033: Car Service, §1033.1084 Service Order No. 1084 (Chicago, R.I. & P. R. authorized to operate over tracks of Chicago & N.W. Ry.), Amdt. 1 extends expiration date of S.O. 1084, effective June 30, 1972.

37 FR 12727, June 28, 1972, Part 1033: Car Service, §1033.1086 Service Order No. 1086 (Chicago, R.I. & P. R. authorized to operate over tracks of Peoria & P. U. Ry.), Amdt. 1 extends expiration date of S.O. 1086, effective June 30, 1972.

37 FR 12727, June 28, 1972, Part 1033: Car Service, §1033.1093 Service Order No. 1093 (Burlington Northern, Inc. authorized to operate over tracks of Minneapolis Indus. Ry.), Amdt. 1 extends expiration date of S.O. 1093, effective June 30, 1972.

37 FR 13334, July 7, 1972, Part 1033: Car Service, §1033.1094 Service Order No. 1094 (Lehigh Valley R. authorized to operate over tracks of Lehigh Coal & Nav. Co.), Amdt. 2, extends expiration date of S.O. 1094, effective July 3, 1972.

37 FR 13625, July 12, 1972, Part 1033: Car Service, §1033.1101 Service Order No. 1101, Erie Lackawanna Ry. Co. authorized to operate over certain tracks, effective on date of order.

37 FR 13697, July 13, 1972, Part 1033: Car Service, §1033.1102 Service Order No. 1102, Delaware & H. Ry. Co. and Penn Central Transp. Co. authorized to assume joint supervisory control over rail operations of Albany Port District Comm., Albany N.Y., effective July 10, 1972.

37 FR 14785, July 25, 1972, Part 1033: Car Service, §1033.1103 Service Order No. 1103, Texas & P. Ry. Co. authorized to operate over tracks of St. Louis-S.F. Ry. Co., effective July 31, 1972.

37 FR 15514, Aug. 3, 1972, Part 1033: Car Service, §1033.1094 Service Order No. 1094 (Lehigh Valley R. Co. authorized to operate over tracks of Lehigh Coal & Nav. Co.), Amdt. 3 extends expiration date of S.O. 1094, effective day after date of order.

37 FR 15515, Aug. 3, 1972, Part 1033: Car Service, §1033.1106 Service Order No. 1106, Baltimore & O.R. Co. authorized to operate over tracks of Penn Central Transp. Co., effective day after date of order.

37 FR 15369, Aug. 1, 1972, Part 1033: Car Service, §1033.1092 Service Order No. 1092 (Missouri Pac. R. authorized to operate over tracks of Illinois Central R.), Amdt. 1 extends expiration date of S.O. 1092, effective May 31, 1972.

37 FR 16549, Aug. 16, 1972, Part 1033: Car Service, §1033.1107 Service Order No. 1107, Lehigh Valley R. Co. authorized to operate over tracks of Penn Central Transp. Co., effective day after date of order.

37 FR 15929, Aug. 8, 1972, Part 1033: Car Service, §1033.1105 Service Order No. 1105, Distribution of boxcars, effective Aug. 1, 1972.

37 FR 15930, Aug. 8, 1972, Part 1033: Car Service, §1033. 1089 Service Order No. 1089 (New York Dock Ry. authorized to operate over trackage abandoned by Bush Term. R. Co.), Amdt. 2, extends expiration date of S.O. 1089, effective Aug. 1, 1972.

37 FR 15306, July 29, 1972, Part 1033: Car Service, §1033.1043 Regulations for return of hopper cars (4th Rev. S.O. 1043), effective Aug. 1, 1972.

37 FR 15307, July 29, 1972, Part 1033: Car Service, §1033.1104 Service Order No. 1104, Penn Central Transp. Co. authorized to operate over tracks of Erie Lackawanna Ry., effective day after date of order.

37 FR 15433, Aug. 2, 1972, Part 1033: Car Service, §1033.1105 Service Order No. 1105, Distribution of boxcars, effective Aug. 1, 1972.

37 FR 17837, Sep. 1, 1972, Part 1033: Car Service, §1033.1108 Service Order No. 1108, Reading Co., et al authorized to operate over tracks of Valley R. Co., effective two days after date of order.

37 FR 18467, Sept. 12, 1972, Part 1033: Car Service, §1033.1110 Service Order No. 1110, Penn Central Transp. Co. required to restore service at Buttonwood (Wilkes-Barre), Pa., effective day after date of order.

37 FR 18467, Sept. 12, 1972, Part 1033: Car Service, §1033.1110 Service Order No. 1110, Amdt. 1, amends S. O. 1110 by substituting a new paragraph (b) for paragraph (b) thereof, effective on date of order.

37 FR 18618, Sept. 14, 1972, Part 1033: Car Service, §1033.1110 Service Order No. 1110 (Penn Central Transp. Co. required to restore service at Buttonwood (Wilkes-Barre), Pa.), Amdt. 2, new paragraph (b) substituted for paragraph (b) of S.O. 1110, effective Sept. 11, 1972.

37 FR 19616, Sept. 21, 1972, Part 1033: Car Service, §1033.1110 Service Order No. 1110, Penn Central Transp. Co. required to restore service at Buttonwood (Wilkes-Barre), Pa., Rev. S.O. 1110, effective on date of order.

37 FR 19617, Sept. 21, 1972, Part 1033: Car Service, §1033.1111 Service Order No. 1111, Delaware & Hudson Ry. authorized to operate over tracks of Erie Lackawanna Ry., effective on date of order.

37 FR 20827, Oct. 4, 1972, Part 1033: Car Service, §1033.1093 Service Order No. 1093 (Burlington Northern Inc., authorized to operate over tracks of Minneapolis Ind. Ry. Co.), Amdt. 2, extends expiration date of S. O. 1093, effective Sept. 30, 1972.

37 FR 20827, Oct. 4, 1972, Part 1033: Car Service, §1033.1096 Service Order No. 1096 (Southern Ry. Co. and Missouri Pac. R. Co. authorized to operate over tracks of other lines), Amdt. 1, extends expiration date of S. O. 1096, effective Sept. 30, 1972.

37 FR 21153, Oct. 6, 1972, Part 1033: Car Service, §1033.1112 Service Order No. 1112, Railroad operating regulations for freight car movement, effective Oct. 9. 1972.

37 FR 21532, Oct. 12, 1972, Part 1033: Car Service, §1033.1105 Revised Service Order No. 1105, Distribution of boxcars, effective Oct. 7, 1972.

37 FR 22871, Oct. 26, 1972, Part 1033: Car Service, §1033.1110 Service Order No. 1110 (Penn Central Transp. Co. required to restore service at Buttonwood (Wilkes-Barre), Pa., Gateway), Rev. S.O. 1110, Amdt. 1, substitutes new paragraphs (a) and (e), effective on date of order.

37 FR 22872, Oct. 26, 1972, Part 1033: Car Service, §1033.1111 Service Order No. 1111 (Delaware & Hudson Ry. authorized to operate over tracks of Erie Lackawanna Ry.), Amdt. 1, extends expiration date of S.O. 1111, effective Oct. 21, 1972.

37 FR 22872, Oct. 26, 1972, Part 1033: Car Service, §1033.1113 Service Order No. 1113, Penn Central Transp. authorized to operate over tracks of Norfolk & W. Ry., effective two days after date of order.

37 FR 22872, Oct. 26, 1972, Part 1033: Car Service, §1033.1114 Service Order No. 1114, Norfolk & W. Ry. authorized to operate over tracks of Penn Central Transp. Co., effective one day after date of order.

37 FR 22873, Oct. 26, 1972, Part 1033: Car Service, §1033.1115 Service Order No. 1115, Chicago, M., St. P. & P. R. authorized to operate over tracks of Chicago, R.I. & P. R., effective one day after date of order.

37 FR 23105, Oct. 28, 1972, Part 1033: Car Service, §1033.1098 Service Order No. 1098 (Chicago & N.W. Ry. authorized to operate over tracks of Chicago, R.I. & P. R.), Amdt. 1, extends expiration date of S.O. 1098, effective Oct. 31, 1972.

37 FR 23273, Nov. 1, 1972, Part 1033: Car Service, §1033.1106 Service Order No. 1106 (Baltimore & O. R. authorized to operate over tracks of Penn Central Transp. Co.), Amdt. 1, extends expiration date of S. O. 1106, effective Oct. 31, 1972.

37 FR 23336, Nov. 2, 1972, Part 1033: Car Service, §1033.1089 Service Order No. 1089 (New York Dock Ry. authorized to operate over tracks abandoned by Bush Term. R. Co.), Amdt. 3, extends expiration date of S. O. 1089, effective Oct. 31, 1972.

37 FR 23728, Nov. 8, 1972, Part 1033: Car Service, §1033.1112 Service Order No. 1112 (Railroad operating regulations for freight car movement) Amdt. 1, subdivision (xiv) added to paragraph (a)(1), effective Nov. 6, 1972.

37 FR 23840, Nov. 9, 1972, Part 1033: Car Service, §1033.1112 Service Order No. 1112 (Railroad operating regulations for freight car movement) Amdt. 2, subdivision (iv) added to paragraph (a)(3), effective Nov. 10, 1972.

37 FR 23841, Nov. 9, 1972, Part 1033: Car Service, §1033.1115 Service Order No. 1115 (Chicago, M. St. P. & P. R. authorized to operate over tracks of Chicago, R.I. & P.) vacated and set aside by S. O. 1115-A, effective Nov. 6, 1972.

37 FR 24186, Nov. 15, 1972, Part 1033: Car Service, §1033.1094 Service Order No. 1094 (Lehigh Valley R. authorized to operate over tracks of Lehigh Coal & Nav. Co.), Amdt. 4, extends expiration date of S.O. 1094, effective two days after date of order.

37 FR 24186, Nov. 15, 1972, Part 1033: Car Service, §1033.1109 Service Order No. 1109, Burlington Northern, Inc. authorized to operate over certain trackage in Campbell County, Wyo., effective two days after date of order.

37 FR 22377, Oct. 19, 1972, Part 1033: Car Service, §1033.1105 Service Order No. 1105 (Distribution of boxcars), Second Rev. S. O. 1105, effective Oct. 17, 1972.

37 FR 25236, Nov. 29, 1972, Part 1033: Car Service, §1033.1105 Service Order No. 1105 (Distribution of boxcars), 2nd Rev. S.O. 1105, Amdt. 1, extends expiration date of order, effective No. 30, 1972.

37 FR 25236, Nov. 29, 1972, Part 1033: Car Service, §1033.1107 Service Order No. 1107 (Lehigh Valley R. authorized to operate over tracks of Penn Central Transp. Co.), Amdt. 1, extends expiration date of order, effective Nov. 30, 1972.

37 FR 25236, Nov. 29, 1972, Part 1033: Car Service, §1033.1110, Rev. Service Order No. 1110 (Penn Central Transp. Co. required to restore service at Buttonwood (Wilkes-Barre), Pa., gateway), amended by substituting new paragraphs (a) and (e) for paragraphs (a) and (e) thereof, effective on date of order.

37 FR 25237, Nov. 29, 1972, Part 1033: Car Service, §1033.1111 Service Order No. 1111 (Delaware & Hudson Ry. authorized to operate over tracks of Erie Lackawanna Ry.), Amdt. 2, extends expiration date of order, effective Nov. 25, 1972.

37 FR 28058, Dec. 20, 1972, Part 1033: Car Service, §1033.1043 Fourth Rev. S. O. 1043 (Return of hopper cars), Amdt. 1, extends expiration date of 4th Rev. S.O. 1043, effective Dec. 31, 1972.

37 FR 28059, Dec. 20, 1972, Part 1033: Car Service, §1033.1084 Service Order No. 1084 (Chicago, R.I. & P. R. authorized to operate over tracks of Chicago & N.W. Ry.), Amdt. 2, extends expiration date of S. O. 1084, effective Dec. 31, 1972.

37 CFR 28301, Dec. 22, 1972, Part 1033: Car Service, §1033.994 Rev. Service Order No. 994 (Rerouting of traffic-appointment of agents), Amdt. 3, extends expiration date of Rev. S.O. 994, effective Dec. 31, 1972.

37 FR 28301, Dec. 22, 1972, Part 1033: Car Service, §1033.995 (appointment of embargo agents), Amdt. 3, extends expiration date of Rev. S.O. 995, effective Dec. 31, 1972.

37 FR 28301, Dec. 22, 1972, Part 1033: Car Service, §1033.1002 Rev. Service Order No. 1002 (Car distribution directions—appointment of agents), Amdt. 3, extends expiration date of Rev. S.O. 1002, effective Dec. 31, 1972.

37 FR 28229, Dec. 21, 1972, Part 1033: Car Service, §1033.1112 Service Order No. 1112 (operating regulations for freight car movement), Exception 4, movement of freight cars originating on lines other than purchasing railroad exempt from provisions of paragraph (a)(2)(ii), effective day after date of order.

37 FR 28633, Dec. 28, 1972, Part 1033: Car Service, §1033.1092 Service Order No. 1092 (Missouri Pac. R. authorized to operate over tracks of Illinois Central R.), Amdt. 2 extends expiration date of S.O. 1092, effective Dec. 31, 1972.

37 FR 28634, Dec. 28, 1972, Part 1033: Car Service, §1033.1099 Service Order No. 1099 (Delray Connecting R. authorized to operate over tracks of Detroit, T. & I. R.), Amdt. 1 extends expiration date of S.O. 1099, effective Dec. 31, 1972.

37 FR 28634, Dec. 28, 1972, Part 1033: Car Service, §1033.1102 Service Order No. 1102 (Delaware & H. Ry. and Penn Central Transp. Co., joint supervisory control over Albany Port Dis. Comm.'s railroad operations), Amdt. 1 extends expiration date of S.O. 1102, effective Dec. 31, 1972.

37 FR 28634, Dec. 28, 1972, Part 1033: Car Service, §1033.1108 Service Order No. 1108, Reading Co. authorized to operate over tracks of Lehigh Valley R. Co., effective Dec. 31, 1972.

38 FR 876, Jan. 5, 1973, Part 1033: Car Service, §1033.1083 Service Order No. 1083 (Southern Pac. Transp. Co. authorized to operate over tracks of Texas & P. Ry.), Amdt. 3 extends expiration date of S.O. 1083, effective Dec. 31, 1972.

38 FR 877, Jan. 5, 1973, Part 1033: Car Service, §1033.1086 Service Order No. 1086 (Chicago, R.I. & P. R. authorized to operate over tracks of Peoria & P.U. Ry.), Amdt. 2 extends expiration date of S.O. 1086, effective Dec. 31, 1972.

38 FR 877, Jan. 5, 1973, Part 1033: Car Service, §1033.1087 Service Order No. 1087 (Burlington Northern, Inc. authorized to operate over tracks of Peoria & P.U. Ry.), Amdt. 2 extends expiration date of S.O. 1087, effective Dec. 31, 1972.

38 FR 877, Jan. 5, 1973, Part 1033: Car Service, §1033.1089 Service Order No. 1089 (New York Dock Ry. authorized to operate over tracks of Bush Term. R.), Amdt. 4 extends expiration date of S.O. 1089, effective Dec. 31, 1972.

38 FR 877, Jan. 5, 1973, Part 1033: Car Service, §1033.1091 Service Order No. 1091 (Norfolk & W. Ry. authorized to operate over tracks of Penn Central Transp. Co.), Amdt. 2 extends expiration date of S.O. 1091, effective Dec. 31, 1972.

38 FR 878, Jan. 5, 1973, Part 1033: Car Service, §1033.1100 Service Order No. 1100 (Union Pac. R. authorized to operate over tracks of Agricultural Products Corp.), Amdt. 1 extends expiration date of S.O. 1100, effective Dec. 31, 1972.

38 FR 878, Jan. 5, 1973, Part 1033: Car Service, §1033.1110 Service Order No. 1110 (Penn Central Transp. Co. required to restore service at Buttonwood (Wilkes-Barre), Pa., gateway), Amdt. 3 substitutes new paragraphs (a) and (e) for current (a) and (e) in S.O. 1110, effective on date of order.

38 FR 878, Jan. 5, 1973, Part 1033: Car Service, §1033.1111 Service Order No. 1111 (Delaware & H. Ry. authorized to operate over tracks of Erie Lackawanna Ry.), Amdt. 3 extends expiration date of S.O. 1111, effective Dec. 29, 1972.

38 FR 1508, Jan. 15, 1973, Part 1033: Car Service, §1033.1116 Service Order No. 1116, Lehigh Valley R. Co. authorized to operate over tracks of West Pittston-Exter R. Co., effective two days after date of order.

38 FR 2217, Jan. 22, 1973, Part 1033: Car Service, §1033.1117 Substitution of hopper cars for covered hopper cars, Rev. S.O. 1117, effective two days after date of order.

38 FR 2761, Jan. 30, 1973, Part 1033: Car Service, §1033.1118 Service Order No. 1118, Providence & W. Co. and Penn Central Transp. Co., each authorized to operate over certain tracks of the other, effective Feb. 2, 1973.

38 FR 3332, Feb. 5, 1973, Part 1033: Car Service, §1033.1093 Service Order No. 1093 (Burlington Northern, Inc. authorized to operate over tracks of Minneapolis Industrial Ry.), Amdt. 3, extends expiration date of S.O. 1093, effective Jan. 31, 1973.

38 FR 3333, Feb. 5, 1973, Part 1033: Car Service, §1033.1105 Service Order No. 1105 (Distribution of boxcars), Amdt. 2 extends expiration date of S.O. 1105, effective Jan. 31, 1973.

38 FR 3332, Feb. 5, 1973, Part 1033: Car Service, §1033.1106 Service Order No. 1106 (Baltimore & O. R. authorized to operate over tracks of Penn Central Transp. Co.), Amdt. 2 extends expiration date of S.O. 1106, effective Jan. 31, 1973.

38 FR 3333, Feb. 5, 1973, Part 1033: Car Service, §1033.1110 Service Order No. 1110 (Penn Central Transp. Co. required to restore service at Buttonwood (Wilkes-Barre) Pa., gateway), Amdt. 4, new paragraphs (a) and (e) substituted for current paragraphs (a) and (e) in S.O. 1110, effective on date of order.

38 FR 3332, Feb. 5, 1973, Part 1033: Car Service, §1033.1111 Service Order No. 1111 (Delaware & H. Ry. authorized to operate over tracks of Erie Lackawanna Ry.), Amdt. 4 extends expiration date of S.O. 1111, effective Jan. 31, 1973.

38 FR 3512, Feb. 7, 1973, Part 1033: Car Service, §1044.1104 Service Order No. 1104 (Penn Central Transp. Co. authorized to operate over tracks of Erie Lackawanna Ry.) Amdt. 2, extends expiration date of S.O. 1104, effective on date of order.

38 FR 3512, Feb. 7, 1973, Part 1033: Car Service, §1033.1110 Service Order No. 1110 (Penn Central Transp. Co. required to restore certain Pennsylvania service), Corrected Amdt. 3 substituting new paragraphs (a) and (e).

38 FR 3513, Feb. 7, 1973, Part 1033: Car Service, §1033.1119 Service Order No. 1119, Demurrage on freight cars, effective Feb. 5, 1973.

38 FR 3513, Feb. 7, 1973, Part 1033: Car Service, §1033.1120 Service Order No. 1120, Distribution of covered hopper cars, effective Feb. 5, 1973.

38 FR 3514, Feb. 7, 1973, Part 1033: Car Service, §1033.1121 Service Order No. 1121, Demurrage and free time at ports, effective Feb. 5, 1973.

38 FR 4401, Feb. 14, 1973, Part 1033: Car Service, §1033.1120 Service Order No. 1120 (Distribution of covered hopper cars), Amdt. 1, new paragraph (a)(2) substituted for paragraph (a)(2) thereof, effective day after date of order.

38 FR 4667, Feb. 20, 1973, Part 1033: Car Service, §1033.1122 Service Order No. 1122, Texas Export R. Co. authorized to operate over certain tracks abandoned by Chicago, R.I. & P. R., effective Feb. 15, 1973.

38 FR 5173, Feb. 26, 1973, Part 1033: Car Service, §1033.1121 Service Order No. 1121, Demurrage and free time at ports, effective Feb. 5, 1973; corrected S.O. 1121.

38 FR 5174, Feb. 26, 1973, Part 1033: Car Service, §1033.1123 Service Order No. 1123, Northwestern Okla. R. Co. authorized to operate over certain tracks abandoned by Missouri-K.-T. R., effective Feb. 19, 1973.

38 FR 5876, March 5, 1973, Part 1033: Car Service, §1033.1086 Service Order No. 1086 (Chicago, R.I. & P. R. authorized to operate over tracks of Peoria & P. U. Ry.), Amdt. 3 extends expiration date of S.O. 1086, effective Feb. 28, 1973.

38 FR 5876, March 5, 1973, Part 1033: Car Service, §1033.1087 Service Order No. 1087 (Burlington Northern Inc. authorized to operate over tracks of Peoria & P. U. Ry.), Amdt. 3 extends expiration date of S.O. 1087, effective Feb. 28, 1973.

38 FR 5876, March 5, 1973, Part 1033: Car Service, §1033.1107 Service Order No. 1107 (Lehigh Valley R. authorized to operate over tracks of Penn Central Transp. Co.), Amdt. 2 extends expiration date of S.O. 1107, effective Feb. 28, 1973.

38 FR 5876, March 5, 1973, Part 1033: Car Service, §1033.1108 Rev. Service Order No. 1108 (Reading Co. authorized to operate over tracks of Lehigh Valley R.), Amdt. 1 extends expiration date of Rev. S.O. 1108, effective Feb. 28, 1973.

38 FR 5877, March 5, 1973, Part 1033: Car Service, §1103.1113 Service Order No. 1113 (Penn Central Transp. Co. authorized to operate over tracks of Norfolk & W. Ry.), Amdt. 1 extends expiration date of S. O. 1113, effective Feb. 28, 1973.

38 FR 5877, March 5, 1973, Part 1033: Car Service, §1033.1114 Service Order No. 1114 (Norfolk & W. Ry. authorized to operate over tracks of Penn Central Transp. Co.), Amdt. 1 extends expiration date of S. O. 1114, effective Feb. 28, 1973.

38 FR 6881, March 14, 1973, Part 1033: Car Service, §1033.1119 Service Order No. 1119, Demurrage on freight cars, Rev. S. O. 1119, effective March 16, 1973.

38 FR 6882, March 14, 1973, Part 1033: Car Service, §1033.1121 Service Order No. 1121, Demurrage and free time at ports, Rev. S. O. 1121, effective March 16, 1973.

38 FR 6883, March 14, 1973, Part 1033: Car Service, §1103.1125 Service Order No. 1125, St. Louis-S.F. Ry. Co. authorized to operate over tracks of Kansas City Southern Ry. Co., effective March 12, 1973.

38 FR 5636, March 2, 1973, Part 1033: Car Service, §1033.1110 Rev. Service Order No. 1110 (Penn Central Transp. Co. required to restore service at Buttonwood (Wilkes-Barre), Pa., gateway), Amdt. 5 substitutes new paragraphs (a) and (e) for present (a) and (e) therein, effective on date of order.

38 FR 5637, March 2, 1973, Part 1033: Car Service, §1033.1111 Service Order No. 1111 (Delaware & H. Ry. authorized to operate over tracks of Erie Lackawanna Ry.), Amdt. 5 extends expiration date of S. O. 1111, effective Feb. 28, 1973.

38 FR 6828, March 13, 1973, Part 1033: Car Service, §1033.1124 Demurrage and free time on freight cars [S. O. 1124], effective March 16, 1973.

38 FR 6999, March 15, 1973, Part 1033: Car Service, §1033.1126 Service Order No. 1126, Baltimore & O. R. Co. authorized to operate over tracks of Penn Central Transp. Co., effective on date of order.

38 FR 7808, March 26, 1973, Part 1033: Car Service, §1033.1127 Service Order No. 1127, Central California Traction Co. authorized to operate over tracks of Southern Pac. Transp. Co., effective on date of order.

38 FR 7332, March 20, 1973, Part 1033: Car Service, §1033.1112 Service Order No. 1112 (Railroad operating regulations for freight car movement), Amdt. 3 extends expiration date of S.O. 1112, effective March 31, 1973.

38 FR 7332, March 20, 1973, Part 1033: Car Service, §1033.1117 Second Revised Service Order No. 1117, Substitution of hopper cars for covered hopper cars or boxcars, effective March 16, 1973.

38 FR 8061, March 28, 1973, Part 1033: Car Service, §1033.1128 Service Order No. 1128, Louisville & N. R. authorized to operate over tracks of Norfolk & W. Ry., effective March 25, 1973.

38 FR 8062, March 28, 1973, Part 1033: Car Service, §1033.1129 Service Order No. 1129, Chicago, R.I. & P. R. authorized to operate over tracks of Burlington Northern, Inc., effective March 25, 1973.

38 FR 8657, Apr. 5, 1973, Part 1033: Car Service, §1033.1089 Service Order No. 1089 (New York Dock Ry. authorized to operate over tracks abandoned by Bush Term. R.), Amdt. 5 extends expiration date of S.O. 1089, effective day after date of order.

38 FR 8598, Apr. 4, 1973, Part 1033: Car Service, §1033.1130 Service Order No. 1130, Illinois Central Gulf R. Co. authorized to operate over tracks of Penn Central Transp. Co., effective day after date of order.

38 FR 8445, Apr. 2, 1973, Part 1033: Car Service, §1033.1104 Service Order No. 1104 (Penn Central Transp. Co. authorized to operate over tracks of Erie Lackawanna Ry.), Amdt. 3 extends expiration date of S.O. 1104, effective March 31, 1973.

38 FR 8446, Apr. 2, 1973, Part 1033: Car Service, §1033.1110 Service Order No. 1110 (Penn Central Transp. Co. required to restore service at Buttonwood (Wilkes-Barre), Pa., gateway), Amdt. 6 substitutes new paragraphs (a) and (e) for those presently in S.O. 1110, effective on date of order.

38 FR 8446, Apr. 2, 1973, Part 1033: Car Service, §1033.1111 Service Order No. 1111 (Delaware & H. Ry. authorized to operate over tracks of Erie Lackawanna Ry.), Amdt. 6 extends expiration date of S.O. 1111, effective March 31, 1973.

38 FR 8446, Apr. 2, 1973, Part 1033: Car Service, §1033.1124 Service Order No. 1124, Demurrage and free time on freight cars, effective Apr. 1, 1973.

38 FR 8516, Apr. 3, 1973, Part 1033: Car Service, §1033.1121 Service Order No. 1121 (Demurrage and free time at ports), 2nd Rev. S.O. 1121 effective Apr. 1, 1973.

38 FR 9229, Apr. 12, 1973, Part 1033: Car Service, §1033.1121 Service Order No. 1121 (Demurrage and free time at ports), corrected 2nd Rev. S.O. 1121, effective Apr. 1, 1973.

38 FR 9230, Apr. 12, 1973, Part 1033: Car Service, §1033.1124 Service Order No. 1124 (Demurrage and free time on freight cars), corrected Rev. S.O. 1124, effective Apr. 1, 1973.

38 FR 9232, Apr. 12, 1973, Part 1033: Car Service, §1033.1131 Service Order No. 1131, Chicago, R.I. & P. authorized to operate over tracks of Chicago, M., St. P. & P. R. Co., effective Apr. 9, 1973.

38 FR 9668, Apr. 19, 1973, Part 1033: Car Service, §1033.1129 Service Order No. 1129 (Chicago, R.I. & P. R. authorized to operate over tracks of Burlington Northern, Inc.), Amdt. 1 extends expiration date of S.O. 1129, effective Apr. 15, 1973.

38 FR 9668, Apr. 19, 1973, Part 1033: Car Service, §1033.1132 Service Order No. 1132, Distribution of freight cars, effective Apr. 20, 1973.

38 FR 10941, May 3, 1973, Part 1033: Car Service, §1033.1089 Service Order No. 1089 (New York Dock Ry. authorized to operate over trackage abandoned by Bush Term. R. Co.), Amdt. 6 extends expiration date of S.O. 1089, effective Apr. 30, 1973.

38 FR 10941, May 3, 1973, Part 1033: Car Service, §1033.1098 Service Order No. 1098 (Chicago & N.W. Ry. authorized to operate over tracks abandoned by Chicago, R.I. & P. R.), Amdt. 2 extends expiration date of S.O. 1098, effective Apr. 30, 1973.

38 FR 10941, May 3, 1973, Part 1033: Car Service, §1033.1105 Service Order No. 1105 (Distribution of boxcars), 3rd Rev. S. O. 1105, effective Apr. 30, 1973.

38 FR 10942, May 3, 1973, Part 1033: Car Service, §1033.1110 Rev. Service Order No. 1110 (Penn Central Transp. Co. required to restore service at Buttonwood (Wilkes-Barre), Pa., gateway), Amdt. 7, new subparagraphs (a) and (e) substituted for current ones, effective on date of order.

38 FR 10942, May 3, 1973, Part 1033: Car Service, §1033.1111 Service Order No. 1111 (Delaware & Hudson Ry. authorized to operate over tracks of Erie Lackawanna Ry.), Amdt. 7 extends expiration date of S.O. 1111, effective Apr. 30, 1973.

38 FR 10942, May 3, 1973, Part 1033: Car Service, §1033.1127 Service Order No. 1127 (Central California Traction Co. authorized to operate over tracks of Southern Pac. Transp. Co.), Amdt. 1 extends expiration date of S.O. 1127, effective Apr. 30, 1973.

38 FR 12606, May 14, 1973, Part 1033: Car Service, §1033.1113 Service Order No. 1113, Central Iowa Ry. & Development Co. authorized to operate over tracks abandoned by Chicago, R.I. & P. R. Co., effective May 10, 1973.

38 FR 12606, May 14, 1973, Part 1033: Car Service, §1033.1134 Service Order No. 1134, Lumber and plywood—restrictions on reconsigning, effective May 15, 1973.

38 FR 12808, May 16, 1973, Part 1033: Car Service, §1033.1133 Service Order No. 1133, Central Iowa Ry. & Development Co. authorized to operate over tracks of, and over tracks abandoned by, Chicago, R.I. & P. R., effective May 10, 1973.

38 FR 12808, May 16, 1973, Part 1033: Car Service, §1033.1135 Service Order No. 1135, Illinois Central Gulf R. Co. authorized to operate over tracks of Penn Central Transp. Co., effective day after date of order.

38 FR 12809, May 16, 1973, Part 1033: Car Service, §1033.1136 Service Order No. 1136, Chicago & Northwestern Transp. Co. authorized to operate over tracks of Soo Line R. Co. effective on date of order.

38 FR 13486, May 22, 1973, Part 1033: Car Service, §1033.1137 Service Order No. 1137, Chicago, R.I. & P. R. authorized to operate over tracks of Texas & Pac. Ry. Co., effective May 20, 1973.

38 FR 16650, June 25, 1973, Part 1033: Car Service §1033.1043 Fourth Rev. S. O. 1043 (Return of hopper cars), Amdt. 2, extends expiration date of 4th Rev. S.O. 1043, to Dec. 31, 1973, effective June 30, 1973.

33 FR 15908, Oct. 9, 1968: S. O. 1002; Pfahler's Car Distribution Direction 1, Louisville & N. R. Co., freight car distribution, expiration date Nov. 2, 1968.

33 FR 15099, Oct. 9, 1968: S.O. 1002; Pfahler's CAr Distribution Direction 2, Southern Ry. Co. and Chicago, B. & Q. R. Co., freight car distribution, expiration date Nov. 2, 1968.

33 FR 15099, Oct. 9, 1968: S.O. 1002; Pfahler's Car Distribution Direction 3, Terminal R. Co. of St. Louis and Illinois Central R. Co., distribution of freight cars, expiration date No. 2, 1968.

33 FR 15098, Oct. 9, 1968: S.O. 1002; Pfahler's Car Distribution Direction 4, Erie-Lackawanna R. Co. and Illinois Central R. Co., distribution of freight cars, expiration date Nov. 2, 1968.

33 FR 15099, Oct. 9, 1968: S.O. 1002; Pfahler's Car Distribtuion Direction 5, Seaboard Coast Line R. Co. and Illinois Central R. Co., distribution of freight cars, expiration date Nov. 2, 1968.

33 FR 15098, Oct. 9, 1968: S.O. 1002; Pfahler's Car Distribution Direction 6, Lehigh Valley R. Co. and Norfolk & W. Ry. Co., distribution of freight cars, expiration date Nov. 2, 1968.

33 FR 15577, Oct. 19, 1968: S.O. 1002; Pfahler's Car Distribution Direction 7, Seaboard Coast Line R. Co., distribution of freight cars, expiration date Nov. 2, 1968.

33 FR 15577, Oct. 19, 1968: S.O. 1002; Pfahler's Car Distribution Direction 8, Boston & Maine Corp., distribution of freight cars, expiration date Nov. 2, 1968.

33 FR 15577, Oct. 19, 1968: S.O. 1002; Pfahler's Car Distribution Direction 9, St. Louis-S.F. Ry. Co. and Chicago & N.W. Ry. Co., distribution of freight cars, expiration date Nov. 2, 1968.

33 FR 16545, Nov. 13, 1968: S.O. 1002; Car Distribution Direction 1-A, Louisville & N. R. Co. and Chicago, B. & Q. R. Co., freight car distribution, vacates Car Distribution Direction No. 1, effective on date of order.

33 FR 16545, Nov. 13, 1968: S.O. 1002; Car Distribution Direction 7-A, Seaboard Coast Line R. Co. et. al., freight car distribution, vacates Car Distribution Direction No. 7, effective on date of order.

33 FR 16175, Nov. 5, 1968: S.O. 1002; Car Distribution Direction No. 8, Amdt. 1, Boston & M. Corp., distribution of freight cars, extends expiration date of Car Distribution Direction 8, effective Nov. 2, 1968.

33 FR 16175, Nov. 5, 1968: S.O. 1002; Car Distribution Direction No. 4, Amdt. 1, Erie-Lackawanna R. Co. and Illinois Central R. Co., freight car distribution, extends expiration date of Car Distribution Direction 4, effective Nov. 2, 1968.

33 FR 16176, Nov. 5, 1968: S.O. 1002; Car Distribution Direction No. 1, Amdt. 1, Louisville & N. R. Co. and Chicago, B. & Q. R. Co., freight car distribution, extends expiration date of Car Distribution Direction No. 1, effective Nov. 2, 1968.

33 FR 16177, Nov. 5, 1968: S.O. 1002; Car Distribution Direction No. 5, Amdt. 1, Seaboard Coast Line R. Co. and Illinois Central R. Co., freight car distribution direction, extends expiration date of Car Distribution Direction No. 5, effective No. 5, effective No. 2, 1968.

33 FR 16177, Nov. 5, 1968: S.O. 1002; Car Distribution Direction No. 7, Amdt. 1, Seaboard Coast Line R. Co., freight car distribution, extends expiration date of Car Distribution Direction No. 7, effective Nov. 2, 1968.

33 FR 16177, Nov. 5, 1968: S.O. 1002; Car Distribution Direction No. 2, Amdt. 1, Southern Ry. Co. and Chicago, B. & Q. R. Co., freight car distribution, extends expiration date of Car Distribution Direction No. 2, effective Nov. 2, 1968.

33 FR 16175, Nov. 5, 1968: S. O. 1002; Pfahler's Car Distribution Direction No. 10, Florida East Coast Ry. Co., distribution of freight cars, effective Nov. 3, 1968.

33 FR 16176, Nov. 5, 1968: S. O. 1002; Pfahler's Car Distribution Direction No. 11, St. Louis-S.F. Ry. Co. and Gulf M. & O. R. Co., freight car distribution, effective Nov. 3, 1968.

33 FR 16176, Nov. 5, 1968: S. O. 1002; Pfahler's Car Distribution Direction No. 12, Kansas City Southern Ry. Co. and Chicago & N.W. Ry. Co., freight car distribution, effective Nov. 3, 1968.

33 FR 16176, Nov. 5, 1968: S.O. 1002; Car Distribution Direction No. 6, Amdt. 1, Lehigh Valley R. Co. and Norfolk & W. Ry. Co., distribution of freight cars, extends expiration date of Car Distribution Direction 6, effective Nov. 2, 1968.

33 FR 16177, Nov. 5, 1968: S.O. 1002; Car Distribution Direction No. 3, Amdt. 1, Terminal R. Ass'n of St. Louis and Illinois Central R. Co., freight car distribution, extends expiration date of Car Distribution Direction No. 3, effective Nov. 2, 1968.

33 FR 16422, Nov. 8, 1968: S.O. 1002; Pfahler's Car Distribution Direction No. 13, Reading Co. et al, freight car distribution, effective Nov. 4, 1968.

33 FR 16422, Nov. 8, 1968: S.O. 1002; Pfahler's Car Distribution Direction No. 14, Penn Central Co. and Chicago, R.I. & P. R. Co., freight car distribution, effective Nov. 4, 1968.

33 FR 16423, Nov. 8, 1968: S.O. 1002; Pfahler's Car Distribution Direction No. 15, Southern Pac. Co. and Chicago, R.I. & P. R. Co., freight car distribution, effective Nov. 4, 1968.

33 FR 16617, Nov. 14, 1968: S. O. 1002; Pfahler's Car Distribution Direction No. 16, Louisville & N. R. Co. and Chicago, B. & Q. R. Co., freight car distribution, effective on day after date of order.

33 FR 16618, Nov. 14, 1968: S.O. 1002; Pfahler's Car Distribution Direction No. 17, Seaboard Coast Line R. Co. et al., freight car distribution, effective on day after date of order.

33 FR 17162, Nov. 19, 1968: S. O. 1002; Car Distribution Direction No. 2, Amdt. 2, Southern Ry. Co. and Chicago, B. & Q. R. Co., distribution of freight cars, further extends expiration date of Car Distribution Direction No. 2, effective Nov. 16, 1968.

33 FR 17162, Nov. 19, 1968: S.O. 1002; Car Distribution Direction No. 3, Amdt. 2, Terminal Railroad Ass'n of St. Louis and Illinois Central R. Co., distribution of freight cars, further extends expiration date of Car Distribution Direction No. 3, effective Nov. 16, 1968.

33 FR 17163, Nov. 19, 1968: S.O. 1002; Car Distribution Directive No. 4, Amdt. 2, Erie-Lackawanna R. Co. and Illinois Central R. Co., freight car distribution, further extends expiration date of Car Distribution Direction No. 4, effective Nov. 16, 1968.

33 FR 17163, Nov. 19, 1968: S.O. 1002; Car Distribution Direction No. 5, Amdt. 2, Seaboard Coast Line R. Co. and Illinois Cental R. Co., freight car distribution, further extends expiration date of Car Distribution Direction No. 5, effective Nov. 16, 1968.

33 FR 17163, Nov. 19, 1968: S.O. 1002; Car Distribution Direction No. 6, Amdt. 2, Lehigh Valley R. Co. and Norfolk & W. R. Co., freight car distribution, further extends expiration date of Car Distribution Direction No. 6, effective Nov. 16, 1968.

33 FR 17163, Nov. 19, 1968: S.O. 1002; Car Distribution Direction No. 8, Amdt. 2, Boston & Maine Corp. et al., freight car distribution, further extends expiration date of Car Distribution Direction No. 8, effective Nov. 16, 1968.

33 FR 17163, Nov. 19, 1968: S.O. 1002; Car Distribution Direction No. 10, Amdt. 1, Florida East Coast Ry. Co. et al., freight car distribution, extends expiration date of Car Distribution Direction No. 10, effective Nov. 16, 1968.

33 FR 17163, Nov. 19, 1968: S.O. 1002; Car Distribution Direction No. 11, Amdt. 1, St. Louis-S.F. Ry. Co. and Gulf, M. & O. R. Co., freight car distribution, extends expiration date of Car Distribution Direction No. 11, effective Nov. 16, 1968.

33 FR 17164, Nov. 19, 1968: S.O. 1002; Car Distribution Direction No. 12, Amdt. 1, Kansas City Southern Ry. Co. and Chicago & N.W. Ry. Co., distribution of freight cars, extends expiration date of Car Distribution Direction No. 12, effective Nov. 16, 1968.

33 FR 17164, Nov. 19, 1968: S.O. 1002; Car Distribution Direction No. 13, Amdt. 1, Reading Co. et al., freight car distribution, extends expiration date of Car Distribution Direction No. 13, effective Nov. 16, 1968.

33 FR 17164, Nov. 19, 1968: S.O. 1002; Car Distribution Direction No. 14, Amdt. 1, Penn Central Co. and Chicago, R.I. & P. R. Co., freight car distribution, extends expiration date of Car Distribution Direction No. 14, effective Nov. 16, 1968.

33 FR 17164, Nov. 19, 1968: S.O. 1002; Car Distribution Direction No. 15, Amdt. 1, Southern Pac. Co. and Chicago, R.I. & P. R. Co., freight car distribution, extends expiration date of Car Distribution Direction No. 15, effective Nov. 16, 1968.

33 FR 17164, Nov. 19, 1968: S.O. 1002; Car Distribution Direction No. 16, Amdt. 1, Louisville & N. R. Co. and Chicago, B. & Q. R. Co., freight car distribution, effective Nov. 16, 1968.

33 FR 17165, Nov. 19, 1968: S.O. 1002; Car Distribution Direction No. 17-A, Seaboard Coast Line R. Co. et al., vacates Car Distribution Direction No. 17, effective on date of order.

33 FR 17165, Nov. 19, 1968: S.O. 1002; Pfahler's Car Distribution Direction No. 18, Seaboard Coast Line R. Co., et al., freight car distribution, effective day after date of order.

33 FR 17165, Nov. 19, 1968: S.O. 1002; Pfahler's Car Distribution Direction No. 19, Chesapeake & O. Ry. Co. and Chicago & N.W. Ry. Co., freight car distribution, effective on day after date of order.

33 FR 18067, Dec. 4, 1968: S.O. 1002; Pfahler's Car Distribution Direction No. 20, Lehigh Valley R. Co. et al., distribution of freight cars, effective Dec. 1, 1968.

33 FR 18066, Dec. 4, 1968: S.O. 1002; Pfahler's Car Distribution Direction No. 21, Florida East Coast Ry. Co. et al., freight car distribution, effective Dec. 1, 1968.

33 FR 18069, Dec. 4, 1968: S.O. 1002; Pfahler's Car Distribution Direction No. 22, St. Louis-S.F. Ry. Co. and Chicago & N.W. Ry. Co., freight car distribution, effective Dec. 1, 1968.

33 FR 18068, Dec. 4, 1968: S.O. 1002; Pfahler's Car Distribution Direction No. 23, Reading Co. et al., freight car distribution, effective Dec. 1, 1968.

33 FR 18067, Dec. 4, 1968: S.O. 1002; Pfahler's Car Distribution Direction No. 24, Penn Central Co. et al., freight car distribution, effective Dec. 1, 1968.

33 FR 18065, Dec. 4, 1968: S.O. 1002; Pfahler's Car Distribution Direction No. 25, Atchison, T. & S.F. Ry. Co. et al., freight car distribution, effective Dec. 1, 1968.

33 FR 18066, Dec. 4, 1968: S.O. 1002; Car Distribution Direction No. 8, Amdt. 3, Boston & M. Corp. et al., freight car distribution, extends expiration date of Car Distribution Direction No. 8, effective Nov. 31, 1968.

33 FR 18066, Dec. 4, 1968: S.O. 1002; Car Distribution Direction No. 19, Amdt. 1, Chesapeake & O. Ry. Co. and Chicago & N.W. Ry. Co., freight car distribution, extends expiration date of Car Distribution Direction No. 19, effective Nov. 30, 1968.

33 FR 18066, Dec. 4, 1968: S.O. 1002; Car Distribution Direction No. 4, Amdt. 3, Erie-Lackawanna R. Co. and Illinois Central R. Co., freight car distribution, extends expiration date of Car Distribution Direction No. 4, effective Nov. 30, 1968.

33 FR 18066, Dec. 4, 1968: S.O. 1002; Car Distribution Direction No. 12, Amdt. 2, Kansas City Southern Ry. Co. and Chicago & N.W. Ry. Co., freight car distribution, extends expiration date of Car Distribution Direction No. 12, effective Nov. 30, 1968.

33 FR 18067, Dec. 4, 1968: S.O. 1002; Car Distribution Direction No. 16, Amdt. 2, Louisville & N. R. Co. and Chicago, B. & Q. R. Co. freight car distribution, extends expiration date of Car Distribution Direction No. 16, effective Nov. 30, 1968.

33 FR 18068, Dec. 4, 1968: S.O. 1002; Car Distribution Direction No. 5, Amdt. 3, Seaboard Coast Line R. Co. and Illinois Central R. Co., freight car distribution, extends expiration date of Car Distribution Direction No. 5, effective Nov. 30, 1968.

33 FR 18068, Dec. 4, 1968: S.O. 1002; Car Distribution Direction No. 18, Amdt. 1, Seaboard Coast Line R. Co. et al., freight car distribution, extends expiration date of Car Distribution Direction No. 18, effective Nov. 30, 1968.

33 FR 18068, Dec. 4, 1968: S.O. 1002; Car Distribution Direction No. 15, Amdt. 2, Southern Pac. Co. and Chicago, R.I. & P. R. Co. freight car distribution, extends expiration date of Car Distribution Direction No. 15, effective Nov. 30, 1968.

33 FR 18069, Dec. 4, 1968: S.O. 1002; Car Distribution Direction No. 2, Amdt. 3, Southern Ry. Co. and Chicago, B. & Q. R. Co. freight car distribution, extends expiraltion date of Car Distribution Direction No. 2, effective Nov. 30, 1968.

33 FR 18069, Dec. 4, 1968: S.O. 1002; Car Distribution Direction No. 3, Amdt. 3, Terminal Railroad Ass'n of St. Louis and Illinois Central R. Co. freight car distribution, extends expiration date of Car Distribution Direction No. 3, effective Nov. 30, 1968.

33 FR 18598, Dec. 14, 1968: S.O. 1002; Car Distribution Direction No. 25, Amdt. 1, Atchison, T. & S.F. Ry. Co., et al., freight car distribution, extends expiration date of Car Distribution Direction No. 25, effective Dec. 15, 1968.

33 FR 18598, Dec. 14, 1968: S. O. 1002; Car Distribution Direction No. 8, Amdt. 4, Boston & M. Corp., et al., freight car distribution, extends expiration date of Car Distribution Direction No. 8, effective Dec. 15, 1968.

33 FR 18598, Dec. 14, 1968: S. O. 1002; Car Distribution Direction No. 19, Amdt. 2, Chesapeake & O. Ry. Co. and Chicago & N.W. Ry. Co., freight car distribution, extends expiration date of Car Distribution Direction No. 19, effective Dec. 15, 1968.

33 FR 18599, Dec. 14, 1968: S. O. 1002; Car Distribution Direction No. 12, Amdt. 3, Kansas City S. Ry. Co. and Chicago & N.W. Ry. Co. freight car distribution, extends expiration date of Car Distribution Direction No. 12, effective Dec. 15, 1968.

33 FR 18599, Dec. 14, 1968: S. O. 1002; Car Distribution Direction No. 20, Amdt. 1, Lehigh Valley R. Co., et al., freight car distribution, extends expiration date of Car Distribution Direction No. 20, effective Dec. 15, 1968.

33 FR 18599, Dec. 14, 1968: S. O. 1002; Car Distribution Direction No. 16, Amdt. 3, Louisville & N. R. Co. and Chicago, B. & Q. R. Co. freight car distribution, extends expiration date of Car Distribution No. 16, effective Dec. 15, 1968.

33 FR 18599, Dec. 14, 1968: S. O. 1002; Car Distribution Direction No. 24, Amdt. 1, Penn Central Co., et al., freight car distribution, extends expiration date of Car Distribution Direction No. 24, effective Dec. 15, 1968.

33 FR 18599, Dec. 14, 1968: S. O. 1002; Car Distribution Direction No. 23, Amdt. 1, Reading Co. et al., freight car distribution, extends expiration date of Car Distribution Direction No. 23, effective Dec. 15, 1968.

33 FR 18600, Dec. 14, 1968: S. O. 1002; Car Distribution Direction No. 22, Amdt. 1, St. Louis-S.F. Ry. Co. and Chicago & N.W. Ry. Co., freight car distribution, extends expiration date of Car Distribution Direction No. 22, effective Dec. 15, 1968.

33 FR 18600, Dec. 14, 1968: S.O. 1002; Car Distribution Direction No. 18, Amdt. 2, Seaboard Coast Line R. Co. et al., freight car distribution, extends expiration date of Car Distribution Direction No. 18, effective Dec. 15, 1968.

33 FR 18600, Dec. 14, 1968: S. O. 1002; Car Distribution Direction No. 2, Amdt. 4, Southern Ry. Co. and Chicago, B. & Q. R. Co. freight car distribution, extends expiration date of Car Distribution Direction No. 2, effective Dec. 15, 1968.

33 FR 18600, Dec. 14, 1968: S. O. 1002; Car Distribution Direction No. 15-A, Southern Pac. Co. and Chicago, R.I. & P. R. Co. freight car distribution, vacates Car Distribution Direction No. 15, effective Dec. 10, 1968.

33 FR 19261, Dec. 25, 1968: S. O. 1002; Car Distribution Direction 8-A, Boston & M. Corp. et al., freight car distribution, vacates Car Distribution Direction No. 8, effective Dec. 19, 1968.

33 FR 19261, Dec. 25, 1968: S. O. 1002; Car Distribution Direction 19-A, Chesapeake & O. Ry. Co. and Chicago & N.W. Ry. Co., freight car distribution, vacates Car Distribution Direction No. 19, effective Dec. 19, 1968.

33 FR 19261, Dec. 25, 1968: S. O. 1002; Car Distribution Direction 12-A, Kansas City S. Ry. Co. and Chicago & N.W. Ry. Co. freight car distribution, vacates Car Distribution Direction No. 12, effective Dec. 19, 1968.

33 FR 19261, Dec. 25, 1968: S. O. 1002; Car Distribution Direction 22-A, St. Louis-S.F. Ry. Co. and Chicago, & N.W. Ry. Co. distribution of freight cars, vacates Car Distribution Direction No. 22, effective Dec. 19, 1968.

33 FR 19876, Dec. 27, 1968: S. O. 1002; Car Distribution Direction No. 18-A, Seaboard Coast Line R. Co., et al., freight car distribution, vacates Car Distribution Direction No. 18, effective Dec. 20, 1968.

33 FR 20067, Dec. 31, 1968: S. O. 1002; Car Distribution Direction No. 16-A, Louisville & N. R. Co. and Chicago, B. & Q. R. Co. freight car distribution, vacates Car Distribution Direction No. 16, effective Dec. 23, 1968.

33 FR 20067, Dec. 31, 1968: S. O. 1002; Car Distribution Direction No. 2-A, Southern Ry. Co. and Chicago, B. & Q. R. Co. freight car distribution, vacates Car Distribution Direction No. 2, effective Dec. 23, 1968.

34 FR 177, Jan. 4, 1969: S. O. 1002; Car Distribution Direction 25, Amdt. 2, Atchison, T. & S.F. Ry. Co. et al., freight car distribution, extends expiration date of Car Distribution Direction No. 25, effective Dec. 29, 1968.

34 FR 178, Jan. 4, 1969: S. O. 1002; Car Distribution Direction 20, Amdt. 2, Lehigh Valley R. Co. et al., freight car distribution, extends expiration date of Car Distribution Direction No. 20, effective Dec. 29, 1968.

34 FR 178, Jan. 4, 1969: S. O. 1002; Car Distribution Direction 24, Amdt. 2, Penn Central Co., et al., freight car distribution, extends expiration date of Car Distribution Direction No. 24, effective Dec. 29, 1968.

34 FR 178, Jan. 4, 1969: S. O. 1002; Car Distribution Direction 23, Amdt. 2, Reading Co. et al., freight car distribution, extends expiration date of Car Distribution Direction No. 23, effective Dec. 29, 1968.

34 FR 416, Jan. 10, 1969: S. O. 1002; Car Distribution Direction 25-A, Atchison, T. & S.F. Ry. Co. et al., freight car distribution, vacates Car Distribution Direction No. 25, effective on date of order.

34 FR 416, Jan. 10, 1969: S. O. 1002; Car Distribution Direction 24-A, Penn Central Co. et al., freight car distribution, vacates Car Distribution Direction No. 24, effective on date of order.

34 FR 1624, Feb. 1, 1969: S. O. 1002; Car Distribution Direction No. 26, Terminal Railroad Assn. of St. Louis and Illinois Central R. Co., freight car distribution, effective Jan. 29, 1969.

34 FR 1577, Jan. 31, 1969: S. O. 1002; Car Distribution Direction No. 27, Florida East Coast Ry. Co., freight car distribution, effective Jan. 29, 1969.

34 FR 1577, Jan. 31, 1969: S. O. 1002; Car Distribution Direction No. 28, Louisville & N. R. Co. and Illinois Central R. Co., freight car distribution, effective Jan. 29, 1969.

34 FR 2289, Feb. 15, 1969: S. O. 1002; Car Distribution Direction No. 26 (Term. Railroad Ass'n of St. Louis and Illinois Central R. Co.), Amdt. 1, extends expiration date of Car Distribution Direction 26, effective Feb. 15, 1969.

34 FR 2289, Feb. 15, 1969: S. O. 1002; Car Distribution Direction No. 27 (Florida East Coast Ry. Co., et al), Amdt. 1, extends expiration date of Car Distribution Direction 27, effective Feb. 15, 1969.

34 FR 2289, Feb. 15, 1969: S. O. 1002; Car Distribution Direction No. 28 (Louisville & N. R. Co. and Illinois Central R. Co.), Amdt. 1, extends expiration date of Car Distribution Direction 28, effective Feb. 15, 1969.

34 FR 2290, Feb. 15, 1969: S. O. 1002; Car Distribution Direction No. 29, Southern Ry. Co. and Illinois Central R. Co., freight car distribution, effective Feb. 12, 1969.

34 FR 2290, Feb. 15, 1969: S. O. 1002; Car Distribution No. 30, Seaboard Coast Line R. Co. and Illinois Central R. Co., freight car distribution, effective Feb. 12, 1969.

34 FR 2468, Feb. 20, 1969: S. O. 1002; Car Distribution Direction No. 31, Louisville & N. R. Co. and Monon R., freight car distribution, effective Feb. 20, 1969.

34 FR 3772, Mch. 4, 1969: S. O. 1002; Car Distribution Direction No. 26, Amdt. 2, Terminal R. Assn. of St. Louis and Illinois Central R. Co., extends expiration date of Car Distribution Direction 26, effective Mch. 1, 1969.

34 FR 3769, Mch. 4, 1969: S. O. 1002; Car Distribution Direction No. 27, Amdt. 2, Florida East Coast Ry. Co., et al., extends expiration date of Car Distribution Direction 27, effective Mch. 1, 1969.

34 FR 3769, Mch. 4, 1969: S.O. 1002; Car Distribution Direction No. 28, Amdt. 2, Louisville & N. R. Co., and Illinois Central R. Co., extends expiration date of Car Distribution Direction 28, effective Mch. 1, 1969.

34 FR 3771, Mch. 4, 1969: S.O. 1002; Car Distribution Direction No. 29, Amdt. 1, Southern Ry. and Illinois Central R. Co., extends expiration date of Car Distribution Direction 29, effective Mch. 1, 1969.

34 FR 3770, Mch. 4, 1969: S.O. 1002; Car Distribution Direction No. 30, Amdt. 1, Seaboard Coast Line R. Co. and Illinois Central R. Co., extends expiration date of Car Distribution Direction 30, effective Mch. 1, 1969.

34 FR 3768, Mch. 4, 1969: S.O. 1002; Car Distribution Direction No. 32, Erie-Lackawanna Ry. Co. et al., freight car distribution, effective Mch. 2, 1969.

34 FR 3769, Mch. 4, 1969: S.O. 1002; Car Distribution Direction No. 33, Norfolk & W. Ry. Co. et al., freight car distribution, effective Mch. 2, 1969.

34 FR 3769, Mch. 4, 1969: S.O. 1002; Car Distribution Direction No. 34, Penn Central Co. et al., freight car distribution, effective Mch. 2, 1969.

34 FR 3770, Mch. 4, 1969: S. O. 1002; Car Distribution Direction No. 35, St. Louis-S.F. Ry. Co. et al., freight car distribution, effective Mch. 2, 1969.

34 FR 3770, Mch. 4, 1969: S.O. 1002; Car Distribution Direction No. 36, Penn Central Co. et al., freight car distribution, effective, Mch. 2, 1959.

34 FR 3771, Mch. 4, 1969: S.O. 1002; Car Distribution Direction No. 37, Seaboard Coast Line R. Co. et al., freight car distribution, effective Mch. 2, 1969.

34 FR 3768, Mch. 4, 1969: S.O. 1002; Car Distribution Direction No. 38, Chicago, R.I. & P. R. Co. and Northern Pac. Ry. Co., freight car distribution, effective Mch. 2, 1969.

34 FR 3771, Mch. 4, 1969: S.O. 1002; Car Distribution Direction No. 39, Southern Ry. Co. and Chicago & E.I. R. Co., freight car distribution, effective Mch. 2, 1969.

34 FR 4992, Mch. 7, 1969: S.O. 1002; Corrected Car Distribution Direction No. 38, Chicago, R.I. & P. R. Co. and Northern Pac. Ry. Co., freight car distribution, effective Mch. 2, 1969.

34 FR 5356, Mch. 18, 1969: S.O. 1002; Car Distribution Direction No. 26, Amdt. 3, Terminal R. Ass'n of St. Louis and Illinois Central R. Co., extends expiration date of Car Distribution Direction No. 26, effective March 15, 1969.

34 FR 5355, Mch. 18, 1969: S.O. 1002; Car Distribution Direction No. 27, Amdt. 3, Florida East Coast Ry. Co. et al., extends expiration date of Car Distribution Direction No. 27, effective March 15, 1969.

34 FR 5356, Mch. 18, 1969: S.O. 1002; Car Distribution Direction No. 28, Amdt. 3, Louisville & N. R. Co. and Illinois Central R. Co., extends expiration date of Car Distribution Direction No. 28, effective March 15, 1969.

34 FR 5356, Mch. 18, 1969: S.O. 1002; Car Distribution No. 29, Amdt. 2, Southern Ry. Co. and Illinois Central R. Co., extends expiration date of Car Distribution Direction No. 29, effective March 15, 1969.

34 FR 5356, Mch. 18, 1969: S.O. 1002; Car Distribution Direction No. 30, Amdt. 2, Seaboard Coast Line R. Co. and Illinois Central R. Co., extends expiration date of Car Distribution Direction No. 30, effective March 15, 1969.

34 FR 5971, March 29, 1969: S.O. 1002; Car Distribution Direction 35, Amdt. 1, St. Louis-S. F. Ry. Co. et al., freight car distribution, extends expiration of Car Distribution Direction 35, effective March 29, 1969.

34 FR 5971, March 29, 1969: S.O. 1002; Car Distribution Direction 36, Amdt. 1, Penn Central Co. et al., freight car distribution, extends expiration date of Car Distribution Direction 36, effective March 29, 1969.

34 FR 5971, March 29, 1969: S.O. 1002; Car Distribution Direction 37, Amdt. 1, Seaboard Coast Line R. Co. et al., freight car distribution, extends expiration date of Car Distribution Direction 37, effective March 29, 1969.

34 FR 5970, March 29, 1969: S.O. 1002; Corrected Car Distribution Direction 38, Amdt. 1, Chicago, R.I. & P. R. Co. and Northern Pac. Ry. Co. freight car distribution, extends expiration date of Car Distribution Direction 38, effective March 29, 1969.

34 FR 5619, March 25, 1969: S. O. 1002; Car Distribution Direction 40, Penn Central Co. and Soo Line R. Co., freight car distribution, effective March 24, 1969.

34 FR 5618, March 25, 1969: S. O. 1002; Car Distribution Direction 41, Louisville & N. R. Co. et al., distribution of freight cars, effective March 24, 1969.

34 FR 5970, March 29, 1969: S.O. 1002; Car Distribution Direction 32, Amdt. 1, Erie-Lackawanna Ry. Co. et al., freight car distribution, extends expiration date of Car Distribution Direction 32, effective March 29, 1969.

34 FR 5970, March 29, 1969; S.O. 1002; Car Distribution Direction 33, Amdt. 1, Norfolk & W. Ry. Co. et al., freight car distribution, extends expiration date of Car Distribution Direction 33, effective March 29, 1969.

34 FR 5971, March 29, 1969: S.O. 1002; Car Distribution Direction 34, Amdt. 1, Penn Central Co. et al., freight car distribution, extends expiration date of Car Distribution Direction 34, effective March 29, 1969.

34 FR 5971, March 29, 1969: S.O. 1002; Car Distribution Direction 39, Amdt. 1, Southern Ry. Co. and Chicago & E.I. R. Co. freight car distribution, extends expiration date of Car Distribution Direction 39, effective March 29, 1969.

34 FR 6307, Apr. 9, 1969: S. O. 1002; Car Distribution Direction 27, Amdt. 4, Florida East Coast Ry. Co. et al., freight car distribution, extends expiration date of Car Distribution Direction 27, effective Apr. 5, 1969.

34 FR 6308, Apr. 9, 1969: S.O. 1002; Car Distribution Direction 26, Amdt. 4, Term. R. Assn. of St. Louis and Illinois Central R. Co., freight car distribution, extends expiration date of Car Distribution Direction 26, effective Apr. 5, 1969.

34 FR 6308, Apr. 9, 1969; S.O. 1002; Car Distribution Direction 28, Amdt. 4, Louisville & N. R. and Illinois Central R. Co., freight car distribution, extends expiration date of Car Distribution Direction 28, effective Apr. 5, 1969.

34 FR 6308, Apr. 9, 1969: S.O. 1002; Car Distribution Direction 30, Amdt. 3, Seaboard Coast Line R. and Illinois Central R., freight car distribution, extends expiration date of Car Distribution Direction 30, effective Apr. 5, 1969.

34 FR 6308, Apr. 9, 1969: S.O. 1002; Car Distribution Direction 42, Southern Ry. Co. and Columbus & G. Ry. Co., freight car distribution, effective Apr. 7, 1969.

34 FR 6613, Apr. 17, 1969: S.O. 1002; Car Distribution Direction 27-A, Florida East Coast Ry. et al., vacates and sets aside Car Distribution Direction 27, effective Apr. 11, 1969.

34 FR 6613, Apr. 17, 1969: S.O. 1002; Car Distribution Direction 43, Florida East Coast Ry. Co. et al., freight car distribution, effective Apr. 14, 1969.

34 FR 6614, Apr. 17, 1969: S.O. 1002; Car Distribution Direction 30-A, Seaboard Coast Line R. and Illinois Central R., vacates Car Distribution Direction 30, effective Apr. 11, 1969.

34 FR 6614, Apr. 17, 1969: S.O. 1002; Car Distribution Direction 44, Seaboard Coast Line R. Co. et al., freight car distribution, effective Apr. 14, 1969.

34 FR 6614, Apr. 17, 1969: S.O. 1002; Car Distribution Direction 40, Amdt. 1, Penn Central Co. and Soo Line R., car distribution extends expiration date of Car Distribution Direction 40, effective Apr. 13, 1969.

34 FR 6614, Apr. 17, 1969: S.O. 1002; Car Distribution Direction 41, Amdt. 1, Louisville & N. R. Co. et al., car distribution, extends expiration date of Car Distribution Direction 41, effective Apr. 13, 1969.

34 FR 6671, Apr. 18, 1969: S.O. 1002; Car Distribution Direction 40-A, Penn Central Co. and Soo Line R. Co., vacates Car Distribution Direction 40, effective on date of order.

34 FR 6671, Apr. 18, 1969: S.O. 1002; Car Distribution Direction 41-A, Louisville & N. R. Co. et al., vacates Car Distribution Direction 41, effective on date of order.

34 FR 6671, Apr. 18, 1969: S.O. 1002; Corrected Car Distribution Direction 44, Seaboard Coast Line R. et al., car distribution, effective Apr. 14, 1969.

34 FR 6718, Apr. 19, 1969: S.O. 1002; Corrected Car Distribution Direction 38-A, Chicago, R.I. & P. R. and Northern Pac. Ry. Co., car distribution, vacates Car Distribution Direction 38, effective on date of order.

34 FR 6718, Apr. 19, 1969: S.O. 1002; Car Distribution Direction 45, Norfolk & W. Ry. Co. and Chicago, R.I. & P. R. Co., freight car distribution, effective Apr. 16, 1969.

34 FR 6719, Apr. 19, 1969: S.O. 1002; Car Distribution Direction 33-A, Norfolk & W. Ry. Co. et al., car distribution, vacates Car Distribution Direction 33, effective on date of order.

34 FR 6813, Apr. 22, 1969: S.O. 1002; Car Distribution Direction 32, Erie-Lackawanna Ry. Co. et al., car distribution, Amdt. 2 further extends expiration date of Car Distribution Direction, effective Apr. 19, 1969.

34 FR 6813, Apr. 23, 1969: S.O. 1002; Car Distribution Direction 34, Penn Central Co. et al., car distribution, Amdt. 2 further extends expiration date of Car Distribution Direction 34, effective Apr. 19, 1969.

34 FR 6813, Apr. 23, 1969: S.O. 1002; Car Distribution Direction 36, Penn Central Co. et al., car distribution, Amdt. 2 further extends expiration date of Car Distribution Direction 36, effective Apr. 19, 1969.

34 FR 6813, Apr. 23, 1969: S.O. 1002; Car Distribution Direction 37, Seaboard Coast Line R. Co. et al., car distribution, Amdt. 2 further extends expiration date of Car Distribution Direction 37, effective Apr. 19, 1969.

34 FR 6814, Apr. 23, 1969: S.O. 1002; Car Distribution Direction 46, Southern Ry. Co. and Missouri Pac. R. Co., freight car distribution, effective Apr. 21, 1969.

34 FR 6897, Apr. 24, 1969: S.O. 1002; Car Distribution Direction 42-A, Southern Ry. Co. and Columbus & G. Ry. Co., car distributions, vacates Car Distribution Direction 42, effective on date of order.

34 FR 6951, Apr. 25, 1969: S.O. 1002; Car Distribution Direction 47, Southern Ry. Co. and Missouri-K.T. R. Co., freight car distribution, effective Apr. 24, 1969.

34 FR 6995, Apr. 26, 1969: S.O. 1002; Car Distribution Direction 28-A, Louisville & N. R. Co. and Illinois Central R. Co., car distribution, vacates Car Distribution Direction 28, effective on date of order.

34 FR 7101, Apr. 30, 1969: S.O. 1002; Car Distribution Direction 48, Southern Pac. Co. and Missouri-K.T. R. Co., freight car distribution, effective April 28, 1969.

34 FR 7101, Apr. 30, 1969: S.O. 1002; Car Distribution Direction 49, Southern Ry. Co. and Chicago, R.I. & P. R. Co., freight car distribution, effective April 28, 1969.

34 FR 7101, Apr. 30, 1969: S.O. 1002; Car Distribution Direction 47-A, Southern Ry. Co. and Missouri-K.T. R. Co. car distribution, vacates Car Distribution Direction 47, effective Apr. 27, 1969.

34 FR 7314, May 3, 1969: S.O. 1002; Car Distribution Direction 43, Florida East Coast Ry. Co. et al., Amdt. 1, extends expiration date of Car Distribution Direction 43, effective May 4, 1969.

34 FR 7315, May 3, 1969: S.O. 1002; Car Distribution Direction 44, Seaboard Coast Line R. Co. et al., Amdt. 1, extends expiration date of Car Distribution Direction 44, effective May 4, 1969.

34 FR 7488, May 8, 1969: S.O. 1002; Car Distribution Direction 32-A, Erie-Lackawanna Ry. et al., vacates Car Distribution Directive 32, effective May 4, 1969.

34 FR 7489, May 8, 1969: S.O. 1002; Car Distribution Direction 34-A, Penn Central Co. et al., vacates Car Distribution Direction 34, effective May 4, 1969.

34 FR 7490, May 8, 1969: S.O. 1002; Car Distribution Direction 36-A, Penn Central Co. et al., vacates Car Distribution Direction 36, effective May 4, 1969.

34 FR 7490, May 8, 1969: S.O. 1002; Car Distribution Direction 37-A, Seaboard Coast Line R. Co. et al., vacates Car Distribution Direction 37, effective May 4, 1969.

34 FR 7490, May 8, 1969: S.O. 1002; Car Distribution Direction No. 50, Seaboard Coast Line R. Co. et al., freight car distribution, effective May 5, 1969.

34 FR 7488, May 8, 1969: S.O. 1002; Car Distribution Direction No. 51, Erie-Lackawanna Ry. Co. and Chicago, B. & Q. R. Co. freight car distribution, effective May 5, 1969.

34 FR 7489, May 8, 1969: S.O. 1002; Car Distribution Direction No. 52, Penn Central Co. and Chicago, B. & Q. R. Co. freight car distribution, effective May 5, 1969.

34 FR 7489, May 8, 1969: S.O. 1002; Car Distribution Direction No. 53, Penn Central Co. and Chicago, R.I. & P. R. Co. freight car distribution, effective May 5, 1969.

34 FR 7488, May 8, 1969: S.O. 1002; Car Distribution Direction No. 54, Norfolk & W. Ry. Co. and Atchison, T. & S.F. Ry. Co. freight car distribution, effective May 5, 1969.

34 FR 7672, May 14, 1969: S.O. 1002; Car Distribution Direction 46, Southern Ry. Co. and Missouri Pac. R. Co., freight car distribution, Amdt. 1, extends expiration date of Car Distribution Direction 46, effective May 11, 1969.

34 FR 7840, May 16, 1969: S.O. 1002; Car Distribution Djrection 55, Kansas City S. Ry. Co. et al., freight car distribution, effective May 14, 1969.

34 FR 8007, May 21, 1969: S.O. 1002; Car Distribution Direction 48, Southern Pac. Co. and Missouri-K.-T. R. Co., car distribution, Amdt. 1, extends expiration date of Car Distribution Direction 48, effective May 18, 1969.

34 FR 8007, May 21, 1969: S.O. 1002; Car Distribution Direction 49, Southern Ry. Co. and Chicago, R.I. & P. R. Co., car distribution, Amdt. 1, extends expiration date of Car Distribution Direction 49, effective May 18, 1969.

34 FR 8942, June 4, 1969: S.O. 1002; Car Distribution Direction No. 43, Florida East Coast Ry. Co. et al., car distribution, Amdt. 2, extends expiration date of Car Distribution Direction 43, effective June 1, 1969.

34 FR 8942, June 4, 1969: S.O. 1002; Corrected Car Distribution Direction No. 44, Seaboard Coast Line R. Co. et al., car distribution, Amdt. 2, extends expiration date of Corrected Car Distribution Direction 44, effective June 1, 1969.

34 FR 9475, June 17, 1969: S.O. 1002; Car Distribution Direction 44-A, Seaboard Coast Line R. Co. et al., car distribution, vacates Car Distribution Direction 44, effective on date of order.

34 FR 9475, June 17, 1969: S.O. 1002; Car Distribution Direction 46, Southern Ry. Co. and Missouri Pac. R. Co., car distribution, Amdt. 2, extends expiration date of Car Distribution Direction 46, effective June 15, 1969.

34 FR 9474, June 17, 1969: S.O. 1002; Car Distribution Direction 50, Seaboard Coast Line R. Co. et al., car distribution, Amdt. 1, extends expiration date of Car Distribution Direction 50, effective June 15, 1969.

34 FR 9473, June 17, 1969: S.O. 1002; Car Distribution Direction 51, Erie-Lackawanna Ry. Co. and Chicago, B. & Q. R. Co., car distribution, Amdt. 1, extends expiration date of Car Distribution Direction 51, effective June 15, 1969.

34 FR 9474, June 17, 1969: S.O. 1002; Car Distribution Direction 52, Penn Central Co. and Chicago, B. & Q. R. Co. car distribution, Amdt. 1, extends expiration date of Car Distribution Direction 52, effective June 15, 1969.

34 FR 9474, June 17, 1969: S.O. 1002; Car Distribution Direction 53, Penn Central Co. and Chicago, R.I. & P. R. Co. car distribution, Amdt. 1, extends expiration date of Car Distribution Direction 53, effective June 15, 1969.

34 FR 9474, June 17, 1969: S.O. 1002; Car Distribution Direction 54-A, Norfolk & W. Ry. Co. and Atchison, T. & S.F. Ry. Co. car distribution, vacates Car Distribution Direction No. 54, effective on date of order.

34 FR 9473, June 17, 1969: S.O. 1002; Car Distribution Direction 55, Kansas City Southern Ry. Co. et al., car distribution, Amdt. 1, extends expiration date of Car Distribution Direction No. 55, effective June 15, 1969.

34 FR 9474, June 17, 1969: S.O. 1002; Car Distribution Direction No. 56, Seaboard Coast Line R. Co. and St. Louis-S.F. Ry. Co., freight car distribution, effective day after date of order.

34 FR 9733, June 21, 1969: S.O. 1002; Car Distribution Direction 48, Southern Pac. Co. and Missouri-K.T. R. Co. car distribution, Amdt. 2, extends expiration date of Car Distribution Direction No. 48, effective June 22, 1969.

34 FR 9777, June 24, 1969: S.O. 1002; Car Distribution Direction No. 56-A, Seaboard Coast Line R. Co. and St. Louis-S.F. Ry. Co. car distribution, vacates Car Distribution Direction No. 56, effective on date of order.

34 FR 9777, June 24, 1969: S.O. 1002; Car Distribution Direction No. 57, Seaboard Coast Line R. Co. et al., freight car distribution, effective day after date of order.

34 FR 9830, June 25, 1969: S.O. 1002; Car Distribution Direction No. 58, Southern Ry. Co. and Chicago, B. & Q. R. Co., freight car distribution, effective June 23, 1969.

34 FR 11127, July 1, 1969: S.O. 1002; Car Distribution Direction 53, Penn Central Co. and Chicago, R.I. & P. R. Co. car distribution, Amdt. 2, extends expiration date of Car Distribution 53, effective June 29, 1969.

34 FR 10015, June 28, 1969: S.O. 1002; Car Distribution Direction No. 48-A, Southern Pac. Co. and Missouri-K.T. R. Co. car distribution, vacates Car Distribution Direction No. 48, effective on date of order.

34 FR 10015, June 28, 1969: S.O. 1002; Car Distribution Direction No. 55-A, Kansas City Southern Ry. Co. et al., car distribution, vacates Car Distribution Direction No. 55, effective on date of order.

34 FR 11166, July 2, 1969: S.O. 1002; Car Distribution Direction 46, Southern Ry. Co. and Missouri Pac. R. Co. car distribution, Amdt. 3, extends expiration date of Car Distribution Direction 46, effective June 29, 1969.

34 FR 11166, July 2, 1969: S. O. 1002; Car Distribution Direction 50, Seaboard Coast Line R. Co. et al., car distribution, Amdt. 2, extends expiration date of Car Distribution Direction 50, effective June 29, 1969.

34 FR 11166, July 2, 1969: S. O. 1002; Car Distribution Direction 51, Erie-Lackawanna Ry. Co. and Chicago, B. & Q. R. Co. car distribution, Amdt. 2, extends expiration date of Car Distribution Direction 51, effective June 29, 1969.

34 FR 11166, July 2, 1969: S. O. 1002; Car Distribution Direction 52, Penn Central Co. and Chicago, B. & Q. R. Co. car distribution, Amdt. 2, extends expiration date of Car Distribution Direction 52, effective June 29, 1969.

34 FR 12072, July 17, 1969: S. O. 1002; Car Distribution Direction 58. Southern Ry. Co. and Chicago, B. & Q. R. Co. car distribution, Amdt. 1, extends expiration date of Car Distribution Direction, effective July 13, 1969.

34 FR 11509, July 11, 1969: S.O. 1002; Car Distribution Direction 51-A, vacates Car Distribution Direction 51, (Erie-Lackawanna Ry. Co. and Chicago, B. & Q. R. car distribution), effective on date of order.

34 FR 11611, July 15, 1969: S. O. 1002; Car Distribution Direction No. 46-A, vacates Car Distribution Direction 46 (Southern Ry. Co. and Missouri Pac. R. Co. car distribution), effective on date of order.

34 FR 11610, July 15, 1969: O. 1002; Car Distribution Direction No. 57-A, vacates Car Distribution Direction 57 (Florida Coast Line R. Co. et al., car distribution), effective on date of order.

34 FR 12243, July 24, 1969: S. O. 1002; Car Distribution Direction No. 50, Seaboard Coast Line R. Co. et al., car distribution, Amdt. 3, extends expiration date of Car Distribution Direction 50, effective July 20, 1969.

34 FR 12243, July 24, 1969: S. O. 1002; Car Distribution Direction No. 52, Penn Central Co. and Chicago, B. & Q. R. car distribution, Amdt. 3, extends expiration date of Car Distribution Direction 52, effective July 20, 1969.

34 FR 12472, July 30, 1969: S. O. 1002; Car Distribution Direction No. 58, Southern Ry. Co. and Chicago, B. & Q. R. Co. car distribution, Amdt. 2, extends expiration date of Car Distribution Direction 58, effective July 27, 1969.

34 FR 12472, July 30, 1969: S. O. 1002; Car Distribution Direction No. 59, Seaboard Coast Line R. Co. et al., car distribution, Amdt. 1, extends expiration date of Car Distribution Direction 59, effective July 27, 1969.

34 FR 12549, July 31, 1969: S. O. 1002; Car Distribution Direction 58-A, Southern Ry. Co. and Chicago, B. & Q. R. Co. car distribution, vacates Car Distribution Direction 58, effective on date of order.

34 FR 12548, July 31, 1969: S. O. 1002; Car Distribution Direction 59-A, Seaboard Coast Line R. Co. et al., car distribution, vacates Car Distribution Direction 59, effective on date of order.

34 FR 12548, July 31, 1969: S. O. 1002; Car Distribution Direction No. 60, Southern Ry. Co. and Chicago & N.W. Ry. Co., freight car distribution, effectively July 26, 1969.

34 FR 12548, July 31, 1969: S. O. 1002; Car Distribution Direction No. 61, Seaboard Coast Line R. Co. et al., freight car distribution, effective July 26, 1969.

34 FR 12805, Aug. 6, 1969: S. O. 1002; Car Distribution Direction 50, Seaboard Coast Line R. Co. et al., car distribution, Amdt. 4, extends expiration date of Car Distribution Direction 50, effective Aug. 3, 1969.

34 FR 12805, Aug. 6, 1969: S. O. 1002; Car Distribution Direction 52, Penn Central Co. and Chicago, B. & Q. R. C. Co. car distribution, Amdt. 4, extends expiration date of Car Distribution Direction 52, effective Aug. 3, 1969.

34 FR 13577, Aug. 22, 1969: S. O. 1002; Car Distribution Direction 60-A, Southern Ry. Co. and Chicago & N.W. Ry. Co. car distribution, vacates Car Distribution Direction 60, effective on date of order.

34 FR 13577, Aug. 22, 1969: S. O. 1002; Car Distribution Direction 61-A, Seaboard Coast Line R. Co. et al., car distribution, vacates Car Distribution Direction 61, effective on date of order.

34 FR 15740, Oct. 10, 1969: S. O. 1002; Car Distribution Direction 62, Seaboard Coast Line R. Co., freight car distribution, effective Oct. 9, 1969.

34 FR 15740, Oct. 10, 1969: S. O. 1002; Car Distribution Direction 63, Southern Ry. Co. and Columbus & G. Ry. Co., freight car distribution, effective Oct. 9, 1969.

34 FR 15739, Oct. 10, 1969; S. O. 1002; Car Distribution Direction 64, Illinois Central R. Co. and Columbus & G. Ry. Co., freight car distribution, effective Oct. 9, 1969.

34 FR 16575, Oct. 16, 1969: S. O. 1002; Car Distribution Direction 65, Southern Ry. Co. and Missouri Pac. R. Co., freight car distribution, effective Oct. 15, 1969.

34 FR 16574, Oct. 16, 1969: S. O. 1002; Car Distribution Direction 66, Seaboard Coast Line R. Co. et al., freight car distribution, effective Oct. 15, 1969.

34 FR 16574, Oct. 16, 1969: S. O. 1002; Car Distribution Direction 67, Penn Central Co. and Chicago, B. & Q. R. Co., freight car distribution. effective Oct. 15, 1969.

34 FR 16574, Oct. 16, 1969: S. O. 1002; Car Distribution Direction 68, Reading Co. et al., freight car distribution, effective Oct. 15, 1969.

34 FR 17788, Nov. 4, 1969: S. O. 1022; Car Distribution Direction 62, Amdt. 1, Seaboard Coast Line R. Co. et al., freight car distribution, extends expiration date of Car Distribution Direction 62, effective Nov. 2, 1969.

34 FR 17788, Nov. 4, 1969: S. O. 1022; Car Distribution Direction 63, Amdt. 1, Southern Ry Co. and Columbus & G. Ry. Co., freight car distribution, extends expiration date of Car Distribution Direction 63, effective Nov. 2, 1969.

34 FR 17788, Nov. 4, 1969: S. O. 1022; Car Distribution Direction 64, Amdt. 1, Illinois Central R. Co. and Columbus & G. Ry. Co., freight car distribution, extends expiration date of Car Distribution Direction 64, effective Nov. 2, 1969.

34 FR 18431, Nov. 19, 1969: S.O. 1002; Car Distribution Direction 69, Southern Ry. Co. and Chicago & N.W. Ry. Co., freight car distribution, effective Nov. 17, 1969.

34 FR 18431, Nov. 19, 1969: S.O. 1002; Car Distribution Direction 70, St. Louis-S.F. Ry. Co. and Chicago, B. & Q. R. Co., freight car distribution, effective Nov. 17, 1969.

34 FR 18431, Nov. 19, 1969: S.O. 1002; Car Distribution Direction 71, Kansas City S. Ry. Co. and Chicago, R.I. & P. R. Co., freight car distribution, effective Nov. 17, 1969.

34 FR 18433, Nov. 19, 1969: S. O. 1002; Car Distribution Direction 72, Atchison, T. & S.F. Ry. Co. and Chicago & N.W. Ry. Co., freight car distribution, effective Nov. 17, 1969.

34 FR 18432, Nov. 19, 1969: S. O. 1002; Car Distribution Direction 73, Southern Pac. Co. and Northern Pac. Ry. Co., freight car distribution, effective Nov. 17, 1969.

34 FR 18432, Nov. 19, 1969: S. O. 1002, Car Distribution Direction 74, Louisville & N. R. Co. and Chicago, B. & Q. R. Co., freight car distribution, effective Nov. 17, 1969.

34 FR 18433, Nov. 19, 1969: S.O. 1002; Car Distribution Direction 66, Amdt. 1, Seaboard Coast Line R. Co. et al., extends expiration date of Car Distribution Direction 66, effective Nov. 16, 1969.

34 FR 18433, Nov. 19, 1969: S.O. 1002; Car Distribution Direction 67, Amdt. 1, Penn Central Co. and Chicago, B. & Q. R. Co., extends expiration date of Car Distribution Direction 67, effective Nov. 16, 1969.

34 FR 18433, Nov. 19, 1969: S.O. 1002; Car Distribution Direction 68, Amdt. 1, Reading Co. et al., extends effective date of Car Distribution Direction 68, effective Nov. 16, 1969.

34 FR 18575, Nov. 21, 1969: S.O. 1002; Car Distribution Direction 62-A, Seaboard Coast Line R. Co. et al., vacates Car Distribution Direction 62, effective on date of order.

34 FR 18575, Nov. 21, 1969: S.O. 1002; Car Distribution Direction 63-A, Southern Ry. Co. and Columbus & G. Ry. Co., vacates Car Distribution Direction 63, effective on date of order.

34 FR 18575, Nov. 21, 1969: S.O. 1002; Car Distribution 64-A, Illinois Central R. Co. and Columbus & G. Ry. Co., vacates Car Distribution Direction 64, effective on date of order.

34 FR 18775, Nov. 22, 1969: S.O. 1002; Car Distribution Direction 75, Boston & M. Corp. and Maine Central R. Co., freight car distribution, effective Nov. 20, 1969.

34 FR 18775, Nov. 22, 1969: S. O. 1002; Car Distribution Direction 76, Penn Central Co., et al., freight car distribution, effective Nov. 20, 1969.

34 FR 19049, Nov. 29, 1969: S. O. 1002; Car Distribution Direction 68-A, Reading Co. et al., vacates Car Distribution Direction 68, effective on date of order.

34 FR 19101, Dec. 2, 1969: S. O. 1002; Car Distribution Direction 66, Amdt. 2, Seaboard Coast Line R. et al., extends expiration date of Car Distribution Direction 66, effective Nov. 30, 1969.

34 FR 19101, Dec. 2, 1969: S. O. 1002; Car Distribution Direction 67, Amdt. 2, Penn Central Co. and Chicago, B. & Q. R., extends expiration date of Car Distribution Direction 67, effective Nov. 30, 1969.

34 FR 19102, Dec. 2, 1969: S. O. 1002; Car Distribution Direction 69, Amdt. 1, Southern Ry. Co. and Chicago & N.W. Ry. Co., extends expiration date of Car Distribution Direction 69, effective Nov. 30, 1969.

34 FR 19101, Dec. 2, 1969: S. O. 1002; Car Distribution Direction 70, Amdt. 1, St. Louis-S.F. Ry. Co. and Chicago, B. & Q. R. Co., extends expiration date of Car Distribution Direction 70, effective Nov. 30, 1969.

34 FR 19100, Dec. 2, 1969: S. O. 1002; Car Distribution Direction 71, Amdt. 1, Kansas City S. Ry. and Chicago, R.I. & P. R., extends expiration date of Car Distribution Direction 71, effective Nov. 30, 1969.

34 FR 19100, Dec. 2, 1969: S. O. 1002; Car Distribution Direction 72, Amdt. 1, Atchison, T. & S.F. Ry. and Chicago & N.W. Ry., extends expiration date of Car Distribution Direction 72, effective Nov. 30, 1969.

34 FR 19102, Dec. 2, 1969: S. O. 1002; Car Distribution Direction 73, Amdt. 1, Southern Pac. Co. and Northern Pac. Ry. Co., extends expiration date of Car Distribution Direction 73, effective Nov. 30, 1969.

34 FR 19100, Dec. 2, 1969: S. O. 1002; Car Distribution Direction 74, Amdt. 1, Louisville & N. R. and Chicago, B. & Q. R., extends expiration date of Car Distribution Direction 74, effective Nov. 30, 1969.

34 FR 19101, Dec. 2, 1969: S. O. 1002; Car Distribution Direction 77, Reading Co. et al., freight car distribution, effective Dec. 1, 1969.

34 FR 19485, Dec. 9, 1969: S. O. 1002; Car Distribution Direction 75, Amdt. 1, Boston & M. Corp. and Maine Central R., extends expiration date of Car Distribution Direction 75, effective Dec. 7, 1969.

34 FR 19485, Dec. 9, 1969: S. O. 1002; Car Distribution Direction 76, Amdt. 1, Penn Central Co. et al., extends expiration date of Car Distribution Direction 76, effective Dec. 6, 1969.

34 FR 19734, Dec. 16, 1969: S.O. 1002; Car Distribution Direction 66, Amdt. 3, Seaboard Coast Line R. Co. et al., extends expiration date of Car Distribution Direction 66, effective Dec. 14, 1969.

34 FR 19733, Dec. 16, 1969: S.O. 1002; Car Distribution Direction 67, Amdt. 3, Penn Central Co. and Chicago, B. & Q. R., extends expiration date of Car Distribution Direction 67, effective Dec. 14, 1969.

34 FR 19734, Dec. 16, 1969: S.O. 1002; Car Distribution Direction 70, Amdt. 2, St. Louis-S.F. Ry. Co. and Chicago, B. & Q. R., extends expiration date of Car Distribution Direction 70, effective Dec. 14, 1969.

34 FR 19733, Dec. 16, 1969: S.O. 1002; Car Distribution Direction 71, Amdt. 2, Kansas City S. Ry. Co. and Chicago, R.I. & P. R., extends expiration date of Car Distribution Direction 71, effective on Dec. 14, 1969.

34 FR 19734, Dec. 16, 1969: S.O. 1002; Car Distribution Direction 73, Amdt. 2, Southern Pac. Co. and Northern Pac. Ry. Co., extends expiration date of Car Distribution Direction 73, effective Dec. 14, 1969.

34 FR 19733, Dec. 16, 1969: S.O. 1002; Car Distribution Direction 74, Amdt. 2, Louisville & N. R. Co. and Chicago, B. & Q. R., extends expiration date of Car Distribution Direction 74, effective Dec. 14, 1969.

34 FR 19733, Dec. 16, 1969: S.O. 1002; Car Distribution Direction 77, Amdt. 1, Reading Co. et al., extends expiration date of Car Distribution Direction 77, effective Dec. 14, 1969.

34 FR 20078, Dec. 23, 1969: S.O. 1002; Car Distribution Direction 75, Amdt. 2, Boston & Maine Corp. and Maine Central R. Co., extends expiration date of Car Distribution Direction 75, effective Dec. 21, 1969.

34 FR 20078, Dec. 23, 1969: S.O. 1002; Car Distribution Direction 76, Amdt. 2, Penn Central Co. et al., extends expiration date of Car Distribution Direction 76, effective Dec. 21, 1969.

34 FR 20451, Dec. 31, 1969: S.O. 1002; Car Distribution Direction 78, Baltimore & O. R. Co. et al., freight car distribution, effective Dec. 26, 1969.

34 FR 20452, Dec. 31, 1969: S.O. 1002; Car Distribution Direction 67, Amdt. 4, Penn Central Co. and Chicago, B. & Q. R., extends expiration date of Car Distribution Direction 67, effective Dec. 28, 1969.

34 FR 20452, Dec. 31, 1969: S.O. 1002; Car Distribution Direction 70, Amdt. 3, St. Louis-S.F. Ry. and Chicago, B. & Q. R., extends expiration date of Car Distribution Direction 70, effective Dec. 28, 1969.

34 FR 20452, Dec. 31, 1969: S.O. 1002; Car Distribution Direction 71, Amdt. 3, Kansas City Southern and Chicago, R.I. & P., extends expiration date of Car Distribution Direction 71, effective Dec. 28, 1969.

34 FR 20453, Dec. 31, 1969: S.O. 1002; Car Distribution Direction 73, Amdt. 3, Southern Pac. Co. and Northern Pac. Ry., extends expiration date of Car Distribution Direction 73, effective Dec. 28, 1969.

34 FR 20452, Dec. 31, 1969: S.O. 1002; Car Distribution Direction 74, Amdt, 3, Louisville & N. R. and Chicago, B. & Q. R., extends expiration date of Car Distribution Direction 74, effective Dec. 28, 1969.

34 FR 20452, Dec. 31, 1969: S.O. 1002; Car Distribution Direction 77, Amdt. 2, Reading Co. et al., extends expiration date of Car Distribution Direction 77, effective Dec. 28, 1969.

35 FR 131, Jan. 3, 1970: S.O. 1002; Car Distribution Direction 70-A, St. Louis-S.F. Ry. and Chicago, B. & Q. R., vacates Car Distribution Direction 70, effective on date of order.

35 FR 131, Jan. 3, 1970: S.O. 1002; Car Distribution Direction 74-A, Louisville & N. R. and Chicago, B. & Q. R., vacates Car Distribution Direction 74, effective on date of order.

35 FR 245, Jan. 7, 1970: S.O. 1002; Car Distribution Direction 79, Southern Pac. Co. and Great Northern Ry. freight car distribution, effective Jan. 1, 1970.

35 FR 246, Jan. 7, 1970: S.O. 1002; Car Distribution Direction 73-A, Southern Pac. Co. and Northern Pac. Ry., vacates Car Distribution Direction 73, effective on date of order.

35 FR 1299, Jan. 31, 1970: S.O. 1002; Car Distribution Direction 67, Amdt. 6, Penn Central Co. and Chicago, B. & Q. R. Co. car distribution, extends expiration date of Car Distribution Direction 67, effective Feb. 1, 1970.

35 FR 1299, Jan. 31, 1970: S.O. 1002; Car Distribution Direction 71, Amdt. 5, Kansas City S. Ry. and Chicago, R.I. & P. R. car distribution, extends expiration date of Car Distribution Direction 71, effective Feb. 1, 1970.

35 FR 1299, Jan. 31, 1970: S.O. 1002; Car Distribution Direction 75, Amdt. 4, Boston & M. Corp. and Maine Central R. car distribution, extends expiration date of Car Distribution 75, effective Feb. 1, 1970.

35 FR 1299, Jan. 31, 1970: S.O. 1002; Car Distribution Direction 76, Amdt. 4, Penn Central Co. et al., car distribution, extends expiration date of Car Distribution Direction 76, effective Feb. 1, 1970.

35 FR 1300, Jan. 31, 1970: S.O. 1002; Car Distribution Direction 77, Amdt. 4, Reading Co. et al., car distribution, extends expiration date of Car Distribution Direction 77, effective Feb. 1, 1970.

35 FR 1299, Jan. 31, 1970: S.O. 1002; Car Distribution Direction 78, Amdt. 2, Baltimore & O. R. et al., car distribution, extends expiration date of Car Distribution Direction 78, effective Feb. 1, 1970.

35 FR 1300, Jan. 31, 1970: S.O. 1002; Car Distribution Direction 79, Amdt. 2, Southern Pac. Co. and Great Northern Ry. car distribution, extends expiration date of Car Distribution 79, effective Feb. 1, 1970.

35 FR 2844, Feb. 11, 1970: S.O. 1002; Car Distribution Direction 75-A, Boston & M. Corp. and Maine Central R., vacates Car Distribution Direction 75, effective Feb. 6, 1970.

35 FR 2844, Feb. 11, 1970: S.O. 1002; Car Distribution Direction 76-A, Penn Central Co. et al., vacates Car Distribution Direction 76, effective Feb. 6, 1970.

35 FR 3096, Feb. 17, 1970: S.O. 1002; Car Distribution Direction No. 80, Illinois Central R. Co. and Chicago & N.W. Ry. Co., freight car distribution, effective Feb. 13, 1970.

35 FR 3096, Feb. 17, 1970: S.O. 1002; Car Distribution Direction No. 81, St. Louis-S.F. Ry. Co. and Chicago, B. & Q. R. Co., freight car distribution, effective Feb. 13, 1970.

35 FR 3096, Feb. 17, 1970: S.O. 1002; Car Distribution Direction No. 82, Southern Ry. Co. and Chicago, B. & Q. R. Co., freight car distribution, effective Feb. 13, 1970.

35 FR 3097, Feb. 17, 1970: S.O. 1002; Car Distribution Direction No. 83, Seaboard Coast Line R. Co., Louisville & N. R. Co., and Chicago & N.W. Ry. Co., freight car distribution, effective Feb. 13, 1970.

35 FR 3780, Feb. 26, 1970: S.O. 1002; Car Distribution Direction 67, Amdt. 7, Penn Central Co. and Chicago, B. & Q. R. Co., extends expiration date of Car Distribution Direction 67, effective Feb. 22, 1970.

35 FR 3779, Feb. 26, 1970: S.O. 1002; Car Distribution Directive 71, Amdt. 7, Kansas City S. Ry. and Chicago, R.I. & P. R., extends expiration date of Car Distribution Direction 71, effective Feb. 22, 1970.

35 FR 3780, Feb. 26, 1970: S.O. 1002; Car Distribution Direction 77, Amdt. 5, Reading Co. et al., extends expiration date of Car Distribution Direction 77, effective Feb. 22, 1970.

35 FR 3779, Feb. 26, 1970: S.O. 1002; Car Distribution Direction 78, Amdt. 3, Baltimore & O. R. Co. et al., extends expiration date of Car Distribution Direction 78, effective Feb. 22, 1970.

35 FR 3780, Feb. 26, 1970: S.O. 1002; Car Distribution Direction 79, Amdt. 3, Southern Pac. Co. and Great Northern Ry. Co., extends expiration date of Car Distribution Direction 79, effective Feb. 22, 1970.

35 FR 4033, Mar. 3, 1970: S.O. 1002; Car Distribution Direction No. 78-A, Baltimore & O. R. Co. et al., car distribution, vacates Car Distribution Direction 78, effective Mar. 1, 1970.

35 FR 4033, Mar. 3, 1970: S.O. 1002; Car Distribution Direction No. 84, Baltimore & O. R. Co. and Burlington-Northern, Inc., freight car distribution, effective Mar. 2, 1970.

35 FR 4034, Mar. 3, 1970: S.O. 1002; Car Distribution Directions No. 67, Amdt. 8; 79, Amdt. 4; 81, Amdt. 1; 82 Amdt. 1, Penn Central Co. et al., amend Car Distribution Directions 67, 79, 81, and 82 by substituting the Burlington-Northern, Inc. for Chicago, B. & Q. R. Co. and Great Northern Ry. Co. wherever latter two are named therein, effective March 2, 1970.

35 FR 5454, Apr. 1, 1970: S.O. 1002; Car Distribution Direction 67, Amdt. 9, Penn Central Co. and Burlington Northern Inc. car distribution, extends expiration date of Car Distribution Direction 67, effective Mar. 29, 1970.

35 FR 5453, Apr. 1, 1970: S.O. 1002; Car Distribution Direction 71, Amdt. 7, Kansas City Southern and Chicago, R.I. & P. car distribution, extends expiration date of Car Distribution Direction 71, effective Mar. 29, 1970.

35 FR 5453, Apr. 1, 1970: S.O. 1002; Car Distribution Direction 77, Amdt. 6, Reading Co. et al., car distribution, extends expiration date of Car Distribution Direction 77, effective Mar. 29, 1970.

35 FR 5453, Apr. 1, 1970: S.O. 1002; Car Distribution Direction 79, Amdt. 5, Southern Pac. Co. and Burlington Northern Inc. car distribution, extends expiration date of Car Distribution Direction 79, effective Mar. 29, 1970.

35 FR 5452, Apr. 1, 1970: S.O. 1002; Car Distribution Direction 80, Amdt. 1, Illinois Central R. and Chicago & N.W. Ry. car distribution, extends expiration date of Car Distribution Direction 80, effective Mar. 29, 1970.

35 FR 5453, Apr. 1, 1970: S.O. 1002; Car Distribution Direction 81, Amdt. 2, St. Louis-S.F. Ry. and Burlington Northern Inc. car distribution, extends expiration date of Car Distribution Direction 81, effective Mar. 29, 1970.

35 FR 5453, Apr. 1, 1970: S.O. 1002; Car Distribution Direction 82, Amdt. 2, Southern Ry. and Burlington Northern Inc. car distribution, extends expiration date of Car Distribution Direction 82, effective Mar. 29, 1970.

35 FR 5452, Apr. 1, 1970: S.O. 1002; Car Distribution Direction 83, Amdt. 1, Seaboard Coast Line R., Louisville & N. R. and Chicago & N.W. Ry. car distribution, extends expiration date of Car Distribution Direction 83, effective Mar. 29, 1970.

35 FR 5452, Apr. 1, 1970: S.O. 1002; Car Distribution Direction 84, Amdt. 1, Baltimore & O. R. and Burlington Northern Inc. car distribution, extends expiration date of Car Distribution Direction 84, effective Mar. 31, 1970.

35 FR 6735, Apr. 28, 1970: S.O. 1002; Car Distribution Direction 67, Amdt. 10, Penn Central Co. and Burlington Northern, Inc., car distribution, extends expiration date of Car Distribution Direction 67, effective Apr. 26, 1970.

35 FR 6736, Apr. 28, 1970: S.O. 1002; Car Distribution Direction 79, Amdt. 6, Southern Pac. Co. and Burlington Northern, Inc., car distribution, extends expiration date of Car Distribution Direction 79, effective Apr. 26, 1970.

35 FR 6735, Apr. 28, 1970: S.O. 1002; Car Distribution Direction 80, Amdt. 2, Illinois Central R. and Chicago & N.W. Ry., car distribution, extends expiration date of Car Distribution Direction 80, effective Apr. 26, 1970.

35 FR 6735, Apr. 28, 1970: S.O. 1002; Car Distribution Direction 81, Amdt. 3, St. Louis-S.F. Ry. Co. and Burlington Northern, Inc., car distribution, extends expiration date of Car Distribution Direction 81, effective Apr. 26, 1970.

35 FR 6736, Apr. 28, 1970: S.O. 1002; Car Distribution Direction 82, Amdt. 3, Southern Ry. Co. and Burlington Northern, Inc., car distribution, extends expiration date of Car Distribution Direction 82, effective Apr. 26, 1970.

35 FR 6736, Apr. 28, 1970: S.O. 1002; Car Distribution Direction 83, Amdt. 2, Seaboard Coast Line R. Co. et al., car distribution, extends expiration date of Car Distribution Direction 83, effective Apr. 26, 1970.

35 FR 6735, Apr. 28, 1970: S.O. 1002; Car Distribution Direction 84, Amdt. 2, Baltimore & O. R. Co. and Burlington Northern, Inc., car distribution, extends expiration date of Car Distribution Direction 84, effective Apr. 26, 1970.

35 FR 6735, Apr. 28, 1970: S.O. 1002; Car Distribution Direction 85, Kansas City Southern Ry. Co. and Burlington Northern, Inc., freight car distribution, effective Apr. 27, 1970.

35 FR 7486, May 13, 1970: S.O. 1002; Car Distribution Direction 80-A, Illinois Central R. and Chicago & N.W. Ry., car distribution, vacates Car Distribution Direction 80, effective May 10, 1970.

35 FR 8316, May 27, 1970: S.O. 1002; Car Distribution Direction 86, Florida East Coast Ry. Co. and Southern Ry. Co., freight car distribution, effective May 25, 1970.

35 FR 8317, May 27, 1970: S.O. 1002; Car Distribution Direction 87, Southern Ry. Co. and Missouri-K.-T. R. Co., freight car distribution, effective May 25, 1970.

35 FR 8623, June 3, 1970: S.O. 1002; Car Distribution Direction 67, Amdt. 11, Penn Central Co. and Burlington Northern, Inc., extends expiration date of Car Distribution Direction 67, effective May, 31, 1970.

35 FR 8623, June 3, 1970: S.O. 1002; Car Distribution Direction 79, Amdt. 7, Southern Pac. Co. and Burlington Northern, Inc., extends expiration date of Car Distribution Direction 79, effective May 31, 1970.

35 FR 8623, June 3, 1970: S.O. 1002; Car Distribution Direction 82, Amdt. 4, Southern Ry. Co. and Burlington Northern Inc., extends expiration date of Car Distribution Direction 82, effective May 31, 1970.

35 FR 8622, June 3, 1970: S.O. 1002; Car Distribution Direction 84, Amdt. 3, Baltimore & O. R. and Burlington Northern, Inc., extends expiration date of Car Distribution Direction 84, effective May 31, 1970.

35 FR 8623, June 3, 1970: S.O. 1002; Car Distribution Direction 85, Amdt. 1, Kansas City Southern Ry. and Burlington Northern, Inc., extends expiration date of Car Distribution Direction 85, effective May 31, 1970.

35 FR 8623, June 3, 1970: S.O. 1002; Car Distribution Direction 88, Seaboard Coast Line R. Co. et al., freight car distribution, effective June 1, 1970.

35 FR 9966, June 17, 1970: S.O. 1002; Revised Car Distribution Direction 67, Penn Central Co. and Burlington Northern, Inc., freight car distribution, effective June 12, 1970.

35 FR 9967, June 17, 1970: S.O. 1002; Revised Car Distribution Direction 79, Southern Pac. Co. and Burlington Northern, Inc., freight car distribution, effective June 12, 1970.

35 FR 9967, June 17, 1970: S.O. 1002; Revised Car Distribution Direction 82, Southern Ry. Co. and Burlington Northern, Inc., freight car distribution, effective June 12, 1970.

35 FR 9968, June 17, 1970: S.O. 1002; Revised Car Distribution Direction 84, Baltimore & O. R. Co. and Burlington Northern, Inc., freight car distribution, effective June 12, 1970.

35 FR 9968, June 17, 1970: S.O. 1002; Revised Car Distribution Direction 85, Kansas City Southern Ry. and Burlington Northern, Inc., freight car distribution, effective June 12, 1970.

35 FR 9968, June 17, 1970: S.O. 1002; Car Distribution Direction 87-A, Southern Ry. Co. and Missouri-K.-T. R. Co., car distribution, vacates Car Distribution Direction 87, effective June 14, 1970.

35 FR 9968, June 17, 1970: S.O. 1002; Car Distribution Direction 88-A, Seaboard Coast Line R., Louisville & N. R., and Missouri K.-T. R., car distribution, vacates Car Distribution Direction 88, effective June 14, 1970.

35 FR 10072, June 18, 1970: S.O. 1002; Revised Car Distribution Directive 86, Florida East Coast Ry. and Southern Ry. Co., freight car distribution, effective June 15, 1970.

35 FR 10073, June 18, 1970: Rev. S.O. 1002; Car Distribution Direction 89, Southern Ry. Co. and Burlington Northern, Inc. freight car distribution, effective June 15, 1970.

35 FR 10073, June 18, 1970: Rev. S.O. 1002; Car Distribution Direction 90, Seaboard Coast Line R. Co. et al., freight car distribution, effective June 15, 1970.

35 FR 10258, June 23, 1970: Rev. S.O. 1002; Car Distribution Direction 86-A, vacates Car Distribution Direction 86 Florida East Coast Ry. and Southern Ry. car distribution, effective June 21, 1970.

35 FR 10258, June 23, 1970: Rev. S.O. 1002; Car Distribution Direction 89-A, vacates Car Distribution Direction 89 Southern Ry. and Burlington Northern, Inc., car distribution, effective June 21, 1970.

35 FR 15349, Oct. 1, 1970: Rev. S.O. 1002; Car Distribution Direction No. 91, Baltimore & O. R. and Pittsburgh & Shawmut R., open-top hopper car distribution, effective Sept. 28, 1970.

35 FR 16122, Oct. 14, 1970: Rev. S.O. 1002; Car Distribution Direction 91, Amdt. 1, Baltimore & O. R. and Pittsburgh & Shawmut R., car distribution, extends expiration date of Car Distribution Direction 91, effective Oct. 11, 1970.

35 FR 16297, Oct. 16, 1970: Rev. S.O. 1002; Car Distribution Direction 91, Corrected Amdt. 1, Baltimore & O. R. and Pittsburgh & S. R., car distribution, extends expiration date of Car Distribution Direction 91, effective Oct. 11, 1970.

35 FR 16223, Oct. 15, 1970: Rev. S.O. 1002; Car Distribution Direction No. 92, Gulf, M. & O. R. Co. and Columbus & Greenville Ry. Co., freight car distribution, effective Oct. 12, 1970.

35 FR 16714, Oct. 28, 1970: Rev S.O. 1002; Car Distribution Direction 92-A, Gulf, M. & O. R. Co. and Columbus & G. Ry. Co., car distribution, vacates Car Distribution Direction No. 92, effective on date of order.

35 FR 16819, Oct. 30, 1970: Rev. S.O. 1002; Car Distribution Direction 91, Amdt. 2, Baltimore & O. R. Co. and Pittsburg & S. R. Co., car distribution, extends expiration date of Car Distribution Direction 91, effective two days after date of order.

35 FR 17380, Nov. 11, 1970: Rev. S.O. 1002; Rev. Car Distribution Direction 91, Baltimore & O. R. Co. and Pittsburgh & S. R. Co. car distribution, effective Nov. 8, 1970.

33 FR 9569, June 29, 1968: S.O. 994; I.C.C. Order 4, Amdt. 3 (Chicago, B. & Q. R. Co.), rerouting and diversion of traffic, expiration date of ICC Order 4 extended to Dec. 31, 1968, effective June 30, 1968.

33 FR 10610, July 25, 1968: S.O. 994; I.C.C. Order 13, St. Louis Southwestern Ry., rerouting and diversion of traffic, effective on date of order.

33 FR 10772, July 27, 1968: S.O. 994; I.C.C. Order 12, Amdt. 1 (New York, S. & W. R. Co.), rerouting and diversion of traffic, extends expiration date of ICC Order 12 to Oct. 31, 1968, effective July 31, 1968.

33 FR 11620, Aug. 15, 1968: S.O. 994; I.C.C. Order 14, Amdt. 1 (Belt Ry. Co. of Chicago) rerouting or diversion of traffic, extends expiration date of ICC Order 14, effective on date of order.

33 FR 11731, Aug. 17, 1968: S.O. 944; I.C.C. Order No. 15, Ann Arbor R. Co., rerouting or diversion of traffic because of work stoppage, effective on date of order.

33 FR 11866, Aug. 21, 1968: S. O. 944; I.C.C. Order 11, Amdt. 1 (New York, N.H. & H. R. Co.) rerouting or diversion of traffic, extends expiration date of I.C.C. Order 11 to Dec. 31, 1968, effective Aug. 31, 1968.

33 FR 12153, Aug. 28, 1968: S. O. 944; I.C.C. Order 14, Amdt. 2 (Belt Ry. Co. of Chicago) rerouting and diversion of traffic, extends expiration date of I.C.C. Order 14, effective on day after date of order.

33 FR 12873, Sept. 11, 1968: S.O. 944; I.C.C. Order 14, Amdt. 3 (Belt Ry. Co. of Chicago) rerouting or diversion of traffic, further extends expiration date of I.C.C. Order 14, effective on date of order.

33 FR 14434, Sept. 25, 1968: S. O. 994; I.C.C. Order 16, Penn Central rerouting and diversion of traffic, effective Sept. 19, 1968.

33 FR 14744, Oct. 2, 1968; S. O. 994; I.C.C. Order 14, Amdt. 4, Belt R. Co. of Chicago rerouting and diversion of traffic, extends expiration date of I.C.C. Order 14.

33 FR 15731, Oct. 24, 1968: S.O. 994; I.C.C. Order 12, Amdt. 2, New York, S. & W. R. Co. rerouting and diversion of traffic, extends expiration date of ICC Order 12, effective Oct. 31, 1968.

33 FR 15731, Oct. 24, 1968: S.O. 994; I.C.C. Order 16, Amdt. 1, Penn Central rerouting and diversion of traffic, extends expiration date of ICC Order 16, effective Oct. 25, 1968.

33 FR 16104, Nov. 1, 1968: S.O. 994; I.C.C. Order 14, Amdt. 5, Belt Ry. Co. of Chicago, rerouting and diversion of traffic, extends expiration date of I.C.C. Order 14 until Nov. 30, 1968, effective Oct. 31, 1968.

33 FR 16544, Nov. 13, 1968: S.O. 994; I.C.C. Order 17, Louisville & N. R. Co., rerouting and diversion of traffic, due to work stoppage by certain employees, effective on date of order.

33 FR 16618, Nov. 14, 1968: S. O. 944; I.C.C. Order No. 17-A vacates and sets aside I.C.C. Order No. 17 (Louisville & N. R. Co.), rerouting and diversion of traffic, effective on date of order.

33 FR 16678, Nov. 15, 1968: S. O. 944; I.C.C. Order No. 14-A, vacates and sets aside I.C.C. Order No. 14 (Belt Ry. Co. of Chicago), rerouting and diversion of traffic, effective on date or order.

33 FR 19097, Dec. 21, 1968: S.O. 994; I.C.C. Order 4 (Chicago B. & Q. Ry. Co.), Amdt. 4, rerouting and diversion of traffic, extends expiration date of I.C.C. Order 4, effective Dec. 31, 1968.

33 FR 19097, Dec. 21, 1968: S. O. 994; I.C.C. Order 1, Amdt. 4 (Chicago, R.I. & P. R. Co.) rerouting and diversion of traffic, extends expiration date of ICC Order 1, effective Dec. 31, 1968.

33 FR 19097, Dec. 21, 1968: S.O. 994; I.C.C. Order 11, Amdt. 2 (New York, N.H. & H. R. Co.) rerouting and diversion of traffic, extends expiration date of ICC Order 11, effective Dec. 31, 1968.

33 FR 19097, Dec. 21, 1968: S. O. 994; I.C.C. Order 12, Amdt. 3 (New York, S. & W. R. Co.) rerouting and diversion of traffic, extends expiration date of ICC Order 12, effective Dec. 31, 1968.

33 FR 19098, Dec. 21, 1968: S. O. 994; I.C.C. Order 16, Amdt. 2 (Penn Central) rereouting and diversion of traffic, extends expiration date of ICC Order 16, effective Dec. 31, 1968.

34 FR 781, Jan. 17, 1969: S. O. 994; I.C.C. Order No. 18, Penn Central Co. and Soo Line R. Co., rerouting and diversion of traffic, effective on date of order.

34 FR 1190, Jan. 24, 1969: S. O. 994; I.C.C. Order No. 18-A (Penn Central Co. and Soo Line R. Co., rerouting traffic), vacates and sets aside I.C.C. Order 18, effective on date of order.

34 FR 5355, March 18, 1969: S. O. 994; I.C.C. Order No. 19, Louisville & N. R. Co. and Birmingham Southern R. Co., rerouting or diversion of traffic, effective March 17, 1969.

34 FR 5468, March 20, 1969: S. O. 994; I.C.C. Order No. 4-A (Chicago, B. & Q. R. Co., rerouting or diversion of traffic), vacates and sets aside I.C.C. Order 4, effective Mar. 13, 1969.

34 FR 5619, March 25, 1969: S. O. 994; I.C.C. Order 12, Amdt. 4 (New York, S. & W. R. Co., rerouting or diversion of traffic), extends expiration date of I.C.C. Order 12, effective March 31, 1969.

34 FR 6614, Apr. 17, 1969: S. O. 994; I.C.C. Order 20, Illinois Central R. Co., rerouting and diversion of traffic, effective on date of order.

34 FR 6671, Apr. 18, 1969: S. O. 994; I.C.C. Order 20-A, Illinois Central R. Co., rerouting or diversion, vacates and sets aside ICC Order 20, effective on date of order.

34 FR 6671, Apr. 18, 1969: S. O. 994; I.C.C. Order 21, Certain Railroads, rerouting or diversion of traffic, effective on date of order.

34 FR 7559, May 9, 1969: S.O. 994; I.C.C. Order 22, St. Johnsbury & Lamoille County R., rerouting traffic in vicinity of Danville, Vt., effective on date of order.

34 FR 8007, May 21, 1969: S.O. 994; I.C.C. Order No. 23, Southern Ry. Co., rerouting and diversion of traffic because of bridge damage, effective on date of order.

34 FR 8217, May 27, 1969: S.O. 994; I.C.C. Order 24, Southern Ry. Co., rerouting and diverting of traffic in vicinity of Demopolis, Ala., effective on date of order.

34 FR 8264, May 28, 1969: S.O. 994; I.C.C. Order No. 24-A, Southern Ry. Co., rerouting of traffic, vacates I.C.C. Order 24, effective on date of order.

34 FR 9045, June 6, 1969: S.O. 994; I.C.C. Order No. 25, Louisville & N. R. Co., rerouting or diversion of traffic, effective on date of order.

34 FR 9733, June 21, 1969: S.O. 994; I.C.C. Order 25-A, Louisville & N. R. Co., rerouting and diversion of traffic, vacates and sets aside I.C.C. Order 25, effective on date of order.

34 FR 11126, July 1, 1969: S.O. 994; I.C.C. Order 26, Atchison, T. & S.F. Ry. Co., rerouting or diversion of traffic, effective on date of order.

34 FR 11127, July 1, 1969: S.O. 994; I.C.C. Order 12, Amdt. 5, New York, S. & W. R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 12, effective June 30, 1969.

34 FR 11127, July 1, 1969: S.O. 994; I.C.C. Order 16, Amdt. 3, Penn Central rerouting or diversion of traffic, extends expiration date of I.C.C. Order 16, effective June 30, 1969.

34 FR 11341, July 8, 1969: S. O. 994; I.C.C. Order 27, St. Louis-S.F. Ry. Co., rerouting or diversion of traffic into Clinton, Mo., effective on date of order.

34 FR 11341, July 8, 1969: S. O. 994; I.C.C. Order 28, Missouri-K.-T. R. Co., rerouting or diversion of traffic, due to bridge damage, effective on date of order.

34 FR 11457, July 10, 1969: S. O. 994; I.C.C. Order 29, Missouri-K.-T. R. Co., rerouting or diversion of traffic, effective on date of order.

34 FR 12147, July 19, 1969: S. O. 994; I.C.C. Order 30, Chicago, R. I. & P. R. Co., rerouting or diversion of traffic because of track damage, effective on date of order.

34 FR 12243, July 24, 1969: S. O. 994; I.C.C. Order 31, Chicago & N. W. Ry. Co., rerouting and diversion of traffic because of damage to car-ferry slip, effective on date of order.

34 FR 12472, July 30, 1969: S. O. 994; I.C.C. Order 31-A, Chicago & N.W. Ry. Co., rerouting and diversion of traffic, vacates I.C.C. Order 31, effective on date of order.

34 FR 12547, July 31, 1969: S. O. 994; I.C.C. Order 26, Atchison, T. & S. F. Ry. Co., diversion or rerouting of traffic, Amdt. 1 extends expiration date of I.C.C. Order 26, effective July 31, 1969.

34 FR 13396, Aug. 19, 1969: S. O. 994; I.C.C. Order 32, Ann Arbor R. Co., rerouting or diversion of traffic, effective on date of order.

34 FR 13396, Aug. 19, 1969: S. O. 994; Corrected I.C.C. Order 32, Ann Arbor R. Co., rerouting or diversion of traffic, effective on date of order.

34 FR 13713, Aug. 27, 1969: S. O. 994; I.C.C. Order No. 33, Chesapeake & O. Ry. Co., rerouting and diversion of traffic in Virginia because of floods, effective on date of order.

34 FR 13713, Aug. 27, 1969: S.O. 994; I.C.C. Order No. 34, Norfolk & W. Ry. Co., rerouting or diversion of traffic in Virginia because of floods, effective on date of order.

34 FR 13892, Aug. 29, 1969: S.O. 994; I.C.C. Order No. 35, Illinois Central R. Co. and Missouri Pac. R. Co., rerouting and diversion of traffic because of barge out of service, effective on date of order.

34 FR 13958, Aug. 30, 1969: S.O. 994; I.C.C. Order 30, Amdt. 1, Chicago, R.I. & P. R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 30, effective Aug. 31, 1969.

34 FR 13597, Aug. 30, 1969: S.O. 994; I.C.C. Order 33, Amdt. 1, Chesapeake & O. Ry. Co., rerouting or diversion of traffic, extends expiration date of ICC Order 33, effective Aug. 28, 1969.

34 FR 14016, Sept. 3, 1969: S.O. 994; I.C.C. Order No. 36, Louisville & N. R. Co., rerouting traffic because of bridge damage, effective on date of order.

34 FR 14043, Sept. 4, 1969: S.O. 994; I.C.C. Order 32-A, vacates and sets aside ICC Order No. 32 (Ann Arbor R.), effective Aug. 31, 1969.

34 FR 14044, Sept. 4, 1969: S.O. 994; I.C.C. Order No. 37, Illinois Central R. Co., rerouting or diversion of traffic via port of Gulfport, Miss., because of hurricane damage, effective on date of order.

34 FR 14564, Sept. 18, 1969: S.O. 994; I.C.C. Order 36, Amdt. 1, Louisville & N. R. Co., rerouting or diversion of traffic, extends expiration date of ICC Order 36, effective on late of order.

34 FR 14801, Sept. 25, 1969: S.O. 994; I.C.C. Order No. 19, Amdt. 1, Louisville & N. N. Co., rerouting or diversion of traffic, extends expiration date of ICC Order 19, effective Sept. 30, 1969.

34 FR 14869, Sept. 26, 1969: S.O. 994; I.C.C. Order No. 12, Amdt. 6, New York, S. & W. R. Co., rerouting or diversion of traffic, extends expiration date of ICC Order 12, effective Sept. 30, 1969.

34 FR 14869, Sept. 26, 1969: S.O. 994; I.C.C. Order No. 38, Missouri-K.-T. R. Co., rerouting or diversion of traffic because of flood damage, effective on date of order.

34 FR 15279, Sept. 30, 1969: S.O. 994; I.C.C. Order 26, Amdt. 2, Atchison, T. & S. F. Ry. diversion or rerouting of traffic, extends expiration date of ICC Order 26, effective Sept. 30, 1969.

34 FR 15280, Sept. 30, 1969: S.O. 994; I.C.C. Order 35, Amdt. 1, Illinois Central R. and Missouri Pac. R. diversion or rerouting of traffic, extends expiration date of ICC Order 35, effective Sept. 30, 1969.

34 FR 19173, Dec. 3, 1969: S.O. 994; I.C.C. Order 30, Amdt. 3, further extends expiration date of I.C.C. Order 30 (Chicago, R.I. & P. R. Co.), effective Nov. 30, 1969.

34 FR 19936, Dec. 19, 1969: S.O. 994; I.C.C. Order 12, Amdt. 7, New York, S. & W. Ry. Co., rerouting or diversion of traffic, extends expiration date of ICC Order 12, effective Dec. 31, 1969.

34 FR 19936, Dec. 19, 1969: S.O. 994; I.C.C. Order 16, Amdt. 4, Penn Central rerouting or diversion of traffic, extends expiration date of ICC Order 16, effective Dec. 31, 1969.

34 FR 19935, Dec. 19, 1969: S.O. 994; I.C.C. Order 19, Amdt. 2, Louisville & N. R. Co. and Southern R. Co. rerouting or diversion of traffic, extends expiration date of ICC Order 19, effective Dec. 31, 1969.

34 FR 19935, Dec. 19, 1969: S.O. 994; I.C.C. Order 26, Amdt. 3, Atchison, T. & S. F. Ry. Co. rerouting or diversion of traffic, extends expiration date of ICC Order 26, effective Dec. 31, 1969.

34 FR 19935, Dec. 19, 1969: S.O. 994; I.C.C. Order 30, Amdt. 4, Chicago, R. I. & P. R. Co. rerouting or diversion of traffic, extends expiration date of ICC Order 30, effective Dec. 31, 1969.

34 FR 19935, Dec. 19, 1969: S.O. 994; I.C.C. Order 35, Amdt. 2, Illinois Central R. and Missouri Pac. R. Co. rerouting or diversion of traffic, extends expiration date of ICC Order 35, effective Dec. 31, 1969.

34 FR 20451, Dec. 31, 1969: S.O. 994; I.C.C. Order 39, Chicago & N.W. Ry. Co., rerouting or diversion of traffic, due to bridge damage, effective on date of order.

35 FR 1211, Jan. 29, 1970: S.O. 994; I.C.C. Order 40, Chesapeake & O. Ry. Co., rerouting or diversion of traffic in Buffalo, N.Y. area, effective on date of order.

35 FR 3095, Feb. 17, 1970: S.O. 994; I.C.C. Order 40, Amdt. 1, Chesapeake & O. Ry. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 40, effective Feb. 14, 1970.

35 FR 3779, Feb. 26, 1970: S.O. 994; I.C.C. Order No. 41, Ann Arbor R., rerouting of car-ferry traffic, effective on date of order.

35 FR 3863, Feb. 27, 1970: S.O. 994; I.C.C. Order 35-A, Illinois Central R. Co. and Missouri Pac. R. Co., rerouting or diversion of traffic, vacates ICC Order 35, effective Feb. 25, 1970.

35 FR 4100, Mar. 4, 1970: S.O. 994; I.C.C. Order 40, Amdt. 2, Chesapeake & O. Ry. rerouting or diversion of traffic, extends expiration date of ICC Order 40, effective Feb. 28, 1970.

35 FR 4804, March 19, 1970: S.O. 994; I.C.C. Order 40, Amdt. 3, Chesapeake & O. Ry. Co., rerouting or diversion of traffic, further extends expiration date of ICC Order 40, effective March 15, 1970.

35 FR 4892, March 20, 1970: S.O. 944; I.C.C. Order 42, Chesapeake & O. Ry. Co., rerouting or diversion of traffic because of bridge damage, effective day after date of order.

35 FR 5204, Mar. 27, 1970: S.O. 944; I.C.C. Order 43, Frankfort & C. R. Co., rerouting or diversion of traffic because of unsafe track and roadbed, effective day after date of order.

35 FR 5384, Mar. 31, 1970: S.O. 944; I.C.C. Order 30, Amdt. 5, Chicago, R.I. & P. R. Co., rerouting or diversion of traffic, extends expiration date of ICC Order 30, effective Mar. 31, 1970.

35 FR 5453, Apr. 1, 1970: S.O. 994; I.C.C. Order 26, Amdt. 4, Atchison, T. & S. F. Ry. Co., rerouting or diversion of traffic, extends expiration date of ICC Order 26, effective Mar. 31, 1970.

35 FR 5575, Apr. 3, 1970: S.O. 994; I.C.C. Order 12, Amdt. 8, New York, S. & W. R. Co., rerouting or diversion of traffic, extends expiration date of ICC Order 12, effective day after date of order.

35 FR 5853, Apr. 9, 1970: S.O. 994; I.C.C. Order 44, Chesapeake & O. Ry. Co., rerouting or diversion of traffic in Buffalo, N.Y., area, effective Apr. 5, 1970.

35 FR 6411, Apr. 21, 1970: S.O. 994; I.C.C. Order 44-A, Chesapeake & O. Ry. Co., rerouting or diversion of traffic, vacates ICC Order 44, effective Apr. 17, 1970.

35 FR 6738, Apr. 28, 1970: S.O. 994; I.C.C. Order 45, Missouri-K.-T. R. Co., rerouting or diversion of traffic because of floods, effective on date of order.

35 FR 7099, May 5, 1970: S. O. 994; I.C.C. Order 39, Amdt. 1, Chicago & N.W. Ry. Co., rerouting or diversion of traffic, extends expiration date of ICC Order 39, effective day after date of order.

35 FR 8002, May 23, 1970: S.O. 994; I.C.C. Order 46, Railroads Serving Peoria, Ill., rerouting or diversion of traffic, effective on date of order.

35 FR 8775, June 5, 1970: S.O. 994; I.C.C. Order 47, Chicago, R.I. & P. R. Co., rerouting or diversion of traffic on account of track damage caused by floods, effective on date of order.

35 FR 10476, June 26, 1970: S.O. 994; I.C.C. Order 19, Amdt. 3, Louisville & N. R. and Birmingham Southern R., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 19, effective June 30, 1970.

35 FR 10541, June 27, 1970: S.O. 994; I.C.C. Order 16, Amdt. 3, Penn Central rerouting or diversion of traffic, extends expiration date of I.C.C. Order 16, effective June 30, 1970.

35 FR 10631, June 30, 1970: S.O. 994; I.C.C. Order 12, Amdt. 9, New York, S. & W. R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 12, effective June 30, 1970.

35 FR 10631, June 30, 1970: S.O. 994; I.C.C. Order 26, Amdt. 5, Atchison, T. & S.F. Ry. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 26, effective June 30, 1970.

35 FR 10714, July 1, 1970: S.O. 994; I.C.C. Order 43, Amdt. 1, Frankfort & Cincinnati R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 43, effective June 30, 1970.

35 FR 11208, July 11, 1970: Rev. S.O. 994; I.C.C. Order 48 Railroads unable to transport traffic because of work stoppage, rerouting or diversion of traffic, effective on date of order.

35 FR 11209, July 11, 1970: Rev. S.O. 994; I.C.C. Order 48-A (railroads unable to transport traffic because of work stoppage) rerouting or diversion of traffic, vacates ICC Order 48, effective on date of order.

35 FR 12446, Aug. 4, 1970: Rev. S.O. 994; I.C.C. Order 39, Amdt. 2, Chicago & N.W. Ry. Co. rerouting or diversion of traffic, extends expiration date of I.C.C. Order 39, effective day after date of order.

35 FR 12446, Aug. 4, 1970: Rev. S.O. 994; I.C.C. Order 47, Amdt. 1, Chicago, R.I. & P. R. Co. rerouting or diversion of traffic, extends expiration date of I.C.C. Order 47, effective day after date of order.

35 FR 13810, Aug. 29, 1970: S. O. 994; I.C.C. Order 43, Amdt. 2 (Frankfort & Cincinnati R. Co.), rerouting or diversion of traffic, extends expiration date of I.C.C. Order 43, effective Aug. 31, 1970.

35 FR 15265, Sept. 30, 1970: S.O. 994; I.C.C. Order 12, Amdt. 10 (New York, S. & W. R. Co.), rerouting or diversion of traffic, extends expiration date of I.C.C. Order 12, effective Sept. 30, 1970.

35 FR 15265, Sept. 30, 1970: S.O. 994; I.C.C. Order 26, Amdt. 6 (Atchison, T. & S.F. Ry. Co.), rerouting or diversion of traffic, extends expiration date of I.C.C. Order 26, effective Sept. 30, 1970.

35 FR 15459, Oct. 3, 1970: S. O. 994; I.C.C. Order No. 16, Amdt. 6, Penn Central Transp. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 16, effective Sept. 30, 1970.

35 FR 15459, Oct. 3, 1970: Rev. S. O. 994; I.C.C. Order No. 49, Penn Central Transp. Co., rerouting or diversion of traffic because of fire damage to Ogdensburg, N.Y., ferry slip, effective Sept. 29, 1970.

35 FR 16662, Oct. 27, 1970: S. O. 994; I.C.C. Order No. 39, Amdt. 3, Chicago & N. W. Ry. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 39, effective Oct. 31, 1970.

35 FR 16775, Oct. 29, 1970: S. O. 994; I.C.C. Order No. 47, Amdt. 2, Chicago, R.I. & P. R. Co., rerouting or diversion of traffic, car distribution, extends expiration date of I.C.C. Order 39, effective Oct. 31, 1970.

35 FR 16880, Oct. 31, 1970: S. O. 994; I.C.C. Order 43, Amdt. 3, Frankfort & C. R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 43, effective Oct. 31, 1970.

35 FR 16967, Nov. 3, 1970: S. O. 994; I.C.C. Order No. 50, Sabine River & N. Ry., rerouting or diversion of traffic because of track damage, effective on date of order.

35 FR 19158, Dec. 17, 1970: S. O. 994; I.C.C. Order 26, Amdt. 7, Atchison, T. & S.F. Ry. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 26, effective Dec. 31, 1970.

35 FR 19222, Dec. 18, 1970: S. O. 994: I.C.C. Order 12, Amdt. 11, New York, S. & W. R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 12, effective Dec. 31, 1970.

35 FR 19645, Dec. 25, 1970: Rev. S. O. 994; I.C.C. Order 19, Amdt. 4, Louisville & N. R. and Birmigham Southern R., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 19, effective Dec. 31, 1970.

35 FR 19645, Dec. 25, 1970: Rev. S. O. 994; I.C.C. Order 39, Amdt. 4, Chicago & N.W. Ry. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 39, effective Dec. 31, 1970.

35 FR 19645, Dec. 25, 1970: Rev. S. O. 994; I.C.C. Order 43, Amdt. 4, Frankfort & C. R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 43, effective Dec. 31, 1970.

35 FR 19645, Dec. 25, 1970: Rev. S. O. 994; I.C.C. Order 47, Amdt. 3, Chicago, R.I. & P. R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 47, effective Dec. 31, 1970.

35 FR 19728, Dec. 29, 1970: Rev. S. O. 994; I.C.C. Order 16, Amdt. 7, Penn Central, rerouting and diversion of traffic, extends expiration date of I.C.C. Order 16, effective Dec. 31, 1970.

35 FR 19728, Dec. 29, 1970: Rev. S. O. 994; I.C.C. Order 49, Amdt. 1, Penn Central Transp. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 49, effective Dec. 31, 1970.

36 FR 3027, Feb. 13, 1971: Rev. S. O. 994; I.C.C. Order 51, Grand Trunk Western R. Co., rerouting or diversion of traffic because of ice conditions, effective on date of order.

36 FR 3402, Feb. 23, 1971: Rev. S.O. 994; I.C.C. Order 51-A, Grand Truck Western R. Co., rerouting or diversion of traffic, vacates and sets aside ICC Order 51, effective on date of order.

36 FR 3300, Feb. 20, 1971: Rev. S. O. 994; I.C.C. Order 52, Chesapeake & O. Ry. Co., rerouting or diversion of traffic because of bridge damage, effective on date of order.

36 FR 3559, Feb. 26, 1971: Rev. S. O. 994; I.C.C. Order 52, Amdt. 1, Chesapeake & O. Ry. Co. rerouting or diversion of traffic, extends expiration date of I.C.C. Order 52, effective Feb. 28, 1971.

36 FR 4527, Mar. 6, 1971: Rev. S. O. 994; I.C.C. Order 53, St. Louis-S.F. Ry. Co., rerouting or diversion of traffic, effective on date of order.

36 FR 4527, Mar. 6, 1971: Rev. S. O. 994; I.C.C. Order 54, Grand Trunk Western R. Co., rerouting or diversion of traffic, effective on date of order.

36 FR 4578, Mar. 9, 1971: Rev. S. O. 994; I.C.C. Order 54-A, Grand Trunk Western R. Co., vacates and sets aside I.C.C. Order 54, effective on date of order.

36 FR 5950, Mar. 31, 1971: Rev. S. O. 994; I.C.C. Order 55, Central R. Co. of New Jersey, rerouting or diversion of traffic, effective on date of order.

36 FR 6053, April 1, 1971: Rev. S. O. 994; I.C.C. Order 16, Amdt. 8, Penn Central Transp. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 16, effective Mar. 31, 1971.

36 FR 6053, April 1, 1971: Rev. S. O. 994; I.C.C. Order 49, Amdt. 2, Penn Central Transp. Co., rerouting of diversion of traffic, extends expiration date of I.C.C. Order 49, effective Mar. 31, 1971.

36 FR 6124, April 2, 1971: Rev. S. O. 994; I.C.C. Order 12, Amdt. 12, New York, S. & W. R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 12, effective Mar. 31, 1971.

36 FR 6124, April 2, 1971; Rev. S.O. 994; I.C.C. Order 43, Amdt. 5, Frankfort & C. R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 43, effective Mar. 31, 1971.

36 FR 6124, April 2, 1971: Rev. S.O. 994; I.C.C. Order 47, Amdt. 4, Chicago, R.I. & P. R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 47, effective Mar. 31, 1971.

36 FR 6467, April 3, 1971: Rev. S.O. 994; I.C.C. Order 39, Amdt. 5, Chicago & N.W. Ry. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 39, effective Mar. 31, 1971.

36 FR 7769, Apr. 24, 1971: Rev. S.O. 994; I.C.C. Order 55, Amdt. 1, Central R. Co. of New Jersey, rerouting or diversion of traffic, extends expiration date of I.C.C. Order 55, effective Apr. 23, 1971.

36 FR 11259, June 10, 1971: Rev. S.O. 994; I.C.C. Order 57, Penn Central Transp. Co., rerouting or diversion of traffic, effective on date of order.

36 FR 1205, June 24, 1971: Rev. S.O. 994; I.C.C. Order 26, Amdt. 8, Atchison, T. & S.F. Ry. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 26, effective June 30, 1971.

36 FR 12152, June 25, 1971: Rev. S.O. 994; I.C.C. Order 12, Amdt. 13, New York, S. & W. R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 12, effective June 30, 1971.

36 FR 12152, June 25, 1971: Rev. S.O. 994; I.C.C. Order 47, Amdt. 5, Chicago, R.I. & P. R. Co., rereouting or diversion of traffic, extends expiration date of I.C.C. Order 47, effective June 30, 1971.

36 FR 12153, June 25, 1971: Rev. S.O. 994; I.C.C. Order 56, Amdt. 1, Penn Central Transp. Co. and Soo Line R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 56, effective June 30, 1971.

36 FR 12152, June 25, 1971: Rev. S.O. 994; I.C.C. Order 57, Amdt. 1, Penn Central Transp. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 57, effective June 30, 1971.

36 FR 12716, July 3, 1971: Rev. S.O. 994; I.C.C. Order 58, Grand Trunk Western R. Co., rerouting or diversion of traffic because of threatened work stoppage, effective on date of order.

36 FR 12716, July 3, 1971: Rev. S.O. 994; I.C.C. Order 58-A, Grand Trunk Western R. Co., rerouting or diversion of traffic, vacates and sets aside I.C.C. Order 58, effective on date of order.

36 FR 13414, July 21, 1971: Rev. S.O. 994; I.C.C. Order 59, Certain Railroads authorized to reroute or divert traffic because of work stoppage by their operating employees, effective on date of order.

36 FR 13716, July 23, 1971: Rev. S.O. 994; I.C.C. Order 56-A, Penn Central Transp. Co., et al., rerouting or diversion of traffic, vacates I.C.C. Order No. 56, effective on date of order.

36 FR 14290, Aug. 3, 1971: Rev. S.O. 994; I.C.C. Order 59, Amdt. 1, Certain railroads authorized to reroute or divert traffic because of work stoppage, extends expiration date of I.C.C. Order 59, effective July 31, 1971.

36 FR 14431, Aug. 5, 1971: Rev. S.O. 994; I.C.C. Order 57, Amdt. 2, Penn Central Transp. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 57, effective day after date of order.

36 FR 14528, Aug. 6, 1971: Rev. S.O. 994; I.C.C. Order 59-A, Certain railroads, rerouting or diversion of traffic, vacates and sets aside I.C.C. Order 59, effective on date of order.

36 FR 16223, Aug. 20, 1971: Rev. S.O. 994; I.C.C. Order 60, Canadian National Rys. et al., rerouting or diversion of traffic, effective on date of order.

36 FR 16224, Aug. 20, 1971: Rev. S.O. 994; I.C.C. Order 60-A, Canadian National Rys., rerouting or diversion of traffic, vacates and sets aside I.C.C. Order 60, effective on date of order.

36 FR 17614, Sept. 2, 1971: Rev. S. O. 994; I.C.C. Order 57, Amdt. 3, Penn Central Transp. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 57, effective Aug. 31, 1971.

36 FR 17903, Sept. 4, 1971: Rev. S. O. 994; I.C.C. Order 61, New York, S. & W. R. Co., rerouting or diversion of traffic because of floods and track damage, effective on date of order.

36 FR 18917, Sept. 23, 1971: Rev. S. O. 994; I.C.C. Order 61, Amdt. 1, New York, S. & W. R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 61, effective Sept. 24, 1971.

36 FR 18992, Sept. 24, 1971: Rev. S. O. 994; I.C.C. Order 54, Amdt. 4, Penn Central Transp. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 54, effective Sept. 30, 1971.

36 FR 19468, Oct. 6, 1971: Rev. S.O. 994; I.C.C. Order 26, Amdt. 10, Atchison, T. & S. F. Ry. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 26, effective day after date of order.

36 FR 19468, Oct. 6, 1971: Rev. S.O. 994; I.C.C. Order 16, Amdt. 9, Penn Central, rerouting or diversion of traffic, extends expiration date of I.C.C. Order 16, effective two days after date of order.

36 FR 19468, Oct. 6, 1971: Rev. S.O. 994; I.C.C. Order 49, Amdt. 3, Penn Central Transportation Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 49, effective two days after date of order.

36 FR 19051, Sept. 25, 1971: Rev. S.O. 994; I.C.C. Order 39, Amdt. 6, Chicago & N.W. Ry. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 39, effective Sept. 30, 1971.

36 FR 21014, Nov. 2, 1971: Rev. S. O. 994; I.C.C. Order 61, Amdt. 2, New York, S. & W. R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 61, effective Oct. 31, 1971.

36 FR 21313, Nov. 5, 1971: Rev. S. O. 994; I.C.C. Order 57, Amdt. 5, Penn Central Transp. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 57, effective Oct. 31, 1971.

36 FR 21389, Nov. 6, 1971: Rev. S. O. 994; I.C.C. Order 62, Chesapeake & O. Ry. Co., rerouting or diversion of traffic, effective day after date of order.

36 FR 21772, Nov. 13, 1971: Rev. S. O. 994; I.C.C. Order 63, Louisville & N. R. Co. and Birmingham S. R. Co., rerouting and diversion of traffic, effective Nov. 15, 1971.

36 FR 23422, Dec. 9, 1971: Rev. S. O. 944; I.C.C. Order 62-A, Chesapeake & O. Ry. Co., rerouting or diversion of traffic, vacates and sets aside I.C.C. Order 62, effective Dec. 7, 1971.

36 FR 24247, Dec. 22, 1971: Rev. S.O. 994; I.C.C. Order No. 12, Amdt. 14, New York, S. & W. Ry. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order No. 12, effective Dec. 31, 1971.

36 FR 24247, Dec. 22, 1971: Rev. S.O. 994; I.C.C. Order No. 16, Amdt. 10, Penn Central, rerouting or diversion of traffic, extends expiration date of I.C.C. Order 10, effective Dec. 31, 1971.

36 FR 24246, Dec. 22, 1971: Rev. S.O. 994; I.C.C. Order No. 26, Amdt. 11, Atchison, T. & S.F. Ry. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 26, effective Dec. 31, 1971.

36 FR 24247, Dec. 22, 1971: Rev. S.O. 994; I.C.C. Order No. 47, Amdt. 6, Whicago, R. I. & P. R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 47, effective Dec. 31, 1971.

36 FR 24247, Dec. 22, 1971: Rev. S.O. 994; I.C.C. Order No. 49, Amdt. 4, Penn Central Transp. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 49, effective Dec. 31, 1971.

36 FR 24247, Dec. 22, 1971: Rev. S.O. 994; I.C.C. Order No. 57, Amdt. 6, Penn Central Transp. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 57, effective Dec. 31, 1971.

36 FR 24248, Dec. 22, 1971: Rev. S.O. 994; I.C.C. Order No. 61, Amdt. 3, Susquehanna & W. R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 61, effective Dec. 31, 1971.

36 FR 24247, Dec. 22, 1971: Rev. S.O. 994; I.C.C. Order No. 63, Amdt. 1, Louisville & N. R. Co. and Birmingham S. R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 63, effective Dec. 31, 1971.

37 FR 831, Jan. 19, 1972: Rev. S.O. 994; I.C.C. Order No. 64, Baltimore & O. R. Co., rerouting or diversion of certain traffic (restrictive clearances), effective on date of order.

37 FR 4759, March 4, 1972: Rev. S. O. 994; I.C.C. Order No. 65, Illinois Central R. Co., rerouting or diversion of traffic because of bridge damage, effective on date of order.

37 FR 5423, March 15, 1972: Rev. S.O. 944; I.C.C. Order No. 66, Missouri Pac. R. Co., rerouting or diversion of traffic because of bridge damage, effective on date of order.

37 FR 6434, March 29, 1972: Rev. S.O. 994; I.C.C. Order 39, Amdt. 7, Chicago & N.W. Ry. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 39, effective March 31, 1972.

37 FR 6434, March 29, 1972: Rev. S.O. 994; I.C.C. Order 47, Amdt. 7, Chicago, R.I. & P. R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 47, effective March 31, 1972.

37 FR 6532, March 30, 1972: Rev. S.O. 994; I.C.C. Order 61, Amdt. 4, New York, S. & W. R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 61, effective March 31, 1972.

37 FR 6532, March 30, 1972: Rev. S.O. 994; I.C.C. Order 65, Amdt. 1, Illinois Central R. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 65, effective March 31, 1972.

37 FR 6721, Apr. 1, 1972: Rev. S.O. 994; I.C.C. Order 67, Central R. Co. of New Jersey, rerouting or diversion of traffic in Pennsylvania via Lehigh Valley R., effective Apr. 1, 1972.

37 FR 6908, Apr. 5, 1972: Rev. S.O. 994; I.C.C. Order 57, Amdt. 7, Penn Central Transp. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 57, effective Mar. 31, 1972.

37 FR 7041, Apr. 7, 1972: Rev. S.O. 994; Supplemental I.C.C. Order 67 (clarifying intent as to interchange), Central R. Co. of New Jersey, rerouting or diversion of traffic, effective Apr. 1, 1972.

37 FR 7414, Apr. 14, 1972: Rev. S.O. 994; I.C.C. Order 26-A, Atchison, T. & S.F. Ry., rerouting or diversion of traffic, vacates and sets aside I.C.C. Order 26, effective on date of order.

37 FR 8140, Apr. 25, 1972: Rev. S.O. 994; I.C.C. Order 63, Louisville & N. R. Co. and Birmingham Southern R. Co., rerouting or diversion of traffic, Amdt. 2 extends expiration date of I.C.C. Order 63, effective Apr. 31, 1972.

37 FR 9656, May 13, 1972: Rev. S.O. 994; I.C.C. Order 47-A, Chicago, R.I. & P. R. Co., rerouting or diversion of traffic, vacates and sets aside I.C.C. Order 47, effective on date of order.

37 FR 11094, June 2, 1972: Rev. S.O. 994; I.C.C. Order 65, Illinois Central R. Co., rerouting or diversion of traffic, Amdt. 2 extends expiration date of I.C.C. Order 65, effective May 31, 1972.

37 FR 11517, June 8, 1972: Rev. S.O. 994; I.C.C. Order 68, Central R. Co. of New Jersey, rerouting or diversion of traffic to, from, or through Pennsylvania via Lehigh Valley, effective on date of order.

37 FR 12531, June 24, 1972: Rev. S.O. 994; I.C.C. Order 16, Penn Central Transp. Co., rerouting or diversion of traffic, Amdt. 11 extends expiration date of I.C.C. Order 16, effective June 30, 1972.

37 FR 12531, June 24, 1972: Rev. S.O. 994; I.C.C. Order 49, Penn Central Transp. Co., rerouting or diversion of traffic, Amdt. 5 extends expiration date of I.C.C. Order 49, effective June 30, 1972.

37 FR 12531, June 24, 1972: Rev. S.O. 994; I.C.C. Order 57, Penn Central Transp. Co., rerouting or diversion of traffic, Amdt. 8 extends expiration date of I.C.C. Order 57, effective June 30, 1972.

37 FR 12531, June 24, 1972: Rev. S.O. 994; I.C.C. Order 61, Susquehanna & W. R. Co., rerouting or diversion of traffic, Amdt. 5 extends expiration date of I.C.C. Order 61, effective June 30, 1972.

37 FR 13388, July 7, 1972: Rev. S.O. 994; I.C.C. Order 68, Central R. Co. of New Jersey rerouting or diversion of traffic, Amdt. 1, extends expiration date of I.C.C. Order 68, effective July 3, 1972.

37 FR 13388, July 7, 1972: Rev. S.O. 994; I.C.C. Order 71, Railroads Operating in Certain States, rerouting or diversion of traffic, Amdt. 1 extends expiration date of I.C.C. Order 71, effective on date of order.

37 FR 15408, Aug. 1, 1972: Rev. S.O. 994; I.C.C. Order 69, Chicago, M., St. P. & P. R. Co., rerouting or diversion of traffic, effective on date of order.

37 FR 13013, June 30, 1972: Rev. S.O. 994; I.C.C. Order 70, Wellsville, A. & G. R. Corp., rerouting or diversion of traffic because of flood, effective on date of order.

37 FR 13013, June 30, 1972: Rev. S.O. 994; I.C.C. Order 71, Certain Railroads in Certain States, rerouting or diversion of traffic because of floods, effective on date of order.

37 FR 14262, July 18, 1972: Rev. S.O. 994; I.C.C. Order 71, Amdt. 2, Certain Railroads Operating in Certain States, rerouting or diversion of traffic, extends expiration date of I.C.C. Order 71, effective July 15, 1972.

37 FR 14651, July 21, 1972: Rev. S.O. 994; I.C.C. Order 70, Amdt. 1, Wellsville, A. & G. R. Corp., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 70, effective July 21, 1972.

37 FR 15558, Aug. 3, 1972: Rev. S.O. 994; I.C.C. Order 71, Amdt. 3, Railroads Operating in Certain States, rerouting or diversion of traffic, extends expiration date of I.C.C. Order 71, effective July 31, 1972.

37 FR 15771, Aug. 4, 1972: Rev. S.O. 994; I.C.C. Order 68, Amdt. 2, Central R. Co. of New Jersey, rerouting or diversion of traffic, extends expiration date of I.C.C. Order 68, effective day after date of order.

37 FR 15963, Oct. 8, 1972: Rev. S.O. 994; Rev. I.C.C. Order 71, Railroads in Certain Disaster Area States, rerouting or diversion of traffic, effective Aug. 3, 1972.

37 FR 17239, Aug. 25, 1972: Rev. S.O. 994; I.C.C. Order 63, Amdt 3, Louisville & N. R. and Birmingham Southern R., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 63, effective Aug. 31, 1972.

37 FR 17877, Sept. 1, 1972: Rev. S. O. 994; Rev. I.C.C. Order 71, Amdt. 1, Railroads operating in Maryland, Delaware, Pennsylvania, and New York, rerouting or diversion of traffic, extends expiration date of I.C.C. Order 71, effective Aug. 31, 1972.

37 FR 18062, Sept. 6, 1972: Rev. S. O. 994; I.C.C. Order 68, Amdt. 3, Central R. Co. of New Jersey, rerouting or diversion of traffic, extends expiration date of I.C.C. Order 68, effective two days after date of order.

37 FR 18132, Sept. 7, 1972: Rev. S.O. 993; Rev. I.C.C. Order 71, Railroads operating in States of Maryland, Delaware, Pennsylvania, and New York, rerouting or diversion of traffic, Amdt. 2, adds paragraph (h) *Exceptions*, effective day after date of order.

37 FR 18254, Sept. 8, 1972: Rev. S.O. 994; Rev. I.C.C. Order 71, Amdt. 2-A, vacates Amdt. 2 (37 FR 18132), effective on date of order.

37 FR 18254, Sept. 8, 1972: Rev. S.O. 994; Rev. I.C.C. Order 71, Railroads operating in States of Maryland, Delaware, Pennsylvania, and New York, rerouting or diversion of traffic, Amdt. 3, adds new paragraph (h) *Exceptions*, effective Sept. 11, 1972..

37 FR 18775, Sept. 15, 1972: Rev. S.O. 994; Rev. I.C.C. Order 71, Railroads operating in Maryland, Delaware, Pennsylvania, and New York, rerouting traffic, Amdt. 3-A, vacates Amdt. 3 to Rev. I.C.C. Order 71, effective Sept. 11, 1972.

37 FR 18775, Sept. 15, 1972: Rev. S.O. 994: Rev. I.C.C. Order 71, Railroads operating in Maryland, Delaware, Pennsylvania, and New York, rerouting traffic, Amdt. 4, new paragraph (h) *Exceptions*, added, effective Sept. 18, 1972.

37 FR 18775, Sept. 15, 1972: Rev. S.O. 994; I.C.C. Order 70, Wellsville, Addison & Galeton R. Corp., rerouting traffic, extends expiration date of I.C.C. Order 70, effective Sept. 15, 1972.

37 FR 19676, Sept. 21, 1972: Rev. S.O. 994; Rev. I.C.C. Order 71, Amdt. 5 (Railroads operating in States of Maryland, Delaware, Pennsylvania, and New York, rerouting or diversion of traffic), adds paragraph (h) *Exceptions* to Rev. I.C.C. Order 71, effective 3 days after date of order.

37 FR 20085, Sept. 23, 1972: Rev. S.O. 994; I.C.C. Order 72, St. Johnsbury & Lamoille County R., rerouting or diversion of traffic, effective on date of order.

37 FR 20204, Sept. 27, 1972: Rev. S.O. 994; I.C.C. Order 39, Amdt. 8, (Chicago & N.W. Ry. Co., rerouting or diversion of traffic, extends expiration date of I.C.C. Order 39, effective Sept. 30, 1972.

37 FR 20610, Sept. 30, 1972: Rev. S. O. 994; I.C.C. Order 71, Amdt. 6, Railroads operating in States of Maryland, Delaware, Pennsylvania, and New York, rerouting or diversion of traffic, extends expiration date of I.C.C. Order 71, effective Sept. 30, 1972.

37 FR 23482, Nov. 3, 1972: Rev. S.O. 994; I.C.C. Order 71, Amdt. 7, Railroads operating in Maryland, Delaware, Pennsylvania, and New York, rerouting or diversion of traffic, extends expiration date of I.C.C. Order 71, effective Oct. 31, 1972.

37 FR 22781, Oct. 21, 1972: Rev. S.O. 994; I.C.C. Order 73, St. Johnsbury & Lamoile County R., rerouting or diversion of traffic, effective on date of order.

37 FR 23769, Nov. 8, 1972: Rev. S.O. 994; I.C.C. Order 73-A (St. Johnsbury & Lamoile County R. rerouting traffic), vacates I.C.C. Order 73, effective Nov. 5, 1972.

37 FR 24396, Nov. 16, 1972: Rev. S.O. 994; I.C.C. Order 74, Penn Central Transp. Co., rerouting or diversion of traffic, effective Nov. 15, 1972.

37 FR 24397, Nov. 16, 1972: Rev. S.O. 994; I.C.C. Order 75, Western Maryland Ry. Co., rerouting traffic, effective Nov. 15, 1972.

37 FR 24475, Nov. 17, 1972: Rev. S.O. 994; I.C.C. Order 70 (Wellsville, A. & G. Corp., rerouting or diversion of traffic), Amdt. 3, extends expiration date of I.C.C. Order 70, effective Nov. 15, 1972.

37 FR 24856, Nov. 22, 1972: Rev. S.O. 994; I.C.C. Order 76, Reading Co., rerouting or diversion of traffic, effective on date of order.

37 FR 24932, Nov. 23, 1972: Rev. S.O. 994; I.C.C. Order 77, Erie Lackawanna Ry. Co., rerouting or diversion of traffic, effective on date of order.

37 FR 26171, Dec. 8, 1972: Rev. S. O. 994; I.C.C. Order 78, Long Island R. Co., rerouting or diversion of traffic because of strike of its employees, effective on date of order.

37 FR 26483, Dec. 12, 1972: Rev. S. O. 994; I.C.C. Order 79, St. Johnsbury & Lamoille County R., rerouting or diversion of traffic because of track damage, effective on date of order.

37 FR 26660, Dec. 14, 1972: Rev. S. O. 994; I.C.C. Order 78 (Long Island R. rerouting or diversion of traffic), Amdt. 1 extends expiration date of I.C.C. Order 78, effective on date of order.

37 FR 28229, Dec. 21, 1972: Rev. S. O. 994; I.C.C. Order 65 (Illinois Central R. rerouting or diversion of traffic), Amdt. 3 extends expiration date of I.C.C. Order 65, effective Dec. 31, 1972.

37 FR 28229, Dec. 21, 1972: Rev. S. O. 994; I.C.C. Order 76 (Reading Co. rerouting or diversion of traffic), Amdt. 1 extends expiration date of I.C.C. Order 76, effective on date of order.

37 FR 28229, Dec. 21, 1972: Rev. S. O. 994; I.C.C. Order 78 (Long Island R. rerouting or diversion of traffic), Amdt. 2 extends expiration date of I.C.C. Order 78, effective on date of order.

38 FR 92, Jan. 3, 1973: Rev. S. O. 994; I.C.C. Order 78 (Long Island R. rerouting or diversion of traffic), Amdt. 3 extends expiration date if I.C.C. Order 78, effective on date of order.

38 FR 1161, Jan. 9, 1973: Rev. S. O. 994; I.C.C. Order 39-A, vacates and sets aside I.C.C. Order 39 (Chicago & N.W. Ry. rerouting or diversion of traffic), effective on date of order.

38 FR 1320, Jan. 11, 1973: Rev. S.O. 994; I.C.C. Order 78 (Long Island R. rerouting or diversion of traffic), Amdt. 4 extends expiration date of I.C.C. Order 78, effective on date of order.

38 FR 1966, Jan. 19, 1973: Rev. S. O. 994; I.C.C. Order 80, Beaver, M. & E. R. Co. and Missouri-K.-T. R. Co., rerouting or diversion of traffic, effective on date of order.

38 FR 1965, Jan. 19, 1973; Rev. S. O. 994; I.C.C. Order 81, Ann Arbor R. Co., rerouting or diversion of traffic, effective on date of order.

38 FR 1967, Jan. 19, 1973; Rev. S. O. 994; I.C.C. Order 57-A, vacates and sets aside I.C.C. Order 57 (Penn Central R. Co. rerouting or diversion of traffic), effective Jan. 15, 1973.

38 FR 3224, Feb. 2, 1973: Rev. S.O. 994; I.C.C. Order 63, Amdt. 4, (Louisville & N.R. and Birmingham Southern R.) rerouting or diversion of traffic, extends expiration date of I.C.C. Order 63, effective Jan. 30, 1973.

37 FR 28673, Dec. 28, 1972: Rev. S.O. 944; I.C.C. Order 61, Admt. 6, (New York, S., & W. R. rerouting or diversion of traffic) extends expiration date of I.C.C. Order 61, effective Dec. 31, 1972.

38 FR 3224, Feb. 2, 1973: Rev. S.O. 994; I.C.C. Order 74, Amdt. 1, (Penn Central Transp. Co.) rerouting or diversion of traffic, extends expiration date of I.C.C. Order 74, effective Jan. 31, 1973.

38 FR 3224, Feb. 2, 1973: Rev. S.O. 994; I.C.C. Order 75, Amdt. 1, (Western Maryland Ry.) rerouting or diversion of traffic, extends expiration date of I.C.C. Order 75, effective Jan. 31, 1973.

38 FR 4304, Feb. 12, 1973: Rev. S.O. 994; I.C.C. Order 82, Chicago & N.W. Transp. Co. and Kansas City S. Ry. rerouting or diversion of traffic, effective on date of order.

38 FR 4304, Feb. 12, 1973: Rev. S.O. 994; I.C.C. Order 82, Amdt. 1, extends expiration date of rerouting I.C.C. Order 82, effective day after date of order.

38 FR 4304, Feb. 12, 1973: Rev. S.O. 994; I.C.C. Order 77, Amdt. 1 (Erie Lackawanna R. Co. rerouting or diversion of traffic), extends expiration date of I.C.C. Order 77, effective on date of order.

38 FR 4457, Feb. 14, 1973: Rev. S.O. 994: I.C.C. Order 83, Penn Central Transp. Co., rerouting or diversion of traffic because of damage to bridge over C & D Canal, effective on date of order.

38 FR 4458, Feb. 14, 1973: Rev. S.O. 994; I.C.C. Order 84, Penn Central Transp. Co., rerouting or diversion of traffic because of strike of railroad employees, effective on date of order.

38 FR 4603, Feb. 16, 1973: Rev. S.O. 994; I.C.C. Order 84-A vacates and sets aside I.C.C. Order 84, Penn Central Transp. Co. rerouting or diversion of traffic, effective on date of order.

38 FR 5382, Feb. 28, 1973: Rev. S. O. 994; Rev. I.C.C. Order 79, St. Johnsbury & Lamoille County R., rerouting diversion of traffic, effective Feb. 20, 1973.

38 FR 5957, March 5, 1973: Rev. S.O. 994; I.C.C. Order 85, Chicago, R.I. & P.R. Co. et al, rerouting or diversion of traffic, effective day after date of order.

38 FR 5706, March 2, 1973: Rev. S.O. 994; I.C.C. Order 83 (Penn Central Transp. Co., rerouting or diversion of traffic) Amdt. 1, extends expiration date of I.C.C. Order 83, effective Feb. 28, 1973.

38 FR 6858, March 13, 1973: Rev. S.O. 994; I.C.C. Order 85 (Chicago, R.I. & P.R. Co., et al, rerouting or diversion of traffic), Amdt. 1 extends expiration date of I.C.C. Order 85, effective on date of order.

38 FR 7050, March 15, 1973: Rev. S.O. 994; I.C.C. Order 70 (Wellsville, A. & G. R. Corp. rerouting or diversion of traffic), Amdt. 4 extends expiration date of I.C.C. Order 70, effective March 15, 1973.

38 FR 7433, March 21, 1973: Rev. S.O. 994; Rev. I.C.C. Order 79 (St. Johnsbury & Lamoile County R. rerouting or diversion of traffic), Amdt. 1 extends expiration date of Rev. I.C.C. Order 79, effective two days after date of order.

38 FR 8027, March 27, 1973: Rev. S.O. 994; I.C.C. Order 86, Chesapeake & O. Ry. Co., rerouting or diversion of traffic, effective on date of order.

38 FR 8325, March 30, 1973: Rev. S.O. 994; I.C.C. Order 76 (Reading Co. rerouting or diversion of traffic), Amdt. 2, extends expiration date of I.C.C. Order 76, effective March 31, 1973.

38 FR 8779, Apr. 6, 1973: Rev. S.O. 994; I.C.C. Order 87, Burlington Northern Inc., rerouting or diversion of traffic, effective on date of order.

38 FR 9125, Apr. 10, 1973: Rev. S.O. 994: I.C.C. Order 87-A, Burlington Northern, Inc., rerouting or diversion of traffic vacates and sets aside I.C.C. Order 87, effective on date of order.

38 FR 9128, Apr. 10, 1973: Rev. S.O. 994; I.C.C. Order 88, Penn Central Transp. Co., rerouting or diversion of traffic, effective on date of order.

38 FR 9360, Apr. 13, 1973: Rev. S.O. 994; I.C.C. Order 89, Kansas City Southern Ry. Co., rerouting or diversion of traffic, effective on date of order.

38 FR 10051, Apr. 23, 1973: Rev. S.O. 994; I.C.C. Order No. 89, Kansas City Southerm Ry. Co., rerouting or diversion of traffic, Amdt. 1 extends expiration date of I.C.C. Order 89, effective day after date of order.

38 FR 10777, May 1, 1973: Rev. S.O. 994; I.C.C. Order No. 90, Illinois Central Gulf R. Co., rerouting or diversion of traffic, effective on date of order.

38 FR 10776, May 1, 1973: Rev. S.O. 994: I.C.C. Order No. 91, Chicago, R.I. & P.R. Co., rerouting or diversion of traffic, effective on date of order.

38 FR 10777, May 1, 1973: Rev. S.O. 994; I.C.C. Order No. 83-A, Penn Central Transp. Co., rerouting or diversion of traffic, vacates and sets aside I.C.C. Order 83, effective on date of order.

38 FR 11143, May 4, 1973: Rev. S.O. 994; I.C.C. Order No. 92, Chesapeake & O. Ry. Co., rerouting or diversion of traffic, effective on date of order.

38 FR 11145, May 4, 1973: Rev. S.O. 994; I.C.C. Order 74 (Penn Central Transp. Co., rerouting or diversion of traffic), Amdt. 2 extends expiration date of I.C.C. Order 74, effective Apr. 30, 1973.

38 FR 11145, May 4, 1973: Rev. S.O. 994; I.C.C. Order 88 (Penn Central Transp. Co., rerouting or diversion of traffic), Amdt. 1 extends expiration date of I.C.C. Order 88, effective Apr. 30, 1973.

38 FR 11145, May 4, 1973: Rev. S.O. 994; I.C.C. Order 75 (Western Maryland Ry. rerouting or diversion of traffic), Amdt. 2 extends expiration date of I.C.C. Order 75, effective Apr. 30, 1973.

38 FR 12183, May 9, 1973: Rev. S.O. 994; I.C.C. Order 93, Burlington Northern, Inc., rerouting or diversion of traffic, effective on date of order.

38 FR 12183, May 9, 1973: Rev. S.O. 994; I.C.C. Order No. 94, Erie Lackawanna Ry. Co., rerouting or diversion of traffic, effective on date of order.

38 FR 12183, May 9, 1973: Rev. S.O. 994; I.C.C. Order No. 95, Ann Arbor R. Co., rerouting or diversion of traffic, effective on date of order.

38 FR 12637, May 14, 1973: Rev. S.O. 994; I.C.C. Order 93 (Burlington Northern, Inc. rerouting or diversion of traffic), Amdt. 1 extends expiration date of I.C.C. Order 93, effective on day after date of order.

38 FR 12637, May 14, 1973: Rev. S.O. 994; I.C.C. Order 95-A (Ann Arbor R. Co. rerouting or diversion of traffic) vacates and sets aside I.C.C. Order 95, effective on date of order.

38 FR 12638, May 14, 1973: Rev. S.O. 994; I.C.C. Order No. 96, Illinois Central Gulf R. Co. rerouting or diversion of traffic, effective on date of order.

38 FR 13515, May 22, 1973: Rev. S.O. 994; I.C.C. Order No. 97, Chicago, R.I. & P. R. Co. rerouting or diversion of traffic, effective on date of order.

38 FR 14131, May 29, 1973: Rev. S.O. 994; I.C.C. Order 98, Ann Arbor R. Co rerouting or diversion of traffic, effective on date of order.

38 FR 14132, May 29, 1973: Rev. S.O. 994; I.C.C. Order 93 (Burlington Northern, Inc. rerouting or diversion of traffic), Amdt. 2 extends expiration date of I.C.C. Order 93, effective on date of order.

38 FR 14132, May 29, 1973: Rev. S.O. 994; I.C.C. Order 92 (Chesapeake & O. Ry. rerouting or diversion of traffic), Amdt. 1 extends expiration date of I.C.C. Order 92, effective 2 days after date of order.

38 FR 14132, May 29, 1973: Rev. S.O. 994; I.C.C. Order 96 (Illinois Central Gulf R. rerouting or diversion of traffic), Amdt. 6 extends expiration date of I.C.C. Order 96, effective 2 days after date of order.

38 FR 14285, May 31, 1973, Part 1033: Car Service, Service Order No. 1138, Colorado & Southern Ry. Co. authorized to operate over tracks on the Colorado & Wyoming Ry. Co. Colorado & Wyoming Ry. Co. authorized to operate over jointly owned tracks of the Atchison, T. & S.F. Ry. Co. and Colorado & Southern Ry. Co., effective May 25, 1973..

38 FR 14753, June 5, 1973, Part 1033: Car Service, S.O. 1089, Amdt. 7 extends the expiration date of S.O. 1089 to July 31, 1973, effective May 31, 1973.

38 FR 14754, June 5, 1973, Part 1033: Car Service, S.O. 1091, Amdt. 3 extends the expiration date of S.O. 1091 to Nov. 30, 1973, effective May 31, 1973.

38 FR 14754, June 5, 1973, Part 1033: Car Service, S.O. 1100, Amdt. 2 extends the expiration date of S.O. 1100 to Aug. 31, 1973, effective May 31, 1973.

38 FR 14754, June 5, 1973, Part 1033: Car Service, S.O. 1104, Amdt. 4 extends the expiration date of S.O. 1104 to June 30, 1973, effective May 31, 1973.

38 FR 14754, June 5, 1973, Part 1033: Car Service, S.O. 1106, Amdt. 3 extends the expiration date of S.O. 1106 to Nov. 30, 1973, effective May 31, 1973.

38 FR 14755, June 5, 1973, Part 1033: Car Service, S.O. 1110, Amdt. 8 orders Penn Central Transp. Co. to restore service via its Buttonwood, Pa. gateway and extends the expiration date of order to June 30, 1973, effective Sept. 15, 1972.

38 FR 14755, June 5, 1973, Part 1033: Car Service, S.O. 1111, Amdt. 8 extends the expiration date of S.O. 1111 to June 30, 1973, effective May 31, 1973.

38 FR 14943, June 7, 1973, Part 1033: Car Service, Rev. S.O. 1138, Colorado & S. Ry. Co. authorized to operate unit-coal trains over tracks of Colorado & Wyo. Ry. Co. and jointly owned tracks of Atchison, T. & S.F. and Colorado & S., effective June 1, 1973.

38 FR 14944, June 7, 1973, Part 1033: Car Service, S.O. 1139, Atchison, T. & S.F. authorized to operate over tracks of Union Pacific R. Co., effective June 1, 1973.

38 FR 15623, June 14, 1973, Part 1033: Car Service, S.O. 1136, Amdt. 1 extends the expiration date of S.O. 1136 to Nov. 30, 1973.

38 FR 15724, June 15, 1973, Part 1033: Car Service, S.O. 1140, Chicago & N.W. Transp. Co. authorized to operate over tracks of Union Pacific R. Co., effective June 8, 1973.

38 FR 15725, June 15, 1973, Part 1033: Car Service, Texas & P.R. Co. order to unload certain cars of boilers at El Paso, Tex., to relieve car shortage, effective June 12, 1973.

38 FR 17843, July 5, 1973, Part 1033: Car Service, S.O. 1102, Amdt, 1 extends the expiration date of S.O. 1102 to Nov. 30, 1973.

38 FR 17843, July 5, 1973, Part 1033: Car Service, S.O. 1116, Amdt. 1 extends the expiration date of S.O. 1116 to Nov. 30, 1973, effective June 30, 1973.

38 FR 17843, July 5, 1973, Part 1033: Car Service, 3rd. Rev. S.O. 1121 regulates demurrage and free time at ports so as to relieve national shortage of covered hopper cars, gondola cars, and boxcars, effective July 1, 1973.

38 FR 17845, July 5, 1973, Part 1033: Car Service, S.O. 1131, Amdt. 1 extends the expiration date of S.O. 1131 to Nov. 30, 1973, effective June 30, 1973.

38 FR 18024, July 6, 1973, Part 1033: Car Service, S.O. 1104, Amdt. 5 extends the expiration date of S.O. 1104 to July 31, 1973, effective June 30, 1973.

38 FR 18024, July 6, 1973, Part 1033: Car Service, S.O. 1107, Amdt. 3 extends the expiration date of S.O. 1107 to Aug. 31, 1973, effective June 30, 1973.

38 FR 18025, July 6, 1973, Part 1033: Car Service, Rev. S.O. 1110, Amdt. 9 orders Penn Central Transp. Co. to restore service via its Buttonwood, Pa. gateway by July 31, 1973, order to expire July 31, 1973, effective Sept. 15, 1972.

38 FR 18025, July 6, 1973, Part 1033: Car Service, S.O. 1111, Amdt. 9 extends the expiration date of S.O. 1111 to July 31, 1973, effective June 30, 1973.

38 FR 18025, July 6, 1973, Part 1033: Car Service, S.O. 1114, Amdt. 2 extends the expiration date of S.O. 1114 to Aug. 31, 1973, effective June 30, 1973.

38 FR 18025, July 6, 1973, Part 1033: Car Service, (Demurrage on Freight Cars), Rev. S.O. 1119, Amdt. 1 extends expiration date of S.O. 1119 to Oct. 31, 1973, effective June 30, 1973.

38 FR 18026, July 6, 1973, Part 1033: Car Service, S.O. 1129, Amdt. 2 extends the expiration date of S.O. 1129 to Nov. 30, 1973, effective June 30, 1973.

38 FR 18026, July 6, 1973, Part 1033: Car Service, Illinois Central Gulf R. Co., S.O. 1135, Amdt. 1 extends expiration date to Aug. 31, 1973, effective June 30, 1973.

38 FR 18251, July 9, 1973, Part 1033: Car Service (Demurrage and Free Time on Freight Cars), 2nd Rev. S.O. 1124, further regulations promulgated to relieve national shortage of boxcars, gondola cars, and covered hopper cars.

38 FR 18465, July 11, 1973, Part 1033: Car Service (Demurrage and Free Time on Freight Cars), S.O. 1124, further regulations promulgated to relieve national shortage of boxcars, gondola cars, and covered hopper cars, including charges for demurrage of such cars, effective July 1, 1973.

38 FR 18659, July 13, 1973, Part 1033: Car Service (Return of Hopper Cars), Fifth Rev. S.O. 1043, regulations promulgated ordering speedy return of hopper cars to their owner railroads, effective July 3, 1973.

38 FR 18660, July 3, 1973, Part 1033: Car Service (Demurrage and Free Time at Ports), Corrected Third Rev. S.O. 1121, further regulations promulgated to relieve the national shortage of boxcars, gondola cars, and covered hopper cars, including charges for detention and definition of cars subject to average demurrage basis, effective July 1, 1973.

38 FR 18876, July 16, 1973, Part 1033: Car Service (Chicago, R.I., & P.R. Co.), S.O. 1142, Chicago, R.I., & P. authorized to operate over tracks of Missouri Pacific R. Co. between Herrington and Salina, Kansas, effective July 11, 1973.

38 FR 19126, July 18, 1973, Part 1033: Car Service (Southern Pacific Transp. Co.), S.O. 1083, Amdt. 4 extends expiration date of S.O. 1083 to Oct. 31, 1973, effective July 31, 1973.

38 FR 19126, July 18, 1973, Part 1033: Car Service (Substitution of Hopper Cars), Second Rev. S.O. 1117, Amdt. 1 extends expiration date of S.O. 1117 to Nov. 15, 1973, effective July 31, 1973.

38 FR 19126, July 18, 1973, Part 1033: Car Service, (St. Louis—S.F. Ry. Co.), S.O. 1125, Amdt. 1 extends expiration date of S.O. 1125 to Nov. 30, 1973, effective July 31, 1973.

38 FR 19222, July 19, 1973, Part 1033: Car Service, (Georgia Rail Road & Banking Co.), Georgia R.R. Co. to unload certain car of limestone at Devereux, Ga. to relieve national shortage of plain boxcars, effective July 16, 1973.

38 FR 19831, July 24, 1973, Part 1033: Car Service, (Lumber and Plywood—Restrictions on Reconsigning), S.O. 1134, Amdt. 1 extends expiration order to S.O. 1134 to Nov. 15, 1973.

38 FR 20087, July 27, 1973, Part 1033: Car Service, (Distribution of Covered Hopper Cars), Regulations as to distribution of such cars, substitution of other cars, jumbo cars, monthly reports, effective July 31, 1973.

38 FR 20621, Aug. 2, 1973, Part 1033: Car Service, (Penn Central Transp. Co.), S.O. 1104, Amdt. 6, Penn Central's authorization to operate over tracks of the Erie-Lackawanna extends expiration date of S.O. 1104 to Aug. 31, 1973, effective July 31, 1973.

38 FR 20621, Aug. 2, 1973, Part 1033: Car Service, (Penn Central Transp. Co.), S.O. 1110, Amdt, 10, Penn Central ordered to restore service via its Buttonwood, Pa., gateway by Sept. 30, 1973, effective Sept. 15, 1973.

38 FR 20621, Aug. 2, 1973, Part 1033: Car Service, (Delaware & Hudson Ry. Co. authorized to operate over tracks of the Erie-Lackawanna Ry. Co.), S.O. 1111, Amdt. 10, extends expiration date of S.O. 1111 to Sept. 30, 1973, effective July 31, 1973.

38 FR 20622, Aug. 2, 1973, Part 1033: Car Service, (St. Louis-SF Ry. Co. authorized to operate over tracks of the Atchison, T. & S.F. Ry. Co.), authorization to operate over 10 miles of tracks between Avard & Waynoka, Okla., until Jan. 31, 1974, effective July 31, 1973.

38 FR 20622, Aug. 2, 1973, Part 1033: Car Service (Distribution of Boxcars) S.O. 1145, promulgating rules for delivery, loading, unloading, and return of boxcars, to expire Nov. 15, 1973, effective July 31, 1973.

38 FR 20840, Aug. 3, 1973, Part 1033: Car Service (Chicago, R.I., & P.R. Co.), S.O. 1084, Amdt. 3 extends expiration date of S.O. 1084 to Jan. 31, 1974, effective July 31, 1973.

38 FR 21170, Aug. 6, 1973, Part 1033: Car Service (Distribution of Freight Cars) S.O. 1132, Amdt. 1 extends expiration date of S.O. 1132 to Sept. 15, 1973, effective July 31, 1973.

38 FR 21414, Aug. 8, 1973, Part 1033: Car Service (New York Dock Ry.), S.O. 1146 authorizes New York Dock to operate over abandoned tracks of Bush Terminal R. Co., until Sept. 30, 1973, effective Aug. 2, 1973.

38 FR 21638, Aug. 10, 1973, Part 1033: Car Service, (Delaware & Hudson Ry. Co.), S.O. 1111, Amdt. 10 extends expiration date of S.O. 1111 to Aug. 31, 1973, effective July 31, 1973.

38 FR 21638, Aug. 10, 1973, Part 1033: Car Service (Norfolk & W. Ry. Co.) S.O. 1147 authorizes N & W to operate over tracks of the Chicago, M., St. P. & P. and of the Kansas City S. between points in Missouri, until Feb. 15, 1974, effective Aug. 7, 1973.

38 FR 22398, Aug. 20, 1973, Part 1033: Car Service (Distribution of Covered Hopper Cars) promulgating rules to relieve national shortage of these cars, effective Aug. 26, 1973.

38 FR 22482, Aug. 21, 1973, Part 1033: Car Service (Graham County R. Co.), Graham County R. Co. authorized to operate over trackage in Graham County, N.C., effective Aug. 21, 1973.

38 FR 22398, Aug. 20, 1973, Part 1033: Car Service (Distribution of Covered Hopper Cars) S.O. 1120, 2nd Rev., promulgating regulations as regards use, supply, control, movement, and distribution of covered hopper cars to relieve shortage of such cars, effective Aug. 26, 1973.

38 FR 22790, Aug. 24, 1973, Part 1033: Car Service (Baltimore and Ohio R. Co. authorized to operate tracks of Penn Central Transp. Co.), S.O. 1126, Amdt. 1 extends the expiration date to Feb. 28, 1974, effective Aug. 31, 1973.

38 FR 23792, Sept. 4, 1973, Part 1033, Car Service (Reading Co.) Amdt. 2 extends the expiration date of Rev. S.O. 1108 to Jan. 15, 1974, effective Aug. 31, 1973.

38 FR 23792, Sept. 4, 1973, Part 1033: Car Service (Texas Export Oil Co.) Amdt. 1 extends the expiration date of S.O. 1122 to Oct. 31, 1973, effective Aug. 31, 1973.

38 FR 23793, Sept. 4, 1973, Part 1033: Car Service (Fort Worth & Denver Ry. Co.) S.O. 1149 authorizes FWD to operate over tracks of Quanah, Acme & Pacific and tracks of the Atchison, T. & S.F. Ry. Co., effective Aug. 29, 1973.

38 FR 23952, Sept. 5, 1973, Part 1033: Car Service (Penn Central Transp. Co.), Amdt. 7 extends the expiration date of S.O. 1104 to Oct. 31, 1973, effective Aug. 31, 1973.

38 FR 23952, Sept. 5, 1973, Part 1033: Car Service (Penn Central Transp. Co.) S.O. 1110 ordering Penn Central to restore service at the Buttonwood, Pa. gateway is hereby vacated, effective Sept. 1, 1973.

38 FR 23952, Sept. 5, 1973, Part 1033: Car Service (Providence & Worcester Co.) Amdt. 1 to S.O. 1118 extends expiration date to Aug. 31, 1973, authorizing Providence & W. to operate over tracks of the Penn Central Transp. Co.

38 FR 23952, Sept. 5, 1973, Part 1033: Car Service (Texas Export R. Co.), S.O. 1122 authorizing Texas Export to operate over tracks abandoned by Chicago, R.I., & P.R. Co. Amdt 1 extends expiration date to Oct. 31, 1973, effective Aug. 31, 1973.

38 FR 24212, Sept. 6, 1973, Part 1033: Car Service (Norfolk & Western Ry. Co.) Amdt. 3 extends expiration date of S.O. 1114 to Oct. 31, 1973, effective Aug. 31, 1973.

38 FR 24902, Sept. 11, 1973, Part 1033: Car Service (Northwestern Oklahoma R. Co.) Amdt. 1 extends expiration date of S.O. 1123, authorizing use of trackage abandoned by Mo.-Kans.-Texas R. Co., to Feb. 28, 1974, effective Aug. 31, 1973.

38 FR 25183, Sept. 12, 1973, Part 1033: Car Service (Northwestern Oklahoma R. Co.) Amdt. 1 sets expiration date of S.O. 1123 at Feb. 28, 1973, effective Aug. 31, 1973.

38 FR 26805, Sept. 25, 1973, Part 1033: Car Service (Demurrage and Free Time on Freight Cars) Amdt. 1 extends expiration date of 2nd Rev. S.O. 1124 to April 1, 1974, effective Oct. 1, 1973.

38 FR 26805, Sept. 26, 1973, Part 1033: Car Service, (Demurrage and Free Time at Ports), Amdt. 1 extends expiration date of 3rd Rev. S.O. 1121 to April 1, 1974, effective Oct. 1, 1973.

38 FR 27218, Oct. 1, 1973, Part 1033: Car Service; S.O. 1151 authorizes Peoria Terminal Co. to operate over tracks of Peoria Terminal Co. to operate over tracks of Peoria & Pekin Union Ry. Co., effective Sept. 25, 1973.

38 FR 27354, Oct. 3, 1973, Part 1033: Car Service (Atchison, Topeka, and Santa Fe Ry. Co.), Amdt. 1 extends expiration date of S.O. 1139 to Dec. 31, 1973, effective Sept. 30, 1973.

38 FR 27828, Oct. 9, 1973, Part 1033: Car Service (Distribution of Refrigerator Cars) S.O. 1152 promulgates regulations, including loading restrictions, on such cars, effective Oct. 7, 1973.

38 FR 28504, Oct. 11, 1973, Partr 1033: Car Service, S.O. 1153 promulgates rules as to demurrage and free time on refrigerator cars, effective Oct. 8, 1973.

38 FR 28292, Oct. 12, 1973, Part 1033: Car Service, S.O. 1154 authorizes the St. Louis-San Francisco Ry. Co. to operate over tracks of the Alabama Great Southern R. Co. between Boligee and York, Ala., effective Oct. 6, 1973.

38 FR 28943, Oct. 18, 1973, Part 1033: Car Service, Rev. S.O. 1152 promulgates rules and regulations for distribution of refrigerator cars, effective Oct. 15, 1973.

38 FR 29219, Part 1033: Car Service (Lamoille County R. Co.) Lamoille authorized to operate over trackage abandoned by St. Johnsbury & Lamoille County R. Co., effective Oct. 12, 1973.

38 FR 29220, Part 1033: Car Service (Chicago, R.I. & P.R. Co.) Chicago R.I. & P. authorized to operate over tracks of the Missouri Pacific-R. Co. between Herrington and Salina, Kans., effective Oct. 16, 1973.

38 FR 29472, Part 1033: Car Service (Union Pac. R. Co.) S.O. 1100-A vacates and sets aside S.O. 1100, effective Oct. 18, 1973.

38 FR 29590, Part 1033: Car Service (Kansas City Southern Ry. Co.) S.O. 1157 authorizes KCS to operate over tracks of the So. Pac. R. Co. in La., effective Oct. 23, 1973.

38 FR 29590, Part 1103: Car Service (So. Pac. Transp. Co.) Amdt. 5 to S.O. 1083 extends expiration date to April 30, 1974.

38 FR 29881, Part 1033: Car Service (Demurrage on Freight Cars) Amdt. 2 extends expiration date of S.O. 1119 to April 1, 1974, effective Oct. 31, 1973.

38 FR 29882, Part 1033: Car Service (Railroad Operating Regulations for Freight Car Movement) Amdt. 4 extends expiration date of S.O. 1112 until April 30, 1974, effective Oct. 31, 1973.

38 FR 29882, Part 1033: Car Service (Fort Worth and Denver Ry. Co.) Amdt. 1 extends expiration date of S.O. 1149 to April 30, 1974, effective Oct. 31, 1973.

38 FR 30001, Part 1033: Car Service (Chicago & N.W. Transp. Co.) S.O. 1158 authorizes Chicago & N.W. to operate over tracks on Union Pac. R. Co. between Ames and Fremont, Nebr., effective Oct. 26, 1973.

38 FR 30439, Part 1033: Car Service (Central Iowa Ry. & Development Co.) Amdt. 1 extends expiration date of S.O. 1133 to April 30, 1974, effective Oct. 31, 1973.

38 FR 30559, Part 1033: Car Service (Penn Central Transportation Co.) Amdt. 8 extends expiration date of S.O. 1104 to Dec. 31, 1973, effective Oct. 31, 1973.

38 FR 30559, Part 1033: Car Service (Chicago & N.W. Transp. Co.) S.O. 1159 authorizes Chicago & N.W. Transp. Co. to operate over tracks of the Chicago, M., St. P. & Pac. R. Co., effective Nov. 1, 1973.

38 FR 30742, Part 1033: Car Service (Central Iowa Ry. & Development Co.) Amdt. 1 extends expiration date of S.O. 1133 to April 30, 1974, effective Oct. 31, 1973.

38 FR 30742, Nov. 7, 1973, Part 1033: Car Service (Lumber & Plywood, Restrictions in Reconsigning) Amdt. 2 suspends S.O. 1134 until further order from the commission.

38 FR 31176, Nov. 12, 1973, Part 1033: Car Service (Substitution of Refrigerator cars for Boxcars) S.O. 1160 promulgates regulations for such substitution, effective Nov. 7, 1973.

38 FR 31309, Nov. 13, 1973, Part 1033: Car Service (Substitution of Hopper Cars for Covered Hopper Cars or Boxcars) Amdt. 2 extends expiration date of 2d Rev. S.O. 1117 to April 15, 1974, effective Nov. 15, 1973.

38 FR 31309, Nov. 13, 1973, Part 1033: Car Service (Distribution of Boxcars) Rev. S.O. 1145 promulgates rules for use, control, and distribution of boxcars on Maine Central R. Co., effective Nov. 8, 1973.

38 FR 31309, Nov. 13, 1973, Part 1033: Car Service (St. Louis-San Francisco Ry. Co.) S.O. 1161 authorizes St. L.-S.F. to operate over tracks of Atchison, T. & S.F. between Perry, Okla. and Arkansas City, Kans., effective Nov. 7, 1973.

38 FR 31681, Nov. 16, 1973, Part 1033: Car Service (Lumber & Plywood—Restrictions on Reconsigning) Amdt. 3 extends expiration date of S.O. 1134 to April 15, 1974, effective Nov. 15, 1973.

38 FR 32138, Nov. 21, 1973, Part 1033: Car Service (Lehigh Valley R. Co.) Amdt. 2 extends expiration date of S.O. 1116 to May 31, 1974, effective Nov. 30, 1973.

38 FR 32138, Nov. 21, 1973, Part 1033: Car Service (Missouri Pacific R. Co.) S.O. 1163 authorizes MoPac to operate over tracks of Union Pacific R. Co. at Cochrane, Kans., effective Nov. 16, 1973.

38 FR 32259, Nov. 23, 1973, Part 1033: Car Service (Lehigh Valley R. Co.) Amdt. 2 extends expiration date of S.O. 1116 to May 31, 1974, effective Nov. 30, 1973.

38 FR 32259, Nov. 23, 1973, Part 1033: Car Service (Missouri Pacific R. Co.) S.O. 1163 authorizes MoPac to operate over tracks of Union Pacific R. Co. at Cochrane, Kans., effective Nov. 16, 1973.

38 FR 33086, Nov. 30, 1973, Part 1033: Car Service (Delaware & Hudson Ry. Co.) Amdt. 3 extends expiration date of S.O. 1102 until May 31, 1974, effective Nov. 30, 1973.

38 FR 33302, Dec. 3, 1973, Part 1033L: Car Service (Delaware & Hudson Ry. Co. & Penn. Central Transp. Co.) Amdt. 3 extends expiration date of S.O. 1102 to May 31, 1974, effective Nov. 30, 1973.

38 FR 33302, Dec. 3, 1973, Part 1033: Car Service (Baltimore & Ohio R. Co.) Amdt. 4 extends expiration date of S.O. 1106 to Jan. 31, 1974, effective Nov. 30, 1973.

38 FR 33399, Dec. 4, 1973, Part 1033: Car Service (Chicago, Rock Island & Pac. R. Co.) Amdt. 3 extends expiration date of S.O. 1129 to Feb. 28, 1973, effective Nov. 30, 1973.

38 FR 33399, Dec. 4, 1973, Part 1033: Car Service (Chicago, Rock Island & Pac. R. Co.) Amdt 2 extends expiration date of S.O. 1131 to Feb. 28, 1974, effective Nov. 30, 1973.

38 FR 33482, Dec. 5, 1973, Part 1033: Car Service (Norfolk & Western Ry. Co.) Amdt. 4 extends expiration date of S.O. 1091 to Feb. 28, 1974, effective Nov. 30, 1973.

38 FR 33482, Dec. 5, 1973, Part 1033: Car Service (St. Louis-San Francisco Ry. Co.) Amdt. 2 extends expiration date of S.O. 1125 to May 31, 1974, effective Nov. 30, 1973.

38 FR 33482, Dec. 5, 1973, Part 1033: Car Service (Colorado & Southern Ry. Co. & Colorado & Wyoming Ry Co.) Amdt 1 extends expiration date of Rev. S.O. 1138 to March 31, 1974, effective Nov. 30, 1973.

38 FR 34664, Dec. 17, 1973, Part 1033: Car Service (Distribution of Covered Hopper Cars) Amdt. 1 extends expiration date of Second Rev. S.O. 1120 to June 15, 1974, effective Dec. 15, 1973.

38 FR 34664, Dec. 17, 1973, Part 1033: Car Service (Graham County R. Co.) Amdt. 1 extends expiration date of S.O. 1148 to June 30, 1974, effective Dec. 31, 1973.

38 FR 34811, Dec. 19, 1973, Part 1033: Car Service (Texas & Pacific Ry. Co.) S.O. 1164 authorizes Texas & Pacific to operate over tracks of the Atchison, Topeka, & Santa Fe Ry. Co. between Tecific Siding and Sweetwater, Texas, effective Dec. 15, 1973.

38 FR 35001, Dec. 21, 1973, Part 1033: Car Service (Regulations for Return of Hopper Cars) Amdt. 1 extends expiration date of Fifth Rev. S.O. 1043 to June 30, 1974, effective Dec. 31, 1973.

38 FR 35001, Dec. 21, 1973, Part 1033: Car Service (Substitution of Refrigerator Cars for Boxcars) Amdt. 1 extends expiration date of S.O. 1160 to Feb. 28, 1974, effective Dec. 15, 1973.

38 FR 35002, Dec. 21, 1973, Part 1033: Car Service (St. Louis-San Francisco Ry. Co.) Amdt 1 extends expiration date of S.O. 1161 to March 31, 1974, effective Dec. 15, 1973.

38 FR 35002, Dec. 21, 1973, Part 1033: Car Service (Chicago, Rock Island & Pac. R. Co.) Amdt. 1 extends expiration date of S.O. 1156 to June 30, 1974, effective Dec. 15, 1973.

38 FR 35002, Dec. 21, 1973, Part 1033: Car Service (Appointment of Embargo Agents) Amdt. 4 extends expiration date of S.O. 995 to Dec. 31, 1974, effective Dec. 31, 1973.

38 FR 35002, Dec. 21, 1973, Part 1033: Car Service (Car Distribution Directions—Appointment of Agents) Amdt. 4 extends expiration date of Rev. S.O. 1002 to Dec. 31, 1974, effective Dec. 31, 1973.

39 FR 808, Jan. 3, 1974, Part 1033: Car Service, S.O. 1165 authorizes Kansas City So. Ry. Co. to operate over tracks of Southern Pacific Transp. Co. at Lake Charles, La., effective Dec. 21, 1974.

39 FR 1046, Jan. 4, 1974, Part 1033: Car Service (Atchison, Topeka, and Santa Fe Ry. Co.) Amdt. 2 extends expiration date of S.O. 1139 to June 30, 1974, effective Dec. 31, 1974.

39 FR 1046, Jan. 4, 1974, Part 1033: Car Service, S.O. 1166 authorizes Chicago and North Western Transp. Co. to operate over tracks of Des Moines Western Ry. Co. in vicinity of Des Moines, Iowa, effective Dec. 31, 1974.

39 FR 1269, Jan. 7, 1974, Part 1033: Car Service. S.O. 1167 authorizes Chicago, Milwaukee, St. Paul, & Pac. R. Co. to operate over tracks of Burlington Northern Inc., between Savannah & Ayres, Ill., effective Jan. 4, 1974.

39 FR 1444, Jan. 9, 1974, Part 1033: Car Service. S.O. 1166 authorizes Chicago & North Western Transp. Co. to operate over tracks of Des Moines Western Ry. Co. in vicinity of Des Moines, Iowa, effective Dec. 31, 1973.

39 FR 1596, Jan. 11, 1974, Part 1033: Car Service S.O. 1168 authorizes Vermont Ry., Inc. over certain tracks owned by the State of Vermont between No. Bennington & Bennington, Vt., effective Jan. 7, 1974.

39 FR 1851, Jan. 11, 1974, Part 1033: Car Service. Amdt. 3 to S.O. 1108 extends expiration date of the order to Mar. 15, 1974, effective Jan. 15, 1974.

39 FR 2586, Jan. 23, 1974, Part 1033: Car Service Corrected S.O. 1168 authorizes Vermont Ry., Inc. to operate over tracks owned by State of Vermont, pending disposition of application of Vermont Ry. in Finance Docket 22830, (320 ICC 330), effective Jan. 7, 1974.

39 FR 2555, Jan. 28, 1974, Part 1033: Car Service. S.O. 1169 authorizes Providence & Worcester Co. to operate over tracks abandoned by Boston and Maine Corp., effective Feb. 1, 1974.

39 FR 3827, Jan. 30, 1974, Part 1033: Car Service. Amdt. 4 extends expiration date of S.O. to July 31, 1974, effective Jan. 31, 1974.

39 FR 3827, Jan. 30, 1974, Part 1033: Car Service. Amdt. 5 extends expiration date of S.O. 1106 to July 31, 1974, effective Jan. 31, 1974.

39 FR 3827, Jan. 30, 1974, Part 1033: Car Service, S.O. 1170 promulgates railroad operating regulations for movement of privately owned freight cars, effective Jan. 28, 1974.

39 FR 4087, Feb. 1, 1974, Part 1033: Car Service. (St. Louis-San Francisco Ry. Co.) Amdt. 1 extends expiration date of S.O. 1144 to May 31, 1974, effective Jan. 31, 1974.

39 FR 4088, Feb. 1, 1974, Part 1033: Car Service (Peoria Terminal Co.) Amdt. 1 extends expiration date of S.O. 1151 to July 31, 1974, effective Jan. 31, 1974.

39 FR 4088, Feb. 1, 1974, Part 1033: Car Service. S.O. 1171 promulgates Regulations for Return of Hopper Cars, effective Feb. 1, 1974.

39 FR 4479, Feb. 4, 1974, Part 1033: Car Service. Rev. S.O. 1112 promulgates Railroad Operating Regulations for Freight Car Movement, effective Feb. 1, 1974.

39 FR 4579, Feb. 5, 1974, Part 1033: Car Service. (Mo.-Kans.-Tex. R. Co.-Traffic rerouting, Sub. Switching), S.O. 957-A vacates S.O. 957, effective Jan. 31, 1974.

39 FR 4579, Feb. 5, 1974, Part 1033: Car Service (Kans. City So. Ry. Co.) Amdt. 1 extends expiration date of S.O. 1165 to March 2, 1974, effective Jan. 31, 1974.

39 FR 4665, Feb. 6, 1974, Part 1033: Car Service (Providence & Worcester Co. & Penn Central Transp. Co.) Amdt. 2 extends expiration date of S.O. 1118 to Feb. 3, 1975, effective Feb. 3, 1974.

39 FR 4781, Feb. 7, 1974, Part 1033: Car Service. R.S.O. 1112 promulgates Railroad Operating Regulations for Freight Car Movement, effective Feb. 1, 1974.

39 FR 4783, Feb. 7, 1974, Part 1033: Car Service. (Providence & Worcester Co.) S.O. 1169 authorizes Prov. & W. Co. to operate over tracks abandoned by Boston & Maine Corp. between Worcester and Gardner, Mass., effective Feb. 1, 1974.

39 FR 5489, Feb. 13, 1974, Part 1033: Car Service. S.O. 1172 authorizes California Western R. Co. to operate over tracks of Northwestern Pacific R. Co., between Willits and Calpella, Calif., effective Feb. 8, 1974.

39 FR 6610, Feb. 21, 1974, Part 1033: Car Service (Norfolk & Western Ry. Co.) Amdt. 1 extends expiration date of S.O. 1147 to Aug. 15, 1974, effective Feb. 15, 1974.

39 FR 6610, Feb. 21, 1974, Part 1033: Car Service, S.O. 1173 promulgates regulations for the distribution of refrigerator cars, effective Feb. 18, 1974.

39 FR 7792, Feb. 28, 1974, Part 1033: Car Service, Rev. S.O. 1156 authorizes Chicago, Rock Island, and Pacific R. Co. to operate over tracks of Missouri Pacific R. Co. and Union Pacific R. Co., between Herrington and Salina, Kans., and Salina interchange, effective Feb. 22, 1974.

39 FR 7792, Feb. 28, 1974, Part 1033: Car Service. 3d. Rev. S.O. 1124 promulgates regulations for Demurrage and Free Time on Freight Cars, effective March 1, 1974.

39 FR 8161, Mar. 4, 1974, Part 1033: Car Service. (Chicago, Rock Island & Pacific R. Co.) Amdt. 4 extends expiration date of S.O. 1129 to May 31, 1974, effective Feb. 28, 1974.

39 FR 8327, Mar. 5, 1974, Part 1033: Car Service. (Frank W. Pollock, Jr. & Northwestern Oklahoma R. Co.) Amdt. 2 extends expiration date of S.O. 1123 to Aug. 31, 1974, effective Feb. 28, 1974.

39 FR 8327, Mar. 5, 1974, Part 1033: Car Service. (Baltimore & Ohio R. Co.) Amdt. 2 extends expiration date of S.O. 1126 to Aug. 31, 1974, effective Feb. 28, 1974.

39 FR 8327, Mar. 5, 1974, Part 1033: Car Service. Chicago, Rock Island and Pacific R. Co.) Amdt. 3 extends expiration date of S.O. 1131 to May 31, 1974, effective Feb. 28, 1974.

39 FR 8921, Mar. 7, 1974, Part 1033: Car Service. (Kansas City Southern Ry. Co.) Amdt. 2 extends expiration date of S.O. 1165 to April 1, 1974, effective Feb. 28, 1974.

39 FR 9181, Mar. 8, 1974, Part 1033: Car Service. Corrected 3d Rev. S.O. 1124 promulgates regulations as to Demurrage and Free Time on Freight Cars, effective Mar. 1, 1974.

39 FR 9182, Mar. 8, 1974, Part 1033: Car Service. Rev. S.O. 1173 promulgates regulations as to Distribution of Refrigerator Cars, effective Mar. 6, 1974.

39 FR 9542, Mar. 12, 1974, Part 1033: Car Service. Corrected S.O. 1174 promulgates regulations as to Distribution of Boxcars, effective Mar. 10, 1974.

39 FR 9831, Mar. 14, 1974, Part 1033: Car Service. S.O. 1175 promulgates regulations for Substitution of Refrigerator Cars for Boxcars, effective Mar. 11, 1974.

39 FR 10145, Mar. 18, 1974, Part 1033: Car Service. (Distribution of Boxcars) Amdt. 1 extends expiration date of S.O. 1145 to June 30, 1974, effective Mar. 15, 1974.

39 FR 10145, Mar. 18, 1974, Part 1033: Car Service. S.O. 1177 authorizes Atchison, T. & S.F. Ry. Co. to operate over tracks near Dallas, Tex., effective Mar. 13, 1974.

39 FR 9966, Mar. 15, 1974, Part 1033: Car Service. S.O. 1176 authorizes Kansas City So. Ry. Co. to operate over certain tracks of St. Louis-San Francisco Ry. Co., at Fort Smith, Arkansas, effective Mar. 11, 1974.

39 FR 10590, Mar. 21, 1974, Part 1033: Car Service. S.O. promulgates regulations for Distribution of Covered Hopper Cars, effective Mar. 18, 1974.

39 FR 10591, Mar. 21, 1974, Part 1033: Car Service (Reading Co. et al) Amdt. 4 extends expiration date of Rev. S.O. 1108 to June 15, 1974, effective Mar. 15, 1974.

39 FR 11191, Mar. 26, 1974, Part 1033: Car Service. Rev. S.O. 1174 promulgates regulations for Distribution of Boxcars, effective Mar. 24, 1974.

39 FR 11891, April 1, 1974, Part 1033: Car Service, S.O. 1180 authorizes Baltimore and Ohio R. Co. to operate over tracks of Penn Central Transp. Co., effective Mar. 27, 1974.

39 FR 12009, April 2, 1974, Part 1033: Car Service (St. Louis-San Francisco Ry. Co.) Amdt. 1 extends expiration date of S.O. 1154 to Dec. 31, 1974, effective April 1, 1974.

39 FR 12009, April 2, 1974, Part 1033: Car Service. (Demurrage and Free Time at Ports) Amdt. 2 extends expiration date of S.O. 1121 to July 1, 1974, effective April 1, 1974.

39 FR 12010, April 2, 1974, Part 1033: Car Service. (Substitution of Refrigerator Cars for Boxcars) S.O. 1175-A vacates S.O. 1175, effective Mar. 31, 1974.

39 FR 12352, April 5, 1974, Part 1033: Car Service (Colorado & Southern Ry. Co.) Amdt. 2 extends expiration date of Rev. S.O. 1138 to Sept. 30, 1974, effective Mar. 31, 1974.

39 FR 12352, April 5, 1974, Part 1033: Car Service. 2nd. Rev. S.O. 1119 promulgates regulations for Demurrage on Freight Cars, effective April 1, 1974.

39 FR 12353, April 5, 1974, Part 1033: Car Service. S.O. 1181 authorizes St. Louis-San Francisco Ry. Co. to operate over tracks of Atchison, Topeka, and Santa Fe Ry. Co. between Perry, Okla. and Arkansas City, Kans., effective April 1, 1974.

39 FR 13158, April 11, 1974, Amdt. 3 to Second R.S.O. 1117 extends expiration date to Oct. 15, 1974, effective April 15, 1974.

39 FR 13159, April 11, 1974, Part 1033: Car Service. S.O. 1182 promulgates regulations for Substitution of Stock Cars for Boxcars, effective April 8, 1974.

39 FR 13264, April 12, 1974, Part 1033: Car Service. Corrected S.O. 1176 authorizes Kansas City Southern Ry. Co. to operate over tracks of St. Louis-San Francisco Ry. Co. at Fort Smith, Ark., effective Mar. 11, 1974.

39 FR 13971, April 19, 1974, Part 1033: Car Service (Restrictions on Reconsigning Lumber and Plywood) Amdt. 4 suspends S.O. 1134 until further order of the Commission, effective April 15, 1974.

39 FR 14595, April 25, 1974, Part 1033: Car Service (Southern Pacific Transp. Co.) Amdt. 6 extends expiration date of S.O. 1083 to June 30, 1974, effective April 30, 1974.

39 FR 14595, April 25, 1974, Part 1033: Car Service. (Fort Worth and Denver Ry. Co.) Amdt. 2 extends expiration date of S.O. 1149 to July 31, 1974, effective April 30, 1974.

39 FR 14947, April 29, 1974, Part 1033: Car Service. S.O. 1183 authorizes Norfolk and Western Ry. Co. to operate over tracks of Toledo, Peoria, & Western Ry. Co. at Forrest, Ill., effective April 26, 1974

39 FR 15130, May 1, 1974, Part 1033: Car Service. (Chicago and North Western Transp. Co.) Amdt. 1 extends expiration date of S.O. 1158 to Oct. 31, 1974, effective April 30, 1974.

39 FR 15131, May 1, 1974, Part 1033: Car Service. (Chicago and North Western Transp. Co.) Amdt. 1 extends expiration date of S.O. 1159 to Oct. 31, 1974, effective April 30, 1974.

39 FR 15401, May 3, 1974, Part 1033: Car Service. 2nd Rev. S.O. 1174 promulgates regulations for distribution of boxcars, effective April 30, 1974.

39 FR 15402, May 3, 1974, Part 1033: Car Service. Amdt. 1 to S.O. 1178 promulgates regulations as to Distribution of Covered Hopper Cars, especially regarding retention of cars in service and return to owners, effective April 30, 1974.

39 FR 17321, May 15, 1974, Part 1033: Car Service. S.O. 1184 authorizes Central Iowa Ry. Co. to operate over tracks of Chicago, Rock Island and Pacific R. Co., between Iowa City and Hills, Iowa, effective May 10, 1974.

39 FR 18280, May, 24, 1974, Part 1033: Car Service Amdt. 1 to S.O. 1163 (Missouri Pac. R. Co.) extends expiration date to Nov. 30, 1974, effective May 31, 1974.

39 FR 18280, May 24, 1974, Part 1033: Car Service. Amdt. 3 extends the expiration date of S.O. 1125 (St. Louis-San Francisco Ry. Co.) to Dec. 31, 1974, effective May 31, 1974.

39 FR 18280, May 13, 1974, Part 1033: Car Service. Amdt. 2 extends the expiration date of S.O. 1144 (St. Louis-San Francisco Ry. Co.) to Dec. 31, 1974, effective May 31, 1974.

39 FR 18655, May 29, 1974, Part 1033: Car Service. Amdt. 4 extends the expiration date of S.O. 1102 (Delaware & Hudson Ry. Co. & Penn. Central Transp.) to Nov. 30, 1974, effective May 31, 1974.

39 FR 18656, May 29, 1974, Part 1033: Car Service. Amdt. 1 extends the expiration date of S.O. 1168 (Vermont Ry., Inc.) to Nov. 15, 1974, effective May 31, 1974.

39 FR 19218, May 31, 1974, Part 1033: Car Service. Amdt. 5 extends the expiration date of S.O. 1129 (Chicago, R.I. and Pac. R. Co. authorized to operate over tracks of Burlington Northern) to Dec. 15, 1974, effective May 31, 1974.

39 FR 19218, May 31, 1974, Part 1033: Car Service. Amdt. 4 extends the expiration date of S.O. 1121 (Chicago, R.I. and Pac. R. Co. authorized to operate over tracks of Chicago, M., St. P., and P. R. Co.) to Nov. 30, 1974, effective May 31 1974.

39 FR 20207, June 7, 1974, Part 1033: Car Service. Rev. S.O. 1171 promulgates regulations for return of hopper cars, effective June 10, 1974.

39 FR 20684, June 13, 1974, Part 1033: Car Service. S.O. 1185 promulgates regulations for minimum loading of refrigerator cars, effective June 10, 1974.

39 FR 20684, June 13, 1974, Part 1033: Car Service. S.O. 1186 promulgates regulations on distribution of privately owned coal cars, effective June 15, 1974.

39 FR 20799, June 14, 1974, Part 1033: Car Service. Amdt. 5 extends the expiration date of S.O. 1108 (Reading Co., et al) to Nov. 15, 1974, effective June 15, 1974.

39 FR 21054, June 18, 1974, Part 1033: Car Service. S.O. 1187 promulgates regulations for the return of trailers, effective June 15, 1974.

39 FR 22269, June 21, 1974, Part 1033: Car Service. Second Rev. S.O. 1112 promulgates railroad operating regulations for freight car movement, effective June 15, 1974.

39 FR 22269, June 21, 1974, Part 1033: Car Service. S.O. 1187 promulgates regulations for return of trailers, effective June 15, 1974.

39 FR 22426, June 24, 1974, Part 1033: Car Service. Second Rev. S.O. 1117-A vacates and sets aside S.O. 1117, effective June 19, 1974.

39 FR 23060, June 26, 1974, Part 1033: Car Service. Rev. Order No. 126, Amdt. 1 extends expiration date of Rev. S.O. No. 994 to July 15, 1974, effective June 15, 1974.

39 FR 24016, June 28, 1974, Part 1033: Car Service, Amdt. 2 extends expiration date of S.O. 1148 (Graham County R. Co.) to Dec. 31, 1974, effective June 30, 1974.

39 FR 24016, June 28, 1974, Part 1033: Car Service. S.O. 1188 authorizes Chicago, Rock Island and Pacific R. Co. to operate over tracks of the Chicago and North Western Transp. Co. effective June 25, 1974.

39 FR 24373, July 2, 1974, Part 1033: Car Service. Amdt. 3 extends expiration date of S.O. 1139 (Atchison, Topeka and Santa Fe Ry. Co.) to Dec. 31, 1974, effective June 30, 1974.

39 FR 24373, July 2, 1974, Part 1033: Car Service. Amdt. 2 to fifth Rev. S.O. 1043 (Return of Hopper Cars) extends expiration date to Jan. 31, 1975, effective June 30, 1974.

39 FR 24373, July 2, 1974, Part 1033: Car Service. Amdt. 7 extends expiration date of S.O. 1083 (Southern Pacific Transp. Co.) to Sept. 30, 1974, effective June 30, 1974.

39 FR 24374, July 2, 1974, Part 1033: Car Service. Amdt. 1 extends expiration date of S.O. 1164 (Texas & Pac. Ry. Co.) to Dec. 31, 1974, effective June 30, 1974.

39 FR 24507, July 3, 1974, Part 1033: Car Service. Third Rev. S.O. 1119 promulgates regulations as to Demurrage on Freight Cars, effective July 1, 1974.

39 FR 24508, July 3, 1974, Part 1033: Car Service. Fourth Rev. S.O. 1124 promulgates regulations as to Demurrage and Free Time on Freight Cars, effective July 1, 1974.

39 FR 24510, July 3, 1974, Part 1033: Car Service. Amdt. 1 extends expiration date of Rev. S.O. 1156 (Chicago, Rock Island and Pacific R. Co.) to Sept. 30, 1974, effective June 30, 1974.

39 FR 24510, July 3, 1974, Part 1033: Car Service. Amdt. 1 extends expiration date of S.O. 1166 (Chicago and North Western Transp. Co.) to Dec. 31, 1974, effective June 30, 1974.

39 FR 24510, July 3, 1974, Part 1033: Car Service. Corrected S.O. 1189 authorizes Great Plains Ry. Co. to operate over tracks of Chicago and North Western Transp. Co., effective June 27, 1974.

39 FR 25663, July 12, 1974, Part 1033: Car Service. S.O. 1187-A vacates and sets aside S.O. 1187 (Return of Trailers), effective July 2, 1974.

39 FR 26030, July 16, 1974, Part 1033: Car Service. S.O. 1190 authorizes Union Pacific R. Co. to operate over tracks of Southern Pacific Transp. Co., effective July 10, 1974.

39 FR 26288, July 18, 1974, Part 1033: Car Service. S.O. 1191 promulgates regulations on storage charges on assigned cars, effective July 16, 1974.

39 FR 26911, July 24, 1974, Part 1033: Car Service. S.O. 1186 promulgates regulations for Distribution of Privately Owned Coal Cars, effective July 29, 1974.

39 FR 27329, July 26, 1974, Part 1033: Car Service. S.O. 1192 authorizes Erie Lackawanna Ry. Co. to operate over tracks of Lehigh Valley R. Co., effective July 24, 1974.

39 FR 27574, July 30, 1974, Part 1033: Car Service. Corrected 3rd Rev. S.O. 1119 promulgated rules as to Demurrage on freight cars, effective July 1, 1974.

39 FR 27575, July 30, 1974, Part 1033: Car Service. Corrected Rev. S.O. 1186 promulgates rules for Distribution of Privately Owned Coal Cars, effective July 29, 1974.

39 FR 27671, July 31, 1974, Part 1033: Car Service. Amdt. 6 extends expiration date of S.O. 1106 (Balt. & Ohio authorized to operate over tracks of Penn Central) to Jan. 31, 1975, effective July 31, 1974.

39 FR 27671, July 31, 1974, Part 1033: Car Service. Amdt. 5 extends expiration date of S.O. 1084 (Chicago, R.I. & Pac. authorized to operate over tracks of Chicago & N W) to Jan. 31, 1975, effective July 31, 1974.

39 FR 27672, July 31, 1974, Part 1033: Car Service. Amdt. 1 extends expiration date of S.O. 1173 (Distribution of Refrigerator Cars) to Dec. 15, 1974, effective July 31, 1974.

39 FR 27672, July 31, 1974, Part 1033: Car Service. Amdt. 3 extends expiration date of S.O. 1149 (Forth Worth & Denver operating over tracks of Quanah, Acme, & Pac. and tracks of Atchison, T., & S. F.) to Jan. 31, 1975, effective July 31, 1974.

39 FR 27672, July 31, 1974, Part 1033: Car Service. Amdt. 2 extends expiration date of S.O. 1151 (Peoria Term. Co. operating over tracks of Peoria & Pekin Union) to Jan. 15, 1975, effective July 31, 1974.

39 FR 27804, Aug. 1, 1974, Part 1033: Car Service. S.O. 1193 promulgates regulations as to Distribution of Boxcars, effective Aug. 1, 1974.

Section 1. (16) Rerouting of traffic on failure of initial carrier to serve public.—[Unchanged except paragraph (b) was added and the first paragraph became (a) by act of July 2, 1974, "Regional Rail Reorganization Act of 1973," Pub. Law 93-236, 87 Stat. 1021].

(b) Whenever any carrier by railroad is unable to transport the traffic offered it because—

(1) its cash position makes its continuing operation impossible;

(2) it has been ordered to discontinue any service by a court; or

(3) it has abandoned service without obtaining a certificate from the Commission pursuant to this section;

the Commission may, upon the same procedure as provided in paragraph (15) of this section, make such just and reasonable directions with respect to the handling, routing, and movement of the traffic available to such carrier and its distribution over such carrier's lines, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people subject to the following conditions:

(a) Such direction shall be effective for no longer than 60 days unless extended by the Commission for cause shown for an additional designated period not to exceed 180 days.

(b) No such directions shall be issued that would cause a carrier to operate in violation of the Federal Railroad Safety Act of 1970 (45 U.S.C. 421) or that would substantially impair the ability of the carrier so directed to serve adequately its own patrons or to meet its outstanding common carrier obligations.

(c) The directed carrier shall not, by reason of such Commission direction, be deemed to have assumed or to become responsible for the debts of the other carrier.

(d) The directed carrier shall hire employees of the other carrier to the extent such employees had previously performed the directed service for the other carrier and, as to such employees as shall be so hired, the directed carrier shall be deemed to have assumed all existing employment obligations and practices of the other carrier relating thereto, including, but not limited to, agreements governing rate of pay, rules and working conditions, and all employee protective conditions commencing with and for the duration of the direction.

(e) Any order of the Commission entered pursuant to this paragraph shall provide that if, for the period of its effectiveness, the cost, as hereinafter defined, of handling, routing, and moving the traffic of another carrier over the other carrier's lines of road shall exceed the direct revenues therefor, then upon request, payment shall be made to the directed carrier, in the manner hereinafter provided and within 90 days after expiration of such order, of a sum equal to the amount by which such cost has exceeded said revenues. The term "cost" shall mean those expenditures made or incurred in or attributable to the operations as directed, including the rental or lease of necessary equipment, plus an appropriate allocation of common expenses, overheads, and a reasonable profit. Such cost shall be then currently recorded by the carrier or carriers in such manner and on such forms as by general order may be prescribed by the Commission and shall be submitted to and subject to audit by the Commission. The Commission shall certify promptly to the Secretary of the Treasury the amount of payment to be made to said carrier or carriers under the provisions of this paragraph. Payments required to be made to a carrier under the provisions of this paragraph shall be made by the Secretary of the Treasury from funds hereby authorized to be appropriated in such amounts as may be necessary for the purpose of carrying out the provisions hereof.

Amendments, see footnotes, vol. 2. p. 962; vol. 9, p. 7294.

Historical Note

The Commission recommends that §1(16) be amended so as to empower the Commission to direct one railroad to operate over the tracks of another when the latter is unable to transport essential tendered traffic.—Annual Report, 1973, p. 85. See also vol. 2, p. 887.

Notes of Decisions

Volume 2—p. 962; Volume 9—7294.

Section 1. (17)(a). Directions of Commission as to car service; disobedience; rights of States.—[Unchanged. See vol. 9, p. 7295, vol. 18, p. 14025.]

For previously reported amendments, see footnotes, p. 963; historical note, p. 887; for earlier notes of decisions, p. 963.

Section 1. (17)(b). Bribery affecting car supply or distribution; penalty.—[Unchanged. See vol. 11, p. 9127.]

Section 1.(18) Extension or abandonment of lines; certificate required; contracts for joint use of spurs; switches, etc.—[Unchanged. See vol. 9, p. 7296, vol. 11, p. 9128.]

Historical notes, vol. 2, p. 694, vol. 9, p. 7296, vol. 11, p. 9128, vol. 12, 10211, vol. 13, p. 10931, vol. 14, p. 11414, vol. 16, p. 12618, vol. 17, p. 13269.

Cross Reference

See §13a, infra., Discontinuance or change of certain operations or services, authorized by State statutes and authorities..

Notes of Decisions

Volume 2—p. 966; Volume 6—p. 4934; Volume 9—p. 7297; Volume 11—p. 9128; Volume 12—p. 10212; Volume 13—P. 10932; Volume 14—p. 11414; Volume 15—p. 11984; Volume 16—p. 12619; Volume 17—p. 13269; Volume 18—p. 14026; Volume 19—p. 15068; Volume 21—p. 16424.

5. Construction of paragraph in general.—[Vols. 2, 6, 9, 11, 14, 15, 17, 18, 19, 21].—In action challenging order of the Commission authorizing intervening defendant railroad to abandon its entire line, located entirely within Virginia, the Commission's decision that public convenience and necessity permit abandonment is warranted in law and supported by substantial evidence on the record viewed as a whole. Congress entrusted to the Commission—not the courts—the duty to find the facts and exercise a reasonable judgment to determine the requirements of the public convenience and necessity; and its judgment that, in view of other service available in the area, the inconvenience to communities and shippers is outweighted by the burden placed on interstate commerce by subsidizing the railroad's unprofitable operation finds substantial support in the record. Accordingly, relief sought by plaintiffs is denied; action dismissed.—Washington and Old Dominion Users Ass'n v. United States, 287 F. Supp. 528 (530-2, 535)*.

The principal evil which §1(18) was designed to eradicate is the waste of carrier funds through building or extension of unnecessary lines which, without adequate promise of profitable operation, would become a burden on the public. It was also designed to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a line not required in the public interest.—Monon R. Construction and Operation, 324 I.C.C. 208 (233, 235).

Although order of bankruptcy court authorizes trustee of carrier in reorganization, effective upon the Commission's ratification, to acquire by conveyance or condemnation a right-of-way and certain trackage owned by complainant, a public corporation of the State of New Jersey, the Commission has no power to compel a carrier to acquire trackage rights or a line of railroad. Whether the transaction be subject to §5 or §1(18), the Commission's authorization to a carrier to engage in a transaction is permissive, not mandatory, and the Commission may not sanction a transaction unless an appropriate application has been submitted to it.—Industrial Corp. of S. Hackensack, N.J. v. N.J. & N.Y. R. Co., 324 I.C.C. 272 (273-4).

Of points raised by protestants in proceeding on railroad's application for authority to (1) abandon portion of its line over its Calumet River bridge, (2) construct and operate track extensions on either side of the river connecting its line with main line of another railroad, and (3) to acquire trackage rights over tracks of the other railroad approaching and crossing the river, only the matter of whether or not those transactions are permitted and required by public convenience and necessity and consisent with the public interest comes within the Commission's jurisdiction; and, as used in the Act, those terms are not as broad as they might seem in the abstract, but have direct relation to adequacy of transportation service, to its economy and efficiency, and to appropriate provisions and best use of transportation facilities.—Calumet Western Ry. Abandonment, 324 I.C.C. 523 (524, 532).

Operation by applicant railroad over the tracks of another constitutes a bona fide operation of a line of railroad under a trackage rights agreement and not a joint traffic arrangement; thus the abandonment of such operation is within the purview of §1(18) and subject to the Commission's jurisdiction, and fact that passenger service only is involved does not detract from its jurisdiction. Furthermore, acquisition of such trackage rights was found to be a transaction under §5(2) in 261 ICC 615, and a finding that considered operation is merely a joint traffic arrangement would be inconsistent with that decision and with the trackage agreement, and would be contrary to obvious intention of the parties when they executed that agreement.—Baltimore & O. R. Co. Abandonment, 328 I.C.C. 449 (452-3).

Order denying applicant's motion to dismiss its application under section 1(18) on the basis that effectuation of the trackage rights would constitute extension of the lines of both applicants modified, since this alone would not warrant denial of applicant's motion and dismissal of its application. An extension of lines of the acquiring carrier is implicit in any section 5(2)(a) transaction. There is no provision in the Act requiring approval of such extension under section 1(18) distinct from Commission approval of the section 5(2)(a) transaction and even a transaction exempted from Commission jurisdiction by the last sentence of the 1(18) exemption is directed to transactions so minor in nature as to have little or no effect on the service or financial structure of the lessor or on the employment status of its operating personnel. In this case, applicant will supersede the entire operations of Seaboard. The Act does not intend that the Commission have no jurisdiction over a transaction having as comprehensive effect as this upon the operations of a carrier party.—Seaboard Air Line R. Co.—Trackage Rights, 331 I.C.C. 361 (364-65)*.

The statute, §1(18-20), has been construed as (1) conferring jurisdiction upon the Commission subject to certain exclusions over abandonment proposals of all railroads engaged in interstate commerce notwithstanding that the line being abandoned may lie wholly within a single state and (2) requiring that due consideration be given to State and local interests in view of the fact that services in interstate and intrastate commerce are inextricably intertwined. Inasmuch as State commission's order of abandonment of the line (located wholly within the State) was restricted to intrastate operations, there is no conflict with Commission's jurisdiction over the abandonment nor is a decision on the jurisdictional issue of the State commission warranted.—Washington & Old Dominion R. Abandonment—Virginia, 331 I.C.C. 587 (591)*.

As pointed out in 315 US 381, the Commission has authority to determine the economic advisability of the continued operation of a railroad "in a situation where someone other than the carrier provides the money". Record shows that neither the expenditures for rehabilitating the line nor the increasing costs of operation can be justified on the basis of present and probable future traffic or predictable revenues to be derived therefrom, regardless of whether operation of the line is continued by applicant or another operator; furthermore, if the line were continued, the State authority could not escape the costly rail-highway crossing projects.—Id., pp. 592-4.

Even if proposed schedules cancelling indicated switching arrangements may force protestant rail carrier to an abandonment contrary to §1(18) protestant's sole remedy is a civil injunctive proceeding under §1(20) which remedy is inconsistent with a proceeding under §1(18) seeking a Commission order to the same end. Commission thus has no jurisdiction over the matter of abandonment, may not consider related issues, and finds such schedules just and reasonable. —Switching & Routing, W. Bank Port Facilities, 332 I.C.C. 398 (401).

Commission, citing *Texas*, 270 US 266, held that spending of large sums of money by a carrier for construction purposes, and the construction of tracks for long distances makes the transaction subject to jurisdictional requirements of §1(18), irrespective of other considerations.—Central of Georgia Ry. Co.—Operation in Ala., 336 I.C.C. 623 (634).

See also North Western Employees—Pur.—Chicago & N.W. Ry. Co. at §5(2), note 5.

12. Effect of Commission's orders on contracts or agreements of carriers.—[Vols. 2, 6, 9, 13, 14, 16, 17, 19].—Substituting a common law business trust as owner-lessor of nonoperating rail carrier's leased railroad lines neither affects operations or service to the public by operating lessee nor reduces the owner-lessor's ability to perform its duties or obligations under the lease or under a reversion of the properties in the event the lease is terminated; however, the authority granted to acquire the rail line, property and franchises of nonoperating rail carrier and to substitute the trust as lessor is conditioned upon prior Commission approval of the termination of the trust.—Pittsburgh & W. Va.

R.—Pur.—Pittsburgh & W. Va. Ry. Co., 330 I.C.C. 593 (596-7).

Carriers Affected

15. In general.—[Vols. 2, 6, 9, 17, 19, 21].—See Pittsburgh & W. Va. Ry. Co. case, §1(3)(a), n. 2

17. —Wholly within a State.—[Vols. 2, 6, 9, 11, 13-17].—The Commission has jurisdiction over abandonment proposals of all railroads engaged in interstate commerce notwithstanding that the line being abandoned may lie whooly within a single state; however, due consideration should be given to State and local interests in view of the fact that services in interstate and intrastate commerce are inextricably interwined.—Washington & Old Dominion R. Abandonment—Vrginia, 331 I.C.C. 587 (591)*.

See also Brooklyn Eastern District Terminal v. United States, §1(22), n. 1.

Acts For Which Certificate is Prerequisite

26. Construction in general.—[Vols. 2, 6, 9, 11, 15, 19, 21].—See Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co., §1(20), n. 16.

28. —Relocation of line.—[Vols, 2, 16, 17, 19].—Since mid-portion of railroad's branch line would be inundated and abandoned upon completion of Oahe Dam, leaving remaining portion of the branch unconnected with applicant's main line, proposed construction of 35-mile substitute line to reestablish that connection is found to be required by present and future public convenience and necessity. On further hearing to consider effect of the abandonment on shippers on remaining portion of the branch, record shows that (1) grain production in the area is substantial and increasing, (2) producers depend on the branch, (3) large quantities of government grain stored in the area will probably move by rail, and (4) that the line will initially generate enough revenues to produce net profits with good prospects of increased earnings; in addition, proposed construction will not weaken carrier's ability to provide on overall adequate and efficient service. Under the circumstances, the branch line should continue in operation and construction of the connecting substitute line is warranted; authorized.—Northern Pac. Ry. Co. Abandonment and Construction, 324 I.C.C. 750 (752, 760-2)*.

29. —Extensions.—[Vols. 2, 6, 9, 12, 14, 16-19, 21].—In action to set aside Commission order granting Norfolk Southern's application, and denying plaintiff's, for authority to construct an extension of rail line to reach newly developed phosphate fields, the Commission's findings, reasoning and conclusions are well within its province and are supported in the evidence; therefore, the reviewing court will not disturb the order. Principal shipper's expressed preference for Norfolk (thought it entered into the conclusions) was not a whim or personal taste, but a preference supported by sound, economic advantages it believes obtainable from that railroad's operation and not observable in plaintiff's; and other findings, supported by the record, amply sustain the Commission's conclusions that need for only one line was shown and issuance of certificate to Norfolk Southern was warranted. Furthermore, record shows adequate Commission consideration of plaintiff's suggested alternatives to an exclusive certificate; condition attached to certificate issued is significant in that regard. Complaint dismissed.—Atlantic Coast Line R. Co. v. United States, 243 F. Supp. 945 (946-7)*.

30. Abandonment.—[Vols. 2, 6, 9, 12, 14, 16-19, 21].—After examining the whole record in suit to set aside Commission certificate and order, which authorized Erie-Lackawanna Ry. to abandon certain branch lines, the court finds no basis for holding that (1) the Commission abused its discretion by not considering whether losses incurred in maintenance of those lines remained a burden on interstate commerce after inclusion of applicant in the more prosperous Norfolk & W. system; (2) the findings as to branch-line losses are not supported by substantial evidence and not adequate to sustain the order in issue; and (3) the Commission erred in altering, without proper explanation, its regulations concerning computation of operating expenses of the lines in question, as plaintiffs claim. Accordingly, in view of the very limited scope of judicial review, the Commission's order must be sustained; previously issued restraining order dissolved and the complaint dismissed.—Cobb v. United States, 297 F. Supp. 169(170)*.

Courts are not free to annul decision of Commission to allow abandonment of railroad because of declining traffic, substantial losses and need of substantial but unwarranted expenditures to continue operation because greater wisdom might have preserved a valuable transportation enterprise. Unprofitable operation cannot be expected to continue indefinitely to benefit shippers who did not furnish sufficient traffic to support line.—City of New York v. United States, 337 F. Supp. 150 (150)*.

Doctrine that authorization of abandonment of line by lessee railroad will not relieve lessor of independent obligation to operate leased properties applies only when lessor is a carrier by railroad within meaning of statute when lease was made.—Id., p. 150.

Where city filed separate action seeking to compel lessor to resume operations abandoned by railroad which was subsidiary and such case had been remanded to Commission to determine lessor's obligation, court reviewing order permitting abandonment of line would not consider claim that order of abandonment should have been conditioned on resumption of operations by lessor.—City of New York v. United States, 344 F. Supp. 929 (941)*.

On reconsideration, authority is granted short-line railroad to abandon its entire rail line; however, in view of approval of separate application of another railroad to acquire and operate line to be abandoned, and so as to avoid possible interruption of service, abandonment authority is made effective from and after commencement of service pursuant to the acquisition and operation authority.—Manistee & R.R. Co. Abandonment, 324 I.C.C. 489 (490, 492-3)*.

No §1(18) application seeking authority to abandon operations by applicant over tracks of another railroad is required inasmuch as applicant reserves the right to operate over the portion of track now used exclusively by the subject trains herein, and which was formerly used occasionally by freight cars.—Erie Lackawanna Ry. Co. Discontinuance of Trains, 336 I.C.C. 206 (233-4).

In authorizing abandonment of applicant's 225-mile subdivision and its subsidiary entire line, Commission noted that applicant was almost bankrupt, that the lines were in need of rehabilitation and that the cost, estimated at between $6 and $12 million, was not justified by present and potential revenues and traffic, citing Purcell, 315 US 381. Guidelines were established for determining whether a railroad intentionally downgraded a line or merely neglected it through a need to economize.—Missouri-Kansas-Texas R. Co. Abandonment, Okla., 338 I.C.C. 728 (743-47).

Mere fact that a line of railroad is losing money does not justify granting abandonment. Applicant must establish by clear, convincing evidence that abandonment will serve the public convenience and necessity. As shippers seem both capable and willing to offer more tonnage, applicant fails to carry its burden of proof. Application denied.—Lehigh Valley Railroad Company Abandonment, 338 I.C.C. 793 (803-4).

Commission prescribed traffic protective conditions herein to protect railroads affected by the abandonment of certain lines by bankrupt Central R. Co. of New Jersey and subsequent operation of such lines by Lehigh Valley R. Co. Additionally, conditions were prescribed establishing a trust fund to receive all of Central's revenues on interlined traffic.—Central R. Co. of New Jersey, 342 I.C.C. 227 (267-71).

See also Baltimore & O. R. Co. Abandonment case, n. 5 above: Brooklyn E. District Terminal Abandonment case, §1(20), n. 8; Manufacturers Hanover Trust Co. v. United States, §5(2), n. 52; Washington & Old Dominion R. Abandonment—Virginia case, n. 59, below.

32. Acquisition and operation.—[Vols. 2, 6, 9, 11, 15, 16, 18, 19].—Railroad's acquisition and operation (as a spur or industrial track) of entire line of short-line railroad to be abandoned is within the Commission's jurisdiction, and requires prior approval, under §1(18), such acquisition and operation not being exempt under §1(22); however, approval of instant application is not to be construed as a finding that considered line is a spur or industrial track, since decision would be the same whether spur or main-line trackage were involved.—Manistee & R. R. Co. Abandonment, 324 I.C.C. 489 (491-2)*.

Railroads' proposal to acquire and operate (as a spur or industrial track) portions of the trackage, in connection with proposed abandonment of entire line of railroad, is within the Commission's jurisdiction under §1(18-20), such acquisition and operation not being exempt under §1(22); thus, although filed under §5(2), the applications are properly entertainable under §1(18).—East Carolina Ry. Abandonment, 324 I.C.C. 506 (517-8).

34. **—Trackage Rights.**—[Vols. 2, 6, 9, 11, 13, 15, 17, 18, 21].—See Oregon-Washington R. & Nav. Co. v. United States, §5(2), n. 56.

Public Convenience and Necessity

44. **In general.**—[Vols. 6, 9, 11-15, 18, 19, 21].—In determining that public convenience and necessity permitted applicant railroad's abandonment of its entire line, located wholly within Virginia, the Commission properly considered the substantial savings to the State Highway Department (through use of abandoned right-of-way as part of new interstate highway system) even though amounts thereof would not accrue to the railroad itself. In addition, since the important issue in suit challenging the order authorizing abandonment is the effect of the railroad's prospects on public convenience and necessity, the court finds no error in the Commission's consideration of, and findings regarding, the railroad's feeder value, revenues (including divisions), and operating costs and, also, the large sums that would have to be spent for its rehabilitation. Congress entrusted the Commission with the duty to find the facts and exercise a reasonable judgment to determine requirements of "public convenience and necessity" and, since the record amply supports its findings and conclusions, plaintiffs are not entitled to relief sought. Action dismissed.—Washington and Old Dominion Users Ass'n v. United States, 287 F. Supp. 528 (531-4, 535)*.

In challenging the Commission's order granting defendant carriers authority to construct and operate a 13-mile rail line, to connect with industry trackage in newly developing industrial area, plaintiffs (protestants in Commission proceeding) argue that a certificate of convenience and necessity may not be granted unless an "urgent necessity" for proposed service is shown to exist; however, a literal interpretation of word "necessity" would frustrate the statutory scheme envisioned by Congress. In instant case, "necessity" must be construed to mean a substantial need for present or future service which is not or cannot be adequately supplied by existing carriers or facilities. The Commission, with its expertise and special knowledge, is allowed broad discretion in making such a determination and the scope of judicial review is extremely narrow. Therefore, since the Commission's action does not constitute an abuse of discretion and is supported by substantial evidence on the record as a whole, plaintiff's claim for relief is denied; order sustained.—Denver & W. R. Co. v. United States, 312 F. Supp. 329 (333)*.

In order to determine whether public convenience and necessity permit abandonment of subsidiary railroad's entire intrastate line, it is necessary to weigh marginal profits from combined operations of subsidiary and parent against the needs and burdens of rehabilitation and needs of public for continued operation. Revenues from the subsidiary line are on downward trend, not justifying $350,000 for rehabilitation of line or $31,000 annual expenditure for maintenance; acquisition and operation of portions of the trackage by parent and another railroad would permit rail service to many of shippers while most of remaining shippers had motor carrier and pipeline service available; approved.—East Carolina Ry. Abandonment, 324 I.C.C. 506 (514-20).

Applicant constructed trackage for which approval is sought prior to filing of application in belief that involved track was an exempt industrial spur. Such track is only existing track over which deliveries can be made to supporting shipper's mine site and denial of application would seriously injure shipper. Application approved as public necessity for the operation of involved trackage outweight extra legal circumstances of its construction.—Illinois Central R. Co. Operation in Jef. County, Ill., 328 I.C.C. 586 (592-3).

See also Calumet Western Ry. Abandonment case, n. 5, above.; New York, N.H. & H.R. Co. Abandonment case, n. 60 below; Oregon Short Line R. Co. & Union Pac. R.

Co. Construction, n. 96, below; Permian Basin R. Co.—Construction case, n. 101, below; Southern Pac. Co. Discontinuance case, §13a, n. 20.

45. Definitions.—[Vols. 2, 14, 21].—The terms public convenience and necessity and consistent with the public interest, as used in the Act, are not as broad as they might seem in the abstract, but have direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provisions and best use of transportation facilities.—Calumet Western Ry. Abandonment, 324 I.C.C. 523 (532).

50. Taxes.—[Vols. 11, 12, 15-18, 21].—The Commission has consistently refused to consider the effect an abandonment will have upon the income tax liability of a carrier or system, inasmuch as matters of this nature have no reasonable relation to issues of public convenience and necessity. Further, the final tax liability of a carrier is dependent upon too many imponderables not directly related to operations to be used as factor in computing effect abandonment will have upon it.—East Carolina Ry. Abandonment, 324 I.C.C. 506 (511-2).

Abandonment

55. Abandonment defined.—[Vols 2, 6, 9, 11, 15, 17, 18, 21].—See Commonwealth of Pennsylvania v. Penn Central Transp. Co., §1(20), n. 16.

59. Grounds for abandonment in general.—[Vols. 2, 6, 9, 11, 15-19, 21].—"Normalization" of traffic figures used in computing railroad's projected annual loss so as to reflect average traffic of years prior to application for abandonment is not justified unless it is shown that denial of the application will bring the traffic back.—City of New York v. United States, 344 F. Supp. 929 (935)*.

Proposed abandonment of branch line approved, where record of deficit operations of the branch indicates irreversible deficits; also, neither possible future financial assistance from the State, nor unestablished service area growth potential, is entitled to weight because both are speculative. Moreover, principal users of the line use other means of transportation and could, at some inconvenience, retain present locations and rely solely on motor transportation or relocate on other portion of line; therefore, continued operation of considered low-density freight branch is not warranted, even though it could be continued in operation for a short time with small losses.—New York, N.H. & H.R. Co. Abandonment, 324 I.C.C. 345 (347, 352-4).

Continued operation of entire line of railroad located wholly within a single state is not justified in view of the proposed use of its right-of-way for other public transportation purposes, the minimal public need for rail line's freight service, expenses incurred in operating the service, heavy expenditures required for rehabilitating the line, financial losses sustained by carrier, continuing downward traffic trend, and bleak prospects for the future.—Washington & Old Dominion R. Abandonment—Virginia, 331 I.C.C. 587 (598)*.

Moreover, while the Commission has discretionary power to impose a condition for the sale of the line at salvage value, it is not exercised unless required by public convenience and necessity. Since applicant railroad has a firm commitment to sell the line to state authority and public utility at a price substantially higher than salvage value, requiring it to accept less than the purchase contract would be unfair; further, to so condition the abandonment authority would be inconsistent with the evidence that there is insufficient need for service to warrant maintenance of the railroad intact. In addition, imposition of the condition would hamper the plans of federal and state authorities for use of the right-of-way for highway purposes.—Id., pp. 599-601.

Abandonment by applicant of its entire line of railroad authorized. Applicant has been previously adjudged bankrupt and its operations have been abandoned. Abandonment proposed herein would allow acquisition of applicant's line by three carriers who would restore much needed rail service to communities on applicant's line.—Tennessee Central Ry. Co. Abandonment, 334 I.C.C. 235 (237-8).

Upon reconsideration, proposed abandonment herein denied as testimony of shippers, receivers of freight, and public witnesses establishes the potential for economic growth of the area served and the fact that this potential is directly based upon the availability of rail service.—Wellsville, A. & G. R. Corp. Abandonment, 338 I.C.C. 604 (608-9)*.

Although question of possible damage to environment has been raised, denial of application for abandonment herein would almost certainly result in financial collapse of applicant thus substituting economic waste for the envisioned environmental damage. Under balancing test stated in *Calvert Cliffs* economic harm outweighs environmental damage. Application approved.—Bush Terminal R. Co. Entire Line Abandonment, 342 I.C.C. 34 (35).

Fact that alternate motor transportation may prove to be more expensive for shippers is not determinative of whether a low traffic density line as that herein should be abandoned.—Chicago, M., St. P. & P. R. Co. Abandonment, 342 I.C.C. 146 (152)*.

After consideration of environmental effects only, Commission found the abandonment proposed should be approved provided that any interested party be afforded a 90-day period to acquire involved right-of-way for use as public parkland. Abandonment is a condition precedent to such use of this property and it must be concluded that this action will beneficially affect the environment.—Burlington Northern, Inc., Abandonment, 342 I.C.C. 446 (454-5)*.

Although applicant's method leaves something to be desired, record shows clearly that line involved is lightly used and unprofitable. Applicant is bankrupt and trimming of unprofitable branches in as economical way as possible is one acceptable method of eliminating deficits. Approved.—Penndel Co. Abandonment Bet. Wil. Jct. and New Wil., 342 I.C.C. 570 (577).

See also Brooklyn Eastern District Terminal v. United States, 28 USC §2325, n. 61; Tennessee Central Ry. Co. Abandonment case, n. 60 below.

60. —Losses from operation.—[Vols. 2, 6, 9, 11-19, 21].—Fact that due to other income of parent, ultimate impact of wholly owned subsidiary railroad's losses might be less than if the railroad stood alone, would not justify requiring railroad operations to be continued at a loss, and only railroad business was to be considered in determining whether operation was unprofitable and should be abandoned.—City of New York v. United States, 337 F. Supp. 150 (150)*.

Claim that the railroad's loss figures constituted only bookkeeping losses which must be disregarded because they reflected intercompany charges arising out of leasing arrangement between parent and railroad which was its wholly owned subsidiary rejected as it did not appear that the intercompany charges were either improper or unreasonable.—Id., p. 150.

Interest on net salvage value is not a savable out-of-pocket operating expense in abandonment proceedings, as both the net salvage value and interest thereon are capital account items. Thus, the interest is not considered in determining whether public convenience and necessity permit abandonment of line; however, consideration is given to the extent it is a benefit accruable to applicant upon abandonment.—New York, N.H. & H.R. Co. Abandonment, 324 I.C.C. 345 (349-50).

And in determining whether convenience and necessity permit abandonment of a branch line, the estimated minimum expenditures necessary to maintain the line for conducting safe operations for a subsequent 5-year period, rather than actual expenditures for maintenance during the record period or costs for normal maintenance as out-of-pocket expenses are acceptable to determine whether past operations have been profitable. While normalized maintenance is an objective to be strived for, the future minimum expenditures necessary for safe operations are more important in considering whether the line can continue to operate profitably and safety in the immediate future.—Id., pp. 351-2.

While a few shippers may suffer inconvenience and financial loss from proposed abandonment, record shows other transportation is available in the immediate area and on approval of related trackage rights agreement, overhead traffic will continue to move between major termini; moreover, evidence is not convincing that there will be an increased use of the line in the foreseeable future; therefore, any economic or service disadvantage resulting from abandonment will be small compared with deficits now experienced by applicant in continuing to maintain considered segment of line. Abandonment of 65-mile segment, authorized; and applicant's acquisition of trackage rights over 18 miles of line of another carrier, in accordance with proposed §5 trackage rights agreement in embraced proceeding, approved.—Louisville & Nashville R. Co. Abandonment, 331 I.C.C. 93 (94, 118-9)*.

Where rail-subsidiary applicant in an abandonment proceeding interchanges traffic with its parent railroad and is part of the parent railroad system, evidence with respect to feeder revenues derived by the system should have been presented; but the omission is not fatal because, since record shows that half the traffic is interstate, very little is outbound and inbound traffic is received from 5 railroads, feeder value of the subsidiary to its parent is *de minimis*.—Washington & Old Dominion R. Abandonment—Virginia, 331 I.C.C. 587 (595-6)*.

While the Commission may give consideration to the propriety of divisions in an abandonment proceeding, where the divisions arrangements between subsidiary applicant and its parent railroad are on the same basis as with other rail carriers, were arrived at before parent acquired control of applicant, and are not shown to be unreasonable or unfair, no need for adjustment of divisions arrangements is shown; therefore, protestant's request for investigation is denied.—Id., pp. 598-9.

A carrier is not required to continue in the carriage business when its overall operations are conducted at a systemwide deficit for a substantial period of time and where there is no reasonable prospect of conducting those operations at a profit for the foreseeable future. Evidence indicates that bankrupt rail applicant's growing operating expenses resulted in its deficit from operations increasing from $28,300 for 1963 to $1,774,877 for 1967; while its balance sheet at the end of latter year showed a net deficit of $1.6 million in working capital. Therefore, though industries and jobs along applicant's line are reliant on continuance of rail service thereover, public convenience and necessity permit the proposed abandonment. Denial of the application would neither preserve service for shippers or jobs for employees nor promote the economy of the territory; however, authorizing abandonment, conditioned on applicant's sale of the line (or portion thereof) to any responsible person for continued operation, could provide alternate means for preservation of service and jobs; authorized accordingly.—Tennessee Central Ry. Co. Abandonment, 333 I.C.C. 443 (447-8, 452-3).

In light of 49 CFR 1121.9, item 14(1)(d), an applicant must provide operating expenses of the line proposed to be abandoned, stated by appropriate primary accounts, actual so far as possible and otherwise approximated, with full statement of the accounting method used. Applicant's cost allocations based upon "educated guesses" are not acceptable.—Wellsville, A. & G. R. Corp. Abandonment, 338 I.C.C. 604 (606-7)*.

No allocation or assignment of bridge traffic revenues to line sought to be abandoned is required where evidence establishes such revenues will be retained by abandoning carrier over an alternate route but applicant has not shown just what part of bridge traffic would be retained.—Id., p. 607.

Applicant railroad, a debtor in reorganization under Bankruptcy Act, was directed by the reorganization court to discontinue its operations in Pennsylvania pending our decision herein. Although applicant's evidence contained weaknesses, its deficits have been sizeable each year and Commission therefore approved abandonment of Pennsylvania lines upon assurance that applicant's essential services would be continued by other carriers.—Central R. Co. of New Jersey—Abandonment, 342 I.C.C. 227 (288-91).

However, Commission found that much of applicant's proposal to abandon operations and lines in New Jersey should be denied. Record was devoid of supporting evidence by applicant or connecting railroads. In addition, there was no proposed alternative service for applicant's New Jersey lines sought to be abandoned.—Id. p. 294-97.

System earnings: In determining system financial results from operation of branch line sought to be abandoned, the 50-percent ratio has consistently been accepted as fair and reasonable where no computations and itemized expenses are submitted in evidence to show otherwise. As explained in 282 ICC 525, the Commission's purpose is to determine the effect of abandonment of branch on entire system, even though it may be impossible to find with accuracy what the expenses of handling branch traffic on system lines will be when mingled with other traffic on regularly scheduled trains moving over many lines in many directions. While there may be no tangible effect on expenses on other parts of the system, it is reasonable to assume that the cumulative effect might result in added expenses.—New York, N.H. and H. R. Co. Abandonment, 324 I.C.C. 345 (350).

Elimination of low-density freight branch that does not contribute to system (net tons of freight per mile of road per day being less than 1 percent of carrier's system average density) is essential for sake of carrier's survival and preservation of essential rail service.—Id., pp. 353-4.

Subsidiary railroad's use of a 65-percent formula (based on Rail Form A) to develop cost of handling feeder traffic of parent railroad, in determining effect of proposed abandonment of subsidiary's entire line on the parent rail system, rejected; since neither the Form used in applicant's computations nor the itemized expenses making up total out-of-pocket expenses of Rail Form A were made part of the record, it is impossible to determine if all out-of-pocket expenses in the computations would be truly savable. While there may be some merit to system operating results predicated on a 65-percent formula, record does not justify substitution thereof for the 50-percent formula which has consistently been found fair and reasonable. Based on applicant's past revenues and expenses, as set forth in its income statements, with elimination of the income tax liability and application of the 50-percent formula, conclusion is warranted that combined operating profits from applicant's traffic are marginal and are not sufficient to compensate the parent railroad for its investment in the subsidiary.—East Carolina Ry. Abandonment, 324 I.C.C. 506 (510-14).

64. —Traffic insufficient to justify existence of line.—[Vols. 2, 6, 9, 11-13, 19, 21].—Line of track involved herein is shown to require extensive and costly rehabilitation and maintenance due to its substantial age. The very light volume of traffic handled is insufficient to justify such heavy maintenance expenditures. Abandonment approved.—Chicago, M., St. P. & P. R. Co. Abandonment, 342 I.C.C. 146 (151-2)*.

See also New York, N.H. & H. R. Co. Abandonment case, no. 60 *Systems*, above.

65. —Road unsafe for operation.—[Vols. 2, 6, 9, 11, 13, 19, 21].—Abandonment sought herein authorized as the need for large expenditures for rehabilitation of the segment and for its continued maintenance has created a situation where the burden on the carrier would overbalance the public need for the line. See *Katy*, 338 ICC 728. A finding that involved line is presently being operated "safely" does not necessarily negate the need for rehabilitation expenditures.—Baltimore and Ohio R. Co. Abandonment Fairmont, 342 I.C.C. 751 (754-8).

66. —Relocation of line.—[Vols. 2, 6, 9, 11, 14, 16, 17, 19, 21].—In connection with authorized abandonment of portion of rail line over applicant's damaged bridge crossing the Calumet River, and with other proposed transactions, public convenience and necessity permit construction of extension of applicant's track south of the river from its main line within boundary of newly developed residential area to nearby bridge of Chicago & W.I.R. Co. across the river. Applicant's bridge, in its damaged condition, is a menace to navigation and must be removed; Western Indiana's bridge will be rebuilt to remove navigational obstructions, and joint use thereof by both railroads would be practicable and economical; and, from a transportation viewpoint, location of that bridge and the route to and from, agreed upon, is the most feasible; approved.—Calumet Western Ry. Abandonment, 324 I.C.C. 523 (524, 530-3).

68. Interest of communities and patrons.—[Vols. 2, 6, 9, 11-19, 21].—See Louisville & N. R. Co. Abandonment case, n. 60, above.

Acquisition and Operation

75. In general.—[Vols. 2, 6, 9, 15-17, 19, 21].—See Central R. Co. of New Jersey at §1(18), n. 30 above.

78. Continuance of needed service.—[Vols. 2, 6, 9, 11, 17, 19, 21].—Commission approved application by Lehigh Valley R. Co. to extend its lines over trackage in Pennsylvania to be abandoned by applicant. This would allow applicant, a railroad in reorganization under the Bankruptcy Act, to abandon these unprofitable lines but would continue needed service over the affected lines.—Central R. Co. of New Jersey—Abandonment, 342 I.C.C. 227 (291-3).

89. Acquisition or operation of abandoned line or to avoid acquisition or abandonment.—[Vols. 2, 6, 9, 21].—Acquisition by three carriers of portions of substantially all of the railroad line to be abandoned by Tennessee Central Ry. Co. approved as such acquisition will result in restoration of much needed rail service to communities on such line.—Tennessee Central Ry. Co. Abandonment, 334 I.C.C. 235 (244).

Employees

91. In general.—[Vols. 9, 11-19, 21].—As was done in the Savannah Union Station abandonment case, 312 ICC 797, conditions contained in 257 ICC 700 are imposed for protection of employees of subsidiary railroad seeking to abandon its entire line where, as a result of such abandonment, the parent rail carrier would not only benefit from being relieved of the burden of applicant's deficit operations but also benefit from assuming all or portion of prior operation of the subsidiary. There is nothing in the Rutland Ry. Corp. decision, 317 ICC 393, cited by applicant that could be construed as holding that Commission does not have statutory power to impose protective conditions for protection of railway employees in total abandonment proceedings if it considers their imposition reasonable and in the public interest.—East Carolina Ry. Abandonment, 324 I.C.C. 506 (520-22).

Imposition of employee-protective conditions is justified when evidence shows some adverse effect has or will be suffered by one or more railroad employees; and it is of no significance that the number of employees affected or to be affected is indeterminable. In connection with abandonment of B & O's operations over the tracks of New York Central, employees of Central to the extent they operated B & O's trains and otherwise serviced and maintained the necessary equipment and tracks in support of B & O's operations were joint or common employees of New York Central and B & O; thus, an employee-employer relationship existed between the New York Central employees and the B & O so as to justify the imposition of the Burlington conditions for the benefit of those employees who have or will be adversely affected as the result of the abandonment with the cost thereof to be borne by the B & O.—Baltimore & O. R. Co. Abandonment, 328 I.C.C. 449 (455-7).

Furthermore, where the B & O voluntarily abandoned operations over considered tracks without having first secured a certificate of abandonment, the action constituted an actual or de facto abandonment which justifies imposition of protective conditions, effective from the time the individual employee was adversely affected, or from the effective date of the certificate, whichever is first.—Id., p. 458.

Although the Commission does not generally impose employee-protective conditions involving abandonment of an entire line, the matter is to be decided in light of the evidence in each case. Record shows considered abandonment would be of substantial benefit (in the form of savings and disposition of properties) to applicant and, in turn, to its parent railroad and sole stockholder; therefore, Burlington conditions are imposed for protection of adversely affected employees of applicant and the cost thereof is to be borne by the parent railroad.—Washington & Old Dominion R. Abandonment—Virginia, 331 I.C.C. 587 (601-3)*.

In approving rail abandonment application, employee protective conditions are not imposed where proposed abandonment involves termination of all railroad operations of bankrupt independent line which is not able to meet its long-term or immediate financial obligations and, in addition, is not affiliated with a large, financially strong corporation benefiting from the abandonment and capable of sharing some of the costs incident thereto.—Tennessee Central Ry. Co. Abandonment, 333 I.C.C. 443 (453-4).

Commission refuses to impose employee protective conditions on Tennessee Central which is abandoning its entire line of railroad or on those carriers seeking control of portions of the abandoned line. Any adverse effect on involved employees was caused by previous cessation of all operations by TC and its financially bankrupt condition renders it unable to assume responsibility for such imposed conditions. Acquisition applications under §1(18) for extension of line over property previously abandoned are not similar to applications under §5(2) for consolidation of facilities. Commission cannot impose employee protective conditions herein as petitioner has not shown how proposed extension may adversely affect former employees. There is no discernible benefit to three railroads seeking acquisition of the line abandoned herein and thus no justification for imposition of employee protective conditions exists, especially as such imposition would block acquisition of involved line and deny much needed rail service to shippers.—Tennessee Central Ry. Co. Abandonment, 334 I.C.C. 235 (244, 245-246).

Contrary to applicant's arguments, Commission required employee protective conditions for employees affected by abandonment of entire line of applicant's subsidiary, pointing out that law makes no distinction between partial and entire line abandonments (see ICC v Railway, 315 US 373).—Missouri-Kansas-Texas R. Co. Abandonment, Okla., 338 I.C.C. 728 (752-3).

Construction of New Lines Or Reconstruction of Old

95. In general.—[Vols. 2, 6, 9, 11].—The purpose of §1(18)-(22) is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to prevent them from being weakened by another carrier's construction and operation of a competing line not required in the public interest. As the wording of §1(18) does not permit formulation of an equation which can be applied with mathematical perfection to determine whether public convenience and necessity require proposed construction, it is the Commission's duty to find the facts and determine that question in exercise of reasonable judgment; and in determining whether construction of a new line of railroad is required, any inherent advantages in the proposed service over existing service must, when demonstrated of record, be given weight; lacking such a showing, there is no basis for assuming the return of reasonably predictable revenues to justify the expenditure of labor and materials.—Monon R. Construction and Operation, 324 I.C.C. 208 (232-3).

While denial of authority sought by instant applications will effectually prevent construction of proposed coal transfer facilities at Louisville, Ky., and at Michigan City, Ind., planned to be accomplished with funds obtained pursuant to a loan guaranty granted under Part V, applicant did not file application under §1(18-20) prior to or concurrently with its applications under Part V and §20a, and existence of the loan guaranty and authority granted under §20a to issue securities does not relieve the Commission of its duties and responsibilities under §1(18-20).—Id., p. 235.

Application for authority to construct and operate a line of railroad about 80 miles long from Odessa to Seagraves, Tex., presents an unusual case; in an age of declining rail mileage, it stands out as a proceeding to construct a new railroad. Residents of the three-county area have great faith in its future growth and, within reasonable limits, should be permitted to assume the risks involved in constructing a railroad. If those most directly concerned are willing to risk their capital with full knowledge of all relevant circumstances, the Commission should be reluctant to deny them opportunity to improve economy of their area; particularly when the area, now largely dependent on prosperity of one industry, may with adequate rail service develop a more diversified economic base. Applicant should not be denied opportunity to tap the substantial reservoir of traffic available in the area unless the Commission is reasonably certain that its knowledge of local economic conditions exceeds knowledge of those in the area who are prepared to invest in its future.—Permian Basin R. Co.—Construction, 330 I.C.C. 256 (264-5)*.

96. Necessity.—[Vols. 2, 6, 9, 16, 17, 19, 21].—No cost or other advantage of new through route resulting from proposed construction of new coal transfer facilities at Louisville and rail-marine transloading facilities at Michigan City, Ind., has been demonstrated, and it is clear that unless rates established by applicant Monon would be attractive to supporting shippers, making their costs over its route competitive with those over existing routes, none of the coal involved would move over the proposed route. Therefore, shippers who supported the applications did not show a genuine need for the proposed service, and their desire to have an alternate route available, which they would use only if the rate provided was attractive to them, would not justify a finding that public convenience and necessity requires the proposed extensions of line or that they are needed to assure existing and prospective shippers of adequate service. Proposed construction would waste carrier funds through building of unnecessary lines which, without adequate promise of profitable operation, would become a burden on the public. Denied.—Monon R. Construction and Operation, 324 I.C.C. 208 (234-5).

Determination of whether public convenience and necessity requires construction of 35-mile connecting line of railroad, to replace mid-portion of branch line which will be inundated and abandoned upon completion of Oahe Dam, depends on balancing the cost of constructing and operating the line against the adverse effect resulting from loss of the entire branch line. Requirements of public convenience and necessity for proposed construction (as developed at further hearing) outweigh result of comparing construction costs to net revenue carrier would realize in immediate future. Also, it is of primary importance that proposed construction and operation will not weaken carrier's ability to provide an overall adequate and efficient service and will preserve inherent advantages of rail service for grain producers and shippers in the area; authorized.—Northern Pac. Ry. Co. Abandonment and Construction, 324 I.C.C. 750 (760-2)*.

Public convenience and necessity require proposed construction and operation of a new 13.27-mile rail line from Hot Springs, Utah, to connect with industry trackage in Little Mountain area where large mineral resources are to be developed, when it would enable Union Pacific to provide developing industry with direct single-line service therefrom to the Pacific Northwest, southern California, and Midwestern points. Both UP and Southern Pacific serve general territory involved and, while SP's line is closer to parts of the developing area, that fact does not justify precluding UP from direct access thereto. Neither carrier has handled traffic from the area; both have invested in development of the industrial site, and both have a right to compete for the new traffic; thus, no issue of territorial invasion is involved. Also, there is no basis for finding that SP would be materially harmed by approval of the application; its present traffic would not be affected and its failure to get all the new traffic could not materially affect its system operation or strength.—Oregon Short Line R. Co. & Union Pac. R. Co. Construction, 334 I.C.C. 267 (268-70)*.

As the examiner found, applicant's proposal involves some duplication with existing SP facilities (which does not imply duplication of service) and, under §1(18), the Commission is to prevent improvident expenditures for unnecessary facilities and thereby protect carriers from unnecessarily weakening themselves. However, on unrefuted facts of record, there is no reason to say that UP needs to be protected from an improvident expenditure; nor is there basis for a finding of economic waste in the amounts by which costs of two originating lines exceed costs of one when, relatively speaking, amounts involved are *de minimus*. Both carriers are multibillion dollar companies with annual operating revenues that dwarf into insignificance the $1 million of extra investment cost noted by the examiner; adequate justification for that cost lies in the superior service and public benefit it will produce.—Id., p. 270.

Within the overall statutory scheme, however, carrier well-being is not the primary consideration; it is but a means to the end of providing for the public's transportation requirements. All the area's developers expressed support for applicants' proposal; and, while SP argues that joint-line route, SP-Ogden-UP, could be equally efficient and economical, the evidence indicates that UP's single-line service (avoiding interchange at Ogden) would be inherently faster, more efficient, and potentially more economical; also, such single-line service would be more likely to meet other transportation demands in development of the area. Moreover, the presence of the two lines and competitive routes in which they participate will, through rate and service competition, provide greater assurance of dependable service at economical rates.—Id., pp. 270-2.

97. Adequacy or inadequacy of existing service.—[Vols. 2, 6, 9, 18, 19, 21].—Sound economic conditions in the transportation industry require that carriers already serving a particular territory or locality be accorded the right to transport all traffic therein that they can handle adequately, efficiently, and economically, before a new operation is authorized. Therefore, extensions permitting a through service between proposed coal transfer facilities at Louisville and at Michigan City, Ind., should not be authorized solely on findings that their construction would benefit applicants and improve their financial and competitive positons; instead, the broader test of whether public convenience and necessity requires or will require the construction, and whether the resulting services are needed to ensure adequate service to the public, must be applied. Construction of superfluous lines and facilities not needed to ensure adequate service should not be authorized, and existing carriers should not be required to face unnecessary competition, particularly if they are adequately and efficiently handling the traffic involved.—Monon R. Construction and Operation, 324 I.C.C. 208 (233-4).

Whether the proposed construction be viewed in the broadest context as a proposal for institution of a rail-water route to compete with existing rail-water routes, or merely as one for construction of a line of railroad to compete with existing lines, applicants have failed to demonstrate that the proposed service will have any inherent advantage of cost or otherwise over existing service. Indiana mines on the Monon, which are adequately served by its existing lines, would not by themselves support the proposed operations, and coal contemplated for movement over the proposed facilities at Louisville, primarily from Kentucky and West Virginia mines, now moves via facilities of protestant railroads. Allegations of new or increased movements in the area are purely speculative, and there is no showing that existing carriers' services are inadequate or inefficient, that additional capacity to move involved coal traffic is needed, or that any other commodities would move over the proposed transfer facilities. Applications denied.—Id., pp. 232, 234. [But see dissent.]

98. Duplication of facilities.—[Vols. 2, 6, 14, 15, 17, 19].—Applicant Monon and each of protesting railroads has suffered a decline in coal traffic; coal contemplated for movement over proposed facilities at Louisville is now moving via protestants' facilities, and allegations of new or increased movements in the area are purely speculative. Construction of additional lines of railroad devoted primarily to transportation of coal would only rearrange the proportion of existing traffic which each carrier now enjoys, further expanding the overcapacity already existing in the area to be served. Such action would tend to weaken other carriers operating in interstate commerce, and would not afford existing carriers the right to transport all traffic which they can handle adequately, efficiently, and economically. Authority for proposed construction denied.—Monon R. Construction and Operation, 324 I.C.C. 208 (234, 235). [But see dissent.]

See also Oregon Short Line R. Co. & Union Pac. R. Co. Construction, n. 96, above.

99. Development of territory or traffic.—[Vols. 2, 6, 9, 11, 17-19, 21].—Evidence is convincing that, even considering applicant's imprecise traffic study, construction of proposed new 80-mile line of railroad from Odessa to Seagraves, Tex., to provide direct rail freight service in large oil and gas fields and in highly developed agricultural area, would attract some new industry and, also, would alter existing production and marketing patterns for such commodities as sugar beets, oil field equipment and supplies, grain, cotton, and new automobiles. Many industries will not locate a plant in an area not served directly by railroad; shippers in considered area will derive great advantage from proposed line; and, in addition, protesting rail carriers will not be materially affected by a grant of authority. Record shows a need for direct rail service in the Odessa-Seagraves corridor and that such service would foster further development in the tributary area; granted.—Permian Basin R. Co.—Construction, 330 I.C.C. 256 (265, 267)*.

Present and future public convenience and necessity require proposed construction and operation of a new rail line that would extend 13.27 miles southwesterly from Hot Springs, Utah, to connect with industry trackage in the Little Mountain area where large mineral resources are to be developed, and that would enable Union Pacific to provide developing industry with single-line service to Pacific Northwest, southern California, and to midwestern points. Proposed line would not constitute an invasion of Southern Pacific's territory; considered area is not SP territory and, thus, no invasion is involved, since SP is not considered a carrier already in the area. Little Mountain is as yet undeveloped, generating no traffic and, in that respect, is like new territory not served by any carrier. Neither UP nor SP has handled traffic from the area; both have invested in promotion and development of the industrial site; and both are entitled to compete for the new traffic. In addition, two line-haul railroads in newly developing area can make it more attractive to industries and serve to generate more traffic than otherwise would be expected. Authority granted.—Oregon Short Line R. Co. & Union Pac. R. Co. Construction, 334 I.C.C. 267 (268-9, 271-2)*.

101. Probable returns.—[Vols. 2, 6].—Neither applicant's, nor protestants', projection of income to be realized from first year of operation of proposed new line of railroad can be accepted without substantial modification; but applicant's traffic study, made by local residents with intimate knowledge of the area, supports a much larger revenue projection that that accepted by the examiner. Most reasonable estimate warranted by evidence of record is that net income for the first year would be about $50,000; such net income would fall far short of the $300,000 debt service expense contemplated by applicant. However, as held in the *Wenatchee Southern* case, 90 ICC 237, earning ability is not the sole test of public convenience and necessity, although always a factor to be considered; and, while main argument for denial of instant application is the anticipated debt service expense, as concluded in that case, feasibility and fairness of plans to finance proposed railroad should not be considered prior to the filing of a §20a application. Need is shown for construction and operation of proposed rail line; granted.—Permian Basin R. Co.—Construction, 330 I.C.C. 256 (264-7)*.

102. Excessive costs.—[Vol. 2].—Grant of a certificate for construction of lines of railroad requires immediate, high, and largely sunk costs for construction of tracks and other facilities, and if operations are not successful, only scrap is left. Proposed construction of coal transfer facilities at Louisville and at Michigan City, Ind., and institution of a new through service which is in reality only a modification of existing service, would not be prudent in an area of demonstrated overcapacity wherein existing carriers are contemplating shrinkage of facilities through coordination. Lacking any demonstration of a cost or other advantage of proposed service over that now available, there is no basis for assuming return of reasonably predictable revenues to justify the expenditures for material and labor. Denied.—Monon R. Construction and Operation, 324 I.C.C. 208 (232, 234).

Construction of Accessorial Lines or Facilities

114. Relocation of line.—[Vols. 2, 6, 16, 21].—Since mid-portion of railroad's branch line would be inundated and abandoned upon completion of Oahe Dam, leaving remaining portion of the branch unconnected with applicant's main line, proposed construction of 35-mile substitute line to reestablish that connection is found to be required by present and future public convenience and necessity. On further hearing to consider effect of the abandonment on shippers on remaining portion of the branch, record shows that (1) grain production in the area is substantial and increasing, (2) producers depend on the branch, (3) large quantities of government grain stored in the area will probably move by rail, and (4) that the line will initially generate enough revenues to produce net profits with good prospects of increased earnings; in addition, proposed construction will not weaken carrier's ability to provide an overall adequate and efficient service. Under the circumstances, the branch line should continue in operation and construction of the connecting substitute line is warranted; authorized.—Northern Pac. Ry. Co. Abandonment and Construction, 324 I.C.C. 750 (752, 760-2)*.

See also Calumet Western Ry. Abandonment case, n. 66, above.

Extensions

129. Extension defined.—[Vols. 6, 9, 11, 12, 14-16, 18, 19, 21].—Commission found subject track to be an extension of applicant's line of railroad in view of the large expenditure for construction and the substantial length of the track inasmuch as such expenditures may affect the carrier and the national transportation service. Also, a track of length herein could affect competitive position among shippers, thus providing an opportunity for discriminatory practices.—Central of Georgia Ry. Co.—Operation—in Ala., 336 I.C.C. 623 (634-5).

130. Necessity; in general.—[Vols. 2, 6, 11, 13, 14, 16-19, 21].—Where the need for construction of a rail line centers around new rail transportation requirements in an area of economic development, certificate may be issued if applicant proves that proposed construction either presently or in the reasonably near future will meet a public need. Interests of shippers are of substantial importance in resolving issue of public convenience and necessity; further, shipper's and its customer's interests represent the public interest whose transportation needs are sought to be satisfied. Both applicants for a certificate to construct a rail line into new territory to serve developing agricultural "Wahluke Slope" area concede that potential traffic will support only one railroad's construction; and record shows that Northern Pac.'s proposed line, which has strong support from potential producers and processors, would traverse entire slope area, whereas Chicago, M., St. P. & P. R. Co.'s proposal, with little shipper support, would serve only western portion thereof. Approval of Northern Pac.'s application will fulfill a demonstrated need without undue erosion of competitive position of any of the parties; certificate granted Northern Pac., and Milwaukee's application denied.—Northern Pac. Ry. Co. Construction Mesa-Mattawa, Wash., 331 I.C.C. 71 (74-6).

Fact that involved shippers are actively using applicant's facilities, and they express a desire for continuation of service, evidences a strong and urgent need for the proposed service. Evidence also indicates that grant of certificate to applicant will not adversely affect the competitive situation. Application approved.—Central of Georgia Ry. Co.—Operation—in Ala., 336 I.C.C. 623 (636).

134. To reach territory or resources in general.—[Vols. 2, 6, 9, 11, 15, 21].—In action to set aside Commission order granting Norfolk Southern's application, and denying plaintiff's, for authority to construct an extension of rail line to reach newly developed phosphate fields, the Commission's findings, reasoning and conclusions are well within its province and are supported in the evidence; therefore, the reviewing court will not disturb the order. Principal shipper's expressed preference for Norfolk (though it entered into the conclusions) was not a whim or personal taste, but a preference supported by sound, economic advantages it believed obtainable from that railroad's operation and not observable in plaintiff's; and other findings, supported by the record, amply sustain the Commission's conclusions that need for only one line was shown and issuance of certificate to Norfolk Southern was warranted. Furthermore, record shows adequate Commission consideration of plaintiff's suggested alternatives to an exclusive certificate; condition attached to certificate issued is significant in that regard. Complaint dismissed.—Atlantic Coast Line R. Co. v. United States, 243 F. Supp. 945 (946-7)*.

Due to extensive irrigation through the Columbia River Basin project, the Wahluke Slope, now a desert wasteland and not served by any railroad, is developing into an agricultural area. Although without irrigation it could not support a railroad, future convenience and necessity require rail service to meet the needs of potential producers and processors of agricultural commodities; however, need shown does not warrant construction of both of proposed extensions. Application of Northern Pacific approved, since it is responsive to public support for rail transportation in the entire area under development.—Northern Pac. Ry. Co. Construction Mesa-Mattawa, Wash., 331 I.C.C. 71 (72-6).

140. Traffic diverted from existing lines.—[Vols. 2, 14, 18, 19, 21].—Contrary to applicant Milwaukee's contention, approval of Northern Pacific's application for authority to extend its line into newly developed territory to provide direct rail service to a developing agricultural area, would not result in invasion of Milwaukee's tributary territory; considered new territory has not been set aside as the exclusive preserve of any particular railroad. A carrier does not have a right to exclusive occupancy of a territory; moreover, that portion covered by the Northern Pac. proposal is, as a commercial and economic community, more tributary to the Northern Pac. than to the Milwaukee. Furthermore, the area is presently a desert wasteland and without irrigation it could not support a railroad; it is not now served by any rail line and could not be served economically from present rail facilities; and fact that Milwaukee examined feasibility of operating a line into it (three times in 50 years) but took no steps toward an extension, neither accords it any advantage or prerogative nor constitutes Northern Pac.'s proposal an invasion.—Northern Pac. Ry. Co. Construction Mesa-Mattawa, Wash., 331 I.C.C. 71 (73-4).

Regulations of the Commission

38 FR 24902, Sept. 11, 1973, Part 1121: Abandonment of Railroad Lines, corrections of regulations previously published at 37 FR 1046.

38 FR 33086, Nov. 30, 1973, Part 1121: Abandonment of Railroad Lines, Corrections of §§1121.30 through 1121.35 reissued in full.

Section 1. (19) Application for certificate of Commission; notice and hearing.—[Unchanged. See vol. 9, p. 7328.]

Historical note, vol. 2, p. 964.

Notes of Decisions

Volume 2—p. 1040; Volume 6—p. 4994; Volume 9—p. 7328; Volume 11—p. 9143; Volume 12—p. 10217; Volume 13—p. 10935; Volume 14—p. 11420; Volume 15—p. 11990; Volume 16—p. 12624; Volume 17—p. 13279; Volume 18—p. 14034; Volume 19—p. 15090; Volume 21—p. 16458.

1. Application in general.—[Vols. 2, 6, 14, 15, 17-19, 21].—Separate applications filed under §1(18), by one railroad for permission to abandon its entire line and by another railroad for authority to acquire trackage which would otherwise be dismantled or merely lay deserted should be considered individually on their merits under that statute as filed, even though consolidated for decision.—Manistee & R.R. Co. Abandonment, 324 I.C.C. 489 (491)*.

Applications to purchase parts of rail line, filed as part of transaction where entire line of railroad is to be abandoned, are properly entertainable under §1(18). Although the particular applications were filed under §5(2), the Commission can consider the requests as seeking necessary authority under §1(18) if procedural requirements thereof are met. Therefore, when, except for publication, all requirements of §1(18) are met and all necessary information submitted, the acquisition may be approved conditioned on compliance with the publication requirements.—East Carolina Ry. Abandonment, 324 I.C.C. 506 (517).

While bankrupt railroad applicant's amendment at the hearing of its application so as to seek authority for unrestricted abandonment, in lieu of a "temporary total suspension" as initially filed, broadens scope of the application, considered amendment will not adversely affect interests of public or protestants; the formal application itself, as well as published notice thereof, made it abundantly clear that by a "temporary total suspension" applicant was requesting a certificate of convenience and necessity permitting final cessation of railroad operations performed on its own behalf. Moreover, the Bankruptcy court has authorized the amendment and the initial proposal of debtor's trustees for indefinite suspension together with the well-known fact of applicant's status as a bankrupt amounts to a proposal to abandon. Amendment accepted.—Tennessee Central Ry. Co. Abandonment, 333 I.C.C. 443 (444-5).

9. Proceedings on application in general.—[Vols. 2, 13, 14, 16, 19, 21].—In passing on railroad's application for authority to abandon its line, undoubtedly the Commission can examine divisions of joint rates in order to determine whether revenue received by the line seeking abandonment accurately reflects its operations. However, when the divisions are *prima facie* correct and large sums (which are not justified on basis of present or prospective traffic) would have to be spent for rehabilitation of the road, the Commission properly may decline to order an investigation of the divisions; in a situation of the type under review, such judgment is for the Commission.—Washington and Old Dominion Users Ass'n v. United States, 287 F. Supp. 528 (531-2, 534)*.

While decision in C & O — B & O control proceeding [317 I.C.C. 261] recognized that certain savings would result from various proposed coordinations, it did not authorize any future abandonment by either carrier under §1(18); nor did the control application request authority to abandon any line of road or operations thereover. And, while the Commission found therein that protection should not be provided to employees of carriers other than those involved in the transaction, that ruling is limited to the control transaction and is not applicable to considered abandonment proceeding. Although the control transaction made possible the proposed abandonment, the adverse effect upon applicant's employees is the direct result of abandonment and only the indirect consequence of the control transaction. Therefore, since no ruling was made in the control case with respect to proposed abandonment, the doctrine of *res judicata* has no application to imposition of protective conditions for the benefit of railroad employees adversely affected thereby. Record shows some adverse effect on railroad employees entitled to protection and, since it was not necessary to establish the exact number of employees affected or their identity by class or craft, exclusion of applicant's testimony regarding potential claimants and restriction of cross-examination thereon was proper.—Baltimore & O. R. Co. Abandonment, 328 I.C.C. 449 (453-5).

13. Necessity for formal hearing.—[Vols. 2, 6, 11, 16].—The language of §1(18)-(20) does not direct a hearing on all protests to applications filed thereunder. The right to a formal hearing is conferred only upon applicant railroad and the governor or other appropriate authority of a state. Request by protestant herein is denied as the speculative prospect of injury to protestant is outweighed by the nearly certain prospect of injury to applicant from a disruption of its schedule resulting from such hearing.—Illinois Central R. Co. Operation in Jef. County, Ill., 328 I.C.C. 586 (589-90).

18. Issues before Commission.—[Vols. 2, 6, 13, 16, 18, 19, 21].—Although protestants criticize intercorporate transactions wherein rail subsidiary paid a $900,000 dividend to its parent railroad and purchased coal land served by the parent, and urge that they be set aside, those transactions have no bearing on the issue of whether public convenience and necessity permit abandonment of applicant subsidiary's entire line of railroad; moreover, the record is not convincing that the use of the $900,000 for rehabilitating the considered line would have increased business thereon.—Washington & Old Dominion R. Abandonment—Virginia, 331 I.C.C. 587 (598)*.

See also Tennessee Central Ry. Co. Abandonment case, n. 1 above.

20. Showing required and burden of proof.—[Vols. 2, 6, 14-19, 21].—In view of the poor condition of the line sought to be abandoned and the limited prospects for improving the financial condition in the future, the expenditures which would be required to accommodate the grade crossings on considered line are matters to be considered under the doctrine enunciated in 315 US 381, holding that the Commission has authority to determine the economic advisability of the continued operation of a railroad "in a situation where someone other than the carrier provides the money". Record establishes that the public outlays required for continued operation of the line, whether by applicant or another operator, would be uneconomic and wasteful. While some shippers and communities would be inconvenienced, in view of alternate service available, degree of that inconvenience does not outweigh the heavy burden which a requirement to continue would impose; public convenience and necessity does not justify requiring continued operation of the line; approved.—Washington & Old Dominion R. Abandonment—Virginia, 331 I.C.C. 587 (592-4, 598, 603)*. See also same case under §1(18), n. 60.

A carrier, particularly one in financial straits of applicant cannot be expected to incur expense of installing a modern computer system for greater economy and efficiency and then go to added expense of duplicate record keeping by reverting to old procedures for accumulation of records merely to obtain data on a small, lightly used branch line.—Penndel Co., Abandonment Bet. Wil., Jct. and New Wil., 342 I.C.C. 570 (575).

Regulations of the Commission

36 FR 7741, Apr. 24, 1971, Part 1121: Abandonment of Railroad Lines, §§1121.1 through 1121.5, complete revision of regulations governing railroad abandonment applications, effective on date of order.

37 FR 1046, Jan. 22, 1972, Part 1121: Abandonment of Railroad Lines, §§1121.1 through 1121.5 designated as Subpart A, and new Subparts B (§§1121.20 through 1121.24) and C (§§ 1121.30 through 1121.35) providing special procedures for proposed railroad abandonment where no public objection is sustained or where the requirements of public convenience and necessity are minimal or nonexistent, added, effective upon publication in Federal Register.

37 FR 2841, Feb. 8, 1972, Part 1121: Abandonment of Railroad Lines, although new procedures in Subparts B and C (37 FR 1046) took effect on Jan. 22, 1972, the commission will entertain petitions for reconsideration or for a hearing.

37 FR 18919, Sept. 16, 1972, Part 1211: Abandonment of Railroad Lines, subparts B and C (37 FR 1046), providing special procedures for certain railroads, §1121.24 and §§1121.30-1121.35, amended to read as set forth, effective upon publication in Federal Register.

38 FR 26726, Sept. 25, 1973, Part 1121: Abandonment of Railroad Lines, §1121.32 promulgates special procedures as to notice, publication, posting, and service for proposed abandonments.

Section 1. (20) Issuance of certificate by Commission; unlawful extension or abandonment of lines.—[Unchanged. See vol. 9, p. 7328.]

Historical note, vol. 2, p. 964.

Notes of Decisions

Volume 2—p. 1045; Volume 6—p. 4996; Volume 9—p. 7329; Volume 11—p. 9143; Volume 12—p. 10217; Volume 13—p. 10936; Volume 14—p. 11421; Volume 15—p. 11991; Volume 16—p. 12626; Volume 17—p. 13279; Volume 18—p. 14035; Volume 19—p. 15094; Volume 21—p. 16464.

The Certificate

1. In general.—[Vols. 2, 6, 9, 21].—Though the Commission has authority to impose a condition (giving interested persons an opportunity to buy and continue operations on the line) in a certificate authorizing railroad to abandon its line, and frequently has done so, the inclusion of a salvage clause is discretionary. In refusing to include such a salvage clause in abandonment certificate being challenged, the Commission did not abuse its discretion when (1) record clearly shows that the railroad cannot be profitably operated, costs of its rehabilitation would be considerable, and need for rail service does not warrant its continued operation; and (2) due consideration was given to value of the right-of-way to the State Highway Department and its interest in buying the property for use as part of a new interstate highway system. The Commission's issuance of challenged certificate permitting abandonment is warranted in law and supported by substantial evidence on the record as a whole; plaintiff's action dismissed.—Washington and Old Dominion Users Ass'n v. United States, 287 F. Supp. 528 (535)*.

The Commission has no jurisdiction to consider employee union's complaint alleging that railroad's lease agreement for lessee's operation of its piers constituted an effective abandonment by lessor of a line of railroad in violation of §1(18). As held in 217 F. Supp. 252, it is for the courts to decide whether the action of the railroad is an abandonment subject to the Act. Since, under §1(20) a competent court is the only forum having jurisdiction to grant relief for alleged violation of §1(18), the complaint is dismissed.—Brotherhood of Ry. S. S. Clerks v. Reading Co., 328 I.C.C. 11 (11-12).

While it is apparent that defendant did not seek a certificate of abandonment from the Commission, it is well settled, as stated in *Powell*, 300 US 276, that under §1(20) remedies for violation of §1(18) must be sought by court action. Thus, Commission has no jurisdiction to grant the relief sought by complainant for the alleged unlawful abandonment.—Duralite Co., Inc. v. Erie Lackawanna Ry. Co., 339 I.C.C. 312 (314).

3. Terms and conditions.—[Vols. 2, 6, 9, 11, 13, 14, 19, 21].—Under §1(20), the Commission has authority to attach to an abandonment certificate such terms and conditions as in its judgment may be required by the public convenience and necessity; and it determines "public convenience and necessity" not merely to protect the railroad, but to protect interstate commerce from onerous burdens that may affect the carrier's efficiency and ability to perform its duty to the public. Moreover, in the exercise of its authority, the Commission has attached conditions to a certificate of abandonment which are unrelated to its usual areas of jurisdiction and, seemingly, it may impose any *reasonable* condition which is in the public *interest* to the issuance of such a certificate.—Reed v. Meserve, 353 F. Supp. 141 (145).

Record in abandonment proceeding contains evidence that freight traffic, alone, would not support a short line operation over northern segment of debtor railroad's line sought to be abandoned, whereas operation of proposed scenic excursion railroad for passenger carriage would promote the public interest by benefiting local business and increasing employment in the region. And in view of such evidence, when the Commission authorized abandonment of that line segment, conditioned on sale of the properties involved "to any responsible person for the purpose of continued operation," it could not have intended that freight service, in addition to passenger service, was necessary for "continued operation." Therefore, plaintiff who desires to acquire part of the abandoned line, for operation of proposed excursion railroad, comes within the scope of the condition imposed.—Id., pp. 145-8.

Where common law business trust is granted authority to acquire nonoperating rail carrier's rail line, property and franchises and to be substituted as owner-lessor under an outstanding lease agreement with operating carrier, approval is conditioned on receipt of the requisite stockholder approval of the transaction, recording of the trust instrument, and prior Commission approval in the event the trust is terminated.—Pittsburgh & W. Va. R.—Pur.—Pittsburgh & W. Va. Ry. Co., 330 I.C.C. 593 (596-7).

Evidence of record, particularly that concerning applicant's well-known status as a bankrupt railroad, warrants grant of certificate permitting proposed abandonment; however, in view of the need shown for continuance of rail service over the line involved, the abandonment authority is conditioned on sale of the line or any portion thereof to any responsible party offering, within 60 days from date of certificate and order, to purchase it for continued operation at not less than net salvage value of the property involved.—Tennessee Central Ry. Co. Abandonment, 333 I.C.C. 443 (454-5).

Commission approved a proposed abandonment provided that any interested party be afforded a 90-day period in which to acquire involved right-of-way for use as public parkland in compliance with all applicable environmental policies.—Burlington Northern, Inc., Abandonment, 342 I.C.C. 446 (456)*.

See also East Carolina Ry. Abandonment case, §1(19), n. 1.; Washington & Old Dominion R. Abandonment—Virginia, case, §1(18), n. 59.

8. Partial grant or denial.—[Vols. 2, 6, 16, 21].—On reconsideration, decision and order of Review Board denying application for certificate to permit abandonment of portion of considered line of railroad reversed in part. While abandonment of segment of the line currently being used could not be found to be in the public interest, there was no opposition to applicant's abandoning the unused segment; therefore, public convenience and necessity permit abandonment of that portion of line which applicant had not used for over three years.—Brooklyn E. District Terminal Abandonment, 331 I.C.C. 413 (413-4)*.

Injunction

16. In general.—[Vols. 2, 6, 9, 11, 14-16, 18, 19, 21].—In railroad's action seeking injunctive relief in connection with use, operation, and maintenance of certain facilities located within Baton Rouge, La., port area, question of whether rail trackage used entirely for switching, which was constructed, owned, and maintained by the Port Commission (and over which railroads operated pursuant to contract), falls within the "line of railroad" category or the excepted "spur, industrial, team, switching, or side track" category of §1(18), is for the court, rather than the Commission, to decide. Record clearly shows considered trackage to be solely and entirely spur and/or switching trackage not subject to the Commission's jurisdiction, and thus a proper subject for contract between the non-carrier port commission and the various railroads concerning use and maintenance thereof; accordingly, plaintiff is not entitled to injunctive relief sought. Suit dismissed.—Louisiana & A. Ry. Co. v. Missouri Pac. R. Co., 288 F. Supp. 230 (233-4).

Coal mine operator's action for an injunction to restrain defendant's abandonment of its branch line without first obtaining the Commission's approval (the abandonment application being subsequently approved) also includes, by amendment to the complaint, a claim for damages; however, under the Supreme Court's decision in the *Powell* case, 300 US 276, the sole remedy available for a violation of §1(18) is a suit under §1(20) for injunctive relief. Thus, while the court's statutory power to grant an injunction is permissive, injunction (not damages) is the only relief available to plaintiff mine operator for railroad's alleged unauthorized abandonment of the branch line which he used to ship coal to market. Accordingly, since plaintiff presently seeks only recovery for damages, the injunctive relief sought having been denied in 264 F. Supp. 437, defendant railroad's motion for summary judgment on the claim for damages is granted.—Asbury v. Chesapeake & O. Ry. Co., 314 F. Supp. 310 (311-12, 313).

Defendant railroad's indefinite suspension of operations over two of its branch lines, that were severely damaged by a tropical storm, and its application for authority to abandon those lines constitute an abandonment of operation within meaning of §1(18). Thus, the Commission not having authorized the abandonment, railroad's action is in violation of §1(18), and the court is empowered by §1(20) to enjoin that violation; however, the power to enjoin such violation should not be lightly or automatically exercised. Test which the court must apply, in suit seeking mandatory injunction to require defendant to restore the two branches, is whether it is equitable to permit the railroad to continue suspension of service until the Commission decides whether permanent abandonment is appropriate.—Commonwealth of Pennsylvania v. Penn Central Transp. Co., 348 F. Supp. 28 (29-30).

Among many factors considered in deciding whether injunction should issue in instant case, those having greatest weight are (1) the extent of storm damage to the branch lines, (2) the economic importance of each branch, and (3) the pendency of the application for leave to abandon those lines. In addition, it would cost approximately $650,000 to entirely restore both branch lines. Therefore, assessing all factors noted, the court concludes that it would not be equitable to require the railroad, currently undergoing reorganization, to expend substantial funds to restore service, temporarily on the two branches when all the elements, both short and long term, affecting such restoration will be given extensive consideration by the Commission. The Commission has the expertise and broad perspective necessary to determine the feasibility of abandonment of rail lines which the court lacks; also, it indicated that it will expedite consideration of defendant's application to abandon the branches in question. Injunction relief sought, denied.—Id., pp. 30-1.

On appeal from the district court's denial of motion to vacate its preliminary injunction, prohibiting continuance of appellant company's condemnation proceedings in Florida state courts (based on state eminent domain statutes) against railroad's property and, also, construction of any rail facilities thereon until a certificate of convenience and necessity is obtained from the Commission, neither the antiinjunction statute, 28 USC §2283, nor the principles of comity, present any bar to issuance of the federal court's injunction. And no more definite examination of the merits is required, in such appeal, when the record shows that the railroad's suit for injunction under §1(20) against the company's actions, allegedly in violation of §1(18), has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair grounds for litigation and thus for more deliberate investigation.—Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co., 418 F. 2d 387 (391-2).

While the antiinjunction statute bars federal injunction to stay State court proceedings, except as specified, it permits issuance of such an injunction when "expressly authorized by Act of Congress." It is well settled that an injunctive statute need not expressly refer to 28 USC §2283, or to the subject matter of federal stays of State court proceedings, to come within that exception and, also, that a case does not fall within the exception merely because it involves a law that permits injunctive relief in general terms; but beyond those guidelines, the rules are less clear. Courts must then consider the nature of the interests to be protected by the statute authorizing injunction which, in instant case, is §1(20), and the parties authorized to bring suit. Thus, in view of the authority in §1(20) for injunctive relief at the suit of a public or private party, the preliminary injunction could issue under the "expressly authorized" exception to 28 USC §2283, and the district court was within its authority in refusing to dissolve it.—Id., pp. 392-3.

Though there seems to be no serious question that an attempt to condemn lands for the purpose of constructing new trackage thereon without first obtaining Commission authority constitutes "construction" which may be enjoined under §1(20), any uncertainty should be resolved in favor of coverage in view of the national interests to be protected. Therefore, since authority for suit by both private and public parties strongly indicates that §1(20) contemplates supplementing government regulation with private action, and considering the public interest concept of private suits in effective regulation of railroads, the court concludes that appellee railroad in bringing its suit was engaged in protecting and enforcing public as well as private rights, and that the Commission itself could have brought the same suit. In such circumstances, the rule of comity embodied in 28 USC §2283 must yield to the paramount federal interests; judgment granting preliminary injunction, and denial of appellant's motion to vacate, affirmed.—Id., pp. 393-4, 402.

A competent court is the only forum having jurisdiction to grant relief for a violation of §1(18).—Industrial Corp. of S. Hackensack, N.J. v. N.J. & N.Y. R. Co., 324 I.C.C. 272 (274).

See also Brooklyn Eastern District Terminal v. United States, 28 USC §2325, n. 61.

19. —Venue.—[Vols. 2, 6, 19].—Suit for mandatory injunction to require railroad, currently undergoing reorganization in another district court, to restore two storm-damaged branch lines should more properly have been brought by plaintiffs in the reorganization court for two reasons: (1) that court is better able to evaluate the railroad's needs and its ability to expend the funds required for restoration, and (2) that court's Order #1 in the reorganization matter prohibits instant suit. However, since the reorganization court has at times specifically enjoined particular suits, but has not enjoined plaintiffs' suit, the court feels that Order #1 was not an absolute bar to its consideration of plaintiffs' claims; otherwise, the court would have required that plaintiffs apply to the reorganization court *nunc pro tunc* for leave to bring their suit.—Commonwealth of Pennsylvania v. Penn Central Transp. Co., 348 F. Supp. 28 (31).

24. —Parties.—[Vols. 2, 6, 9, 11, 12, 14, 15, 17-19, 21].—See Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co., n. 16 above.

Section 1. (21) Power of Commission to require adequate facilities or extension of line; penalty.—[Unchanged. See vol. 9, p. 7332.]

Historical notes, vol. 2, p. 1053.

Notes of Decisions

Volume 2—p. 1050; Volume 6—p. 5001; Volume 9—p. 7332; Volume 15—p. 11991; Volume 16—p. 12626; Volume 18—p. 10435; Volume 21—p. 16470.

Section 1. (22) Construction, etc., of spurs, switches, etc., within State.—[Unchanged. See vol. 9, p. 7332.]

Historical notes, vol. 2, pp. 964, 1053, vol. 9, p. 7332, vol. 12, p. 10218, vol. 13, p. 10937, vol. 14, p. 11423.; vol. 21, p. 16471.

Cross Reference

See §13a, infra, Discontinuance or change of certain operations or services, State statutes and authorizations involved.

Notes of Decisions

Volume 2—p. 1057; Volume 6—p. 5004; Volume 9—p. 7333; Volume 11—p. 9144; Volume 12—p. 10218; Volume 13—p. 10937; Volume 14—p. 11423; Volume 15—p. 11992; Volume 17—p. 13281; Volume 18—p. 14036; Volume 19—p. 15098; Volume 21—p. 16471.

1. Construction, in general.—[Vols. 2, 6, 9, 11-15, 17, 18, 21].—Terminal railroad contends for the first time, in its suit to enjoin and annul Commission orders partially denying its abandonment application, that track sought to be abandoned was a spur, industrial, or side track within §1(22) and, thus, the Commission had no jurisdiction over the matter. Abandonment of a separate side track might not be subject to Commission jurisdiction; but, as pointed out in 262 F. 2d 676, when a railroad is primarily made up of spur, industrial, switching and team tracks located within a State, §1(22) cannot be read to exclude from Commission jurisdiction all such tracks without reference to their functions as part of the whole railroad, for to so read the law would authorize a terminal line to abandon its entire rail system without Commission sanction. Plaintiff's tracks might have functions beyond those usually ascribed to similar tracks in another rail system and, since they constitute its whole terminal facility and all the rail portion of its total service, the Commission properly could conclude it had jurisdiction over considered abandonment.—Brooklyn Eastern District Terminal v. United States, 320 F. Supp. 1095 (1099, 1106-7)*.

However, ultimate question of the Commission's jurisdiction under the statute is one to be decided by a federal court; and when the court reviews a Commission decision that considers its own jurisdiction under §1(18) and (22), the normal rule restricting scope of judicial review does not apply.

Nevertheless, the cases appear to require that the Commission have an opportunity to make findings on, and pass on, the jurisdictional question before the issue is dealt with in the courts. Present record contains no express findings on the issue and, since plaintiff invoked and no one denied Commission jurisdiction, there was no reason to rule explicitly thereon; the result is that the record is insufficient for the court to determine the jurisdictional issue as a court of first instance. On the record, therefore, no finding that the matter was not within the Commission's jurisdiction can or should be made. Action dismissed on the merits.—Id., p. 1107.

Although §1(22) specifically excludes from jurisdiction of the Commission the construction or abandonment of spur tracks located wholly within one State, it does not exclude the acquisition and operation by a railroad of such a spur. Thus, under §1(18) an acquisition and/or operation by applicants of trackage (either spur or industrial) of railroad to be abandoned comes within the Commission's jurisdiction.—East Carolina Ry. Abandonment, 324 I.C.C. 506 (518); Manistee & R.R. Co. Abandonment, 324 I.C.C. 489 (491-2)*.

Whether trackage is a "team track" within meaning of §1(22) is a mixed question of law and fact for a court to decide. However, Commission must make an appropriate finding as to its jurisdiction in the first instance. Record shows that line herein us used for general freight service to several shippers and receivers and therefore is not a "team track" and proceeding herein is within Commission's jurisdiction.—Penndel Co. Abandonment Bet. Wil. Jct. and New Wil., 342 I.C.C. 570 (571-72).

Certificate Not Required

10. Switching or side tracks.—[Vols. 2, 6, 9, 19].—Railroad trackage owned and maintained by non-carrier State Port Commission, which was located entirely within the port facility, constructed of light weight rails, and had never been used for any purpose other than switching service performed under contract between the railroads and the Port Commission, does not constitute a "line of railroad" within §1(18) but is solely and entirely spur and/or switching trackage specifically exempt from jurisdiction of the Commission under §1(18)-(22) of the Act. Thus, such trackage is a proper subject of contract between the various railroads and the Port Commission insofar as maintenance and use of the facilities is concerned; and when, following termination of previous operating agreement by the Port Commission in strict accordance with provisions thereof, a new contract had been entered into between that commission and one of defendant railroads, neither plaintiff nor the other defendant have any legal ground for complaint. Accordingly, relief sought by plaintiff is denied and the case dismissed.—Louisiana & A. Ry. Co. v. Missouri Pac. R. Co., 288 F Supp. 320 (322-4).

District court did not err in finding that a "line of railroad" was not involved in appellant's action to enjoin or void new operating agreement (providing for Texas & P.R.'s exclusive control and responsibility for switching and maintenance of Baton Rouge Port Commission's trackage and terminal facilities) because appellees failed to obtain prior Commission approval of the agreement, appellant's contention being that the new contract constituted an abandonment by the port authority which required such prior approval. Question of whether trackage involved falls within category of "line of railroad" in §1(18) or in the excepted category of "spur, industrial, team, switching or side tracks" in §1(22) is for the court rather than for the Commission; and, based on its specific findings of fact, the court concluded that the tracks in issue could not be considered as a "line of railroad." Trackage involved was properly classified as spur and switching tracks and, as such, is not subject to Commission jurisdiction; thus, there being no contention as to validity of the agreement, lower court's denial of injunctive relief is affirmed.—Louisiana & A. Ry. Co. v. Missouri Pac. R. Co., 415 F. 2d 751 (752)*.

11. Spurs, industry, or team tracks.—[Vols. 2, 6, 9, 11-15, 17, 18, 19, 21].—See East Carolina Ry. Abandonment case, §1(18), n. 32; Manistee & R.R. Co. Abandonment case, §1(18), n. 32.

Section 2. Special rates and rebates prohibited.—[Unchanged. See vol. 9, p. 7335.]

Amendments, see footnotes, vol. 2, 1061, vol. 6, p. 5008; historical note, p. 1061.

Notes of Decisions

Volume 2—p. 1063; Volume 6—p. 5008; Volume 9—p. 7335; Volume 11—p. 9145; Volume 12—p. 10219; Volume 13—p. 10938; Volume 14—p. 11423; Volume 15—p. 11993; Volume 16—p. 12627; Volume 17—p. 13281; Volume 18—p. 14036; Volume 19—p. 15099; Volume 21—p. 16474.

In General

7. Relation of section to other requirements of Act.—[Vol. 2].—Interstate Commerce Act provision prohibiting common carriers from charging one person more than another for like and contemporaneous service is complementary to provision prohibiting common carriers from giving unreasonable preference to any particular person or any particular description of traffic, and the two provisions are to be read in pari materia.—Atchison, T. & S. F. Ry. Co. V. United States, 244 F. Supp. 955*.

Interpretation and Application

17. Degree of uniformity or equality required.—[Vols. 2, 11, 21].—There is no merit to contention that proposed reduced rates on all freight, minimum 10,000 pounds, in straight or mixed carloads, violate §2 because they apply on, and favor shippers of, "luxury" commodities normally rated higher than class 70, while shippers of lower-rated commodities must pay the same or higher charges, depending on weight of shipment, for the same service. There can be no unjust discrimination where all shippers are charged the same rate for like shipments moving from same origin to same destination, and the proposed rates, on a mileage basis, apply via all participating carriers to all points within the involved territory. Moreover, many l.c.l. rates for commodities rated class 70 or below are lower than those proposed.—Freight, All Kinds, Southern and IFA Territories, 323 I.C.C. 730 (738).

18. Unjust discriminations only prohibited.—[Vols. 2, 6, 19.]—Schedules of reduced local rail rates and charges found to result in unjust discrimination to extent they would provide an annual-volume requirement. Schedules permit single-car, as well as multiple-car, shipments and there is no limitation as to the number of destinations or consignees to which the specified annual volume may be delivered. No evidence is shown as to any cost savings which may accrue in connection with this requirement, as compared with single-car shipments moving under existing higher rates without requirement. Thus, nothing shows traffic using reduced rates move under such substantially different circumstances as to warrant proposed rates. See *New York Harbor*, 311 ICC 355. However, elimination of requirement would result in just and reasonable rates.—Wheat & Wheat Flour, Westbound, 337 I.C.C. 858 (881).

Protestants' contention that a proposed tariff provision restricting joint carload rates on shipments of fresh potatoes southbound from central Oregon only when such shipments are loaded in special refrigerator cars and moved over a specified route would result in discrimination between shippers found not proven. Respondent railroads have proven that an adequate supply of such cars exists and that compliance with the restriction is not an undue burden on shippers.—Routing Restrictions on Fresh Vegetables, 335 I.C.C. 665 (670-1).

Unjust Discrimination

26. Differences in charges and collection among shippers.—[Vols. 2, 6, 9, 11, 14, 15, 17, 19, 21].—Failure to provide rule 66(a) of our Tariff Circular No. 20 for shippers of light loading vegetables is unlawful and unjustly discriminatory in that different rates and charges would be assessed on like shipments moving in different size cars depending upon car furnished by carrier and not the car required and requested to transport the shipment. See *All Freight*, 245 ICC 207, Schedules of per-car rates ordered canceled.—Vegetables & Melons Bet. W. & Southwest, Midwest & S., 341 I.C.C. 597 (616).

See also Allowance for Trucking Baled Cotton—Ark., Okla., Tex., n. 79, below.

28. Reasonableness of rates as affecting discrimination.—[Vols. 2, 6, 9].—The Commission may remove discrimination effected by rates, even when they are within the zone of reasonableness, if the discrimination is forbidden by §3(1).—Matthiessen & Hegeler Zinc Co. v. Baltimore & O. R. Co., 323 I.C.C. 601 (610).

Special Rate, Rebate, Drawback, or Other Device

50. Prohibited devices and concessions, generally.—[Vols. 2, 6, 9, 11-13, 19, 21].—With respect to the 25 mile-per-hour "guaranteed minimum speed" and the provision for liquidated damages for failure to meet that schedule on any trip, Commission concluded that the charges are for normal rather than expedited service. Any refund would come from charges collected for the transportation and thus be unlawful. However, a guaranteed minimum number of trips should be included to protect the shipper.—Grain by Rent-A-Train, IFA Territory to Gulf Ports, 339 I.C.C. 579 (585-7)*.

See also Grain by Rent-A-Train, IFA Territory to Gulf Ports, at §3(1), n. 37 and 140.

Freight

71. Switching charges.—[Vols. 2, 6, 9, 12, 14, 15, 18, 19, 21].—The district court concluded that Commission's findings in 341 ICC 57 holding respondent belt railroad responsible for movement of shipper-owned cars to and from repair facilities was in violation of §2. It was stated in *Private Passenger Train Cars*, 155 ICC 775, that repair moves of cars of one carrier over tracks of another benefits carrier-owner and are subject to freight charges and it seems clear that same must hold true of privately owned cars using lines of a carrier having no interest in and obtaining no revenues from said cars. Commission's order in 341 ICC 57 was set aside by the court.—Indiana Harbor Belt R. Co. v. General Amer. Transp. Co., 368 F. Supp. 904 (908-9)*.

72. —Absorption.—[Vols. 2, 6, 11, 12, 14, 16, 17, 19].—Defendant railroads' tariff provisions limiting absorption of switching charge of complainant Belt Railroad to an amount less than amounts absorbed for switching performed by other carriers at New Orleans, La., are in violation of §2 inasmuch as shippers and consignees served by complainant are thus assessed a greater charge than those served by other switching lines at New Orleans for contemporaneous services in transportation of like kind of traffic under similar circumstances and conditions.—Public Belt R. Comm. v. Aberdeen & R. R. Co., 335 I.C.C. 162 (172-5).

Protestant railroads' proposal to limit their absorption of switching charges at Shreveport, La., in response to respondent's proposed increased switching charges violates §2 in that it would be unjustly discriminatory against shippers located on respondent's lines at Shreveport who would not be accorded full absorption of switching charges whereas other shippers at Shreveport would be given full absorption by other connecting lines.—Switching Charges and Absorption, 339 I.C.C. 65 (82).

See also Armour & Co. v. Sioux City Term. Ky. Co., at §3(1), n.136.

79. Allowances; for services or facilities furnished by shipper.—[Vols. 2, 6, 9, 11, 13, 19, 21].—Railroads' varying allowances to shippers who perform or furnish motor carriage of their cotton from gins to the transit point, found not to result in unlawful discrimination with respect to the compress-to-destination movements. Under a system of rate groupings, wherein all points in specified origin territory are afforded the same rate level so as to permit cotton to reach common markets at equalized transportation costs, local and joint rates from rail gin origins to destination are in many instances at the same, or about the same, level as rates from the compress, or transit point, to destination; and fact that shippers are paid different allowances depending generally on distances from rail gin origins to the compress point is entirely compatible with such group rate system because the allowances generally reflect shipper's cost of trucking the cotton to the compress, in lieu of rail service from the rail origin, and shipper's total transportation costs therefore are approximately the same. Under such circumstances, there is no §2 violation.—Allowance for Trucking Baled Cotton—Ark., Okla., Tex., 329 I.C.C. 786 (795-6)*.

81. —Spotting services.—[Vols. 2, 6, 12, 13].—Petitioner's need for more than one switch per day on its intra-plant tracks, and its performance of such additional switching, constitutes an industrial service which is not respondent's duty to perform. To hold otherwise would be to require respondent to provide petitioner with a preferential service not accorded to shippers generally; it would ignore also our stated definition of ordinary operating convenience as normally encompassing but one switch movement. Petition denied.—Detroit Harbor Terminals, Inc., Terminal Allowance, 332 I.C.C. 635 (640).

Like and Contemporaneous Services

95. In general.—[Vols. 2, 12-19, 21].—Complainant's contention that rates on export carload shipments of automobile parts from Detroit, Mich., to Laredo, Tex., are unduly discriminatory found not proven as no showing has been made that other shippers operating under like circumstances were treated differently.—Fabricas Auto-Mex., S.A. v. N.Y. Central R. Co., 332 I.C.C. 1 (10).

Like Kind of Traffic

98. In general.—[Vols. 2, 6, 13, 14, 16, 17-19].—Rules requiring railroads to make their TOFC service on open-tariff basis available on the same terms to motor carriers as to others were beyond power of Interstate Commerce Commission under Interstate Commerce Act provision prohibiting common carriers from charging one person more than another for like and contemporaneous service and second provision prohibiting common carriers from giving undue preference to any person except that the provision should not apply to discrimination against traffic of any other carriers.—Atchison, T. & S. F. Ry. Co. v. United States, 244 F. Supp. 955*.

Section 2 of the Act prohibiting common carriers from charging one person more than another for like and contemporaneous service does not extend to discriminatory refusal to provide service at all but deals only with discrimination in rates. Nor does it authorize Commission to issue rules requiring railroads to make their TOFC service available on same terms to motor carriers as to others. Rules 2 and 3 (open-tariff rules) promulgated in Ex Parte No. 230 set aside. The circuity rule (no. 5) sustained to the extent of its applicability remaining after elimination of Rules 2 and 3 and rule 7 (publication in tariff form of leasing arrangements of trailers by railroads or their affiliates) upheld.—Id., p. 955.

Substantially Similar Circumstances and Conditions

105. In general.—[Vols. 2, 6, 9, 11-19].—Whether two or more transportation services were performed "under substantially similar circumstances and conditions" would be a matter of fact to be determined in each individual case but there is no reason why the fact that the user of a service was another carrier rather than a private shipper would compel the conclusion that dissimilar circumstances and conditions were present. The Supreme Court, in 282 US 740 (753), upheld a finding of the Commission that transportation by railroads of private passenger cars owned by other railroads at other than published tariff rates was unlawful, and refused to recognize any distinction between the transportation of cars owned by railroads and private shippers. The Court noted that all such cars are hauled between the same points, on the same line, in the same or like trains, and in the same manner. This is equally true of the transportation of loaded highway trailers in TOFC service.—Substituted Service—Piggyback, 322 I.C.C. 301 (335)*.

Proponent railroads' multiple-car rates on canned foodstuffs moved from points on the Pacific coast to points east of the Rocky Mountains found not unjustly discriminatory as such services do not occur under substantially similar circumstances and conditions as single-car shipments due to restrictions of accessorial services and high minimum tender requirements on multiple-car shipments.—

Canned Foodstuffs, Pacific Coast to the East, 335 I.C.C. 612 (623).

To sustain a violation of §2, it must appear that respondents are charging a different compensation for a particular service than is charged another shipper for a like and contemporaneous service. Here, protestants are comparing charges published under two different tariff items, each of which is available to all shippers on a nondiscriminatory basis. Each item covers a different level of service, one including protective service and the other not including such service. Thus, there is no violation of §2.—Increased Freight Rates, 1969, 337 I.C.C. 436 (448-9).

109. —Differences in delivery by carrier.—[Vols. 2, 6, 18].—The principle stated in *East Tennessee*, 181 US 1, to the effect that unjust discrimination or undue preference does not relate to acts the result of conditions beyond the control of involved carriers, while developed in review of section 3, applies also to section 2, since it is the predicate of legal liability generally. Therefore, since respondent carriers in the instant proceeding were unable to remove the disadvantage experienced by food wholesalers as compared to food chain retailers due to market decline factors between scheduled arrival times of their shipments and actual arrival times, the proposed claims policy providing for payment of damages in an amount "not to exceed the actual proven monetary loss"—which would protect the wholesalers but not the retailers—was held not to be in violation of sections 2 and 3.—Provisions on Vegetables & Melons, Transcontinental, 340 I.C.C. 807 (809-811).

Proceedings

133. Determination of fact as to unjust character of discrimination.—[Vols. 2, 15].—Complainants submitted little or no evidence relating to the comparative values of the subject commodities, except for the mill list prices as of July 1970 for 11 prefinished hardwood plywoods and one unfinished softwood plywood manufactured by one of the shippers. There was little or no effort made by complainants to show that the costs, the transportation characteristics, the average loading, the average value, the competitive circumstances, or any other relevant factor affecting the higher-rated commodities were the same or similar to the commodities moving under the lower "incentive" rates. Assailed rates found applicable, and not shown to have been or to be unjust or unreasonable.—Plywood, Hardboard & Particleboard v. Aberdeen, 340 I.C.C. 836 (844-845).

Section 3. Preferences; interchange of traffic; terminal facilities (1) Undue preferences or prejudices prohibited.—[Unchanged. See vol. 11, p. 9147.]

Amendments, see footnotes vol. 2., p. 1104, vol. 9. p. 7345, vol. 11, p. 9148; historical notes, vol. 2, p. 1104, vol. 9, p. 7345.

Notes of Decisions

Volume 2—p. 1106; Volume 6—p. 5022; Volume 9—p. 7345; Volume 11—p. 9148; Volume 12—p. 10221; Volume 13—p. 10939; Volume 14—p.10425; Volume 15—p. 11995; Volume 16—p. 12629; Volume 17—p. 13284; Volume 18—p. 14040; Volume 19—p. 15106; Volume 21—p. 16481.

Constitutionality and Purpose

2. Purpose.—[Vols. 2, 6, 14].—The 1935 amendment of §3 to include "ports" was intended to afford competing ports a forum in which to complain of rate adjustments that tend to concentrate movement of the traffic through one or a limited number of ports and to deprive other ports of opportunity to handle a part of such traffic; also, to encourage and promote the freedom of movement of export, import, and coastwise traffic through the ports of the country.—Alabama State Docks Dept. v. Alabama, T. & N. R. Co., 323 I.C.C. 185 (188-9)*.

Section 3(1) is intended to protect shippers, not competing carriers or modes of transportation.—Freight, All Kinds, Southern and IFA Territories, 323 I.C.C. 730 (738).

Interpretation

11. Equality of treatment basis of section.—[Vols. 2, 6, 9, 12, 13, 16, 17, 19, 21].—The existence of facts justifying inequality of treatment is a matter of defense.—Alabama State Docks Dept. v. Alabama, T. & N. R. Co., 323 I.C.C. 185 (189)*.

Relation to Other Sections

16. —Section 1(5).—[Vols. 2, 6, 9, 16, 18, 19, 21].—The Commission may remove discrimination effected by rates, even when they are within the zone of reasonableness, if the discrimination is forbidden by §3(1).—Matthiessen & Hegeler Zinc Co. v. Baltimore & O.R. Co., 323 I.C.C. 601 (610).

19. —Section 2.—[Vols. 2, 6].—Interstate Commerce Act provision prohibiting common carriers from charging one person more than another for like and contemporaneous service is complementary to provision prohibiting common carriers from giving unreasonable preference to any particular person or any particular description of traffic, and the two provisions are to be read in pari materia.—Atchison, T. & S. F. Ry. Co. v. United States, 244 F. Supp. 955*.

Rules requiring railroads to make their TOFC service on open-tariff basis available on the same terms to motor carriers as to others were beyond power of Interstate Commerce Commission under Interstate Commerce Act provision prohibiting common carriers from charging one person more than another for like and contemporaneous service and second provision prohibiting common carriers from giving undue preference to any person except that the provision should not apply to discrimination against traffic of any other carrier.—Id. p. 955.

Undue Preference and Prejudice Defined

29. Undue preference a question of fact.—[Vols. 2, 6, 9, 11, 19].—Determining whether a rate results in undue preference or prejudice is a complex fact question confided by Congress to the Commission for its determination on the record as a whole, however, such determination must be based on an understandable and identifiable rationale. Though the Commission decided that considered export rates on soybeans from southern Illinois points to Chicago, which bear little relation to distance or services involved, were reasonable and did not result in any undue prejudice or disadvantage, it failed to explain any formula, philosophy or findings on which its conclusions could rationally be based other than finding Chicago was not competitively disadvantaged thereby; also, there is no evidence as to the basis for its conclusion that approved highly disparate rates will encourage competition between Chicago and Gulf ports. Commission conclusion, in second report, that approved rate structure is not unduly preferential or prejudicial, so long as rate to Chicago is not higher than that to New Orleans (regardless of any other relevant factors), is not supported by adequate findings; remanded for further proceedings consistent with the court's opinion.—City of Chicago v. United States, 291 F. Supp. 858 (861-2, 863)*.

30. "Preference" construed.—[Vols. 2, 6].—The principle stated in *East Tennessee*, 181 US 1, to the effect that unjust discrimination or undue preference does not relate to acts the result of conditions beyond the control of involved carriers, while developed in review of section 3, applies also to section 2, since it is the predicate of legal liability generally. Therefore, since respondent carriers in the instant proceeding were unable to remove the disadvantage experienced by food wholesalers as compared to food chain retailers due to market decline factors between scheduled arrival times of their shipments and actual arrival times, the proposed claims policy providing for payment of damages in an amount "not to exceed the actual proven monetary loss"—which would protect the wholesalers but not the retailers—was held not to be in violation of sections 2 and 3.—Provisions on Vegetables & Melons, Transcontinental, 340 I.C.C. 807 (809-811).

31. "Undue or unreasonable preference or advantage."—[Vols. 2, 6, 19, 21].—Protestants' contention that a proposed tariff provision restricting joint carload rates on shipments of fresh potatoes southbound from central Oregon to such shipments loaded in special refrigerator cars and moved over specified routes would unduly prefer shippers from competing areas found not proven. Respondent railroads' evidence as to costs and availability of such cars proves compliance with the restriction is not an undue burden on shippers and would not materially change the competitive situation between shippers from different areas.—Routing Restrictions on Fresh Vegetables, 335 I.C.C. 665 (671).

37. Competitive relationship between preferred and prejudiced.—[Vols. 2, 6, 9, 11-19, 21].—Train-rental rates, assailed herein as preferential of very large shipper, are to enable east-central Illinois area to compete in corn export market. Small shipper in this area does not have volume of corn to use train-rental service; but neither is it competing in the export market. If large shipper's corn is exported, small shippers have more of the domestic market available. The traffic is not being handled by any carrier. Protestants have not shown they would be injured by this service and a finding of undue preference and prejudice is not justified.—Grain by Rent-A-Train, IFA Territory to Gulf Ports, 335 I.C.C. 111 (120).

Protestant meat packers maintain that the proposed adjustment herein is unduly preferential and prejudicial because it would disturb "historical" rate relationships especially in the western trunkline territory. The "history" is a history of only 5 to 7 years and packers themselves have changed preexisting origin relationships by their massive relocation and decentralization of packing plants in the last 10 years. While there is a rate difference between allegedly preferred and prejudiced origins, there is no showing of a rate disparity resulting in undue prejudice; nor have Chicago packers shown that existing rate structure results in advantage to "preferred" origins or detriment to "prejudiced" origins; nor has it been shown that shipments have been made or prevented because of existing rate structure. Moreover, several shipper witnesses could not name their competitors. Evidence does not sustain a finding of violation of §3.—Meat & PHP, TOFC, SWL, WTL, Official Territories, 340 I.C.C. 214 (242-44).

Competing localities: Participation in through routes and joint rates by respondent on lake cargo tonnage to Toledo while contemporaneously refusing to continue to participate in like tonnage to Ashtabula Harbor unduly prefers Toledo and subjects Ashtabula Harbor to unlawful prejudice in violation of section 3(1); proposed cancellation of through routes and joint rates found not shown to be just and reasonable.—Lake Cargo Coal, Ky., Va. and W. Va. to Ashtabula Harbor, 326 I.C.C. 63 (72)*.

Had the proposed rates to Baltimore been applied to New York, they would have been noncompensatory for the Baltimore carriers. The differences in transportation conditions clearly warrant differing rate levels for these points. And, even if it be assumed that preference and prejudice be established, there is on this record, considering the dominant position of New York, no showing that such preference and prejudice would be undue, which is what the Act condemns. It is well settled that a mere difference in rates does not constitute undue preference and prejudice and that inferences or assumptions are of no value.—Paper, Central Territory to North Atlantic Ports, 329 I.C.C. 281 (291).

40. Small shippers.—[Vols. 2, 9, 16, 19, 21].—Train-rental rates, assailed herein as preferential of very large shipper, are to enable east-central Illinois area to compete in corn export market. Small shipper in this area does not have volume of corn to use train-rental service; but neither is it competing in the export market. If large shipper's corn is exported, small shippers have more of the domestic market available. The traffic is not being handled by any carrier. Protestants have not shown they would be injured by this service and a finding of undue preference and prejudice is not justified.—Grain by Rent-A-Train, IFA Territory to Gulf Ports, 335 I.C.C. 111 (120).

46. —Right to benefit of advantage of location.—[Vols. 2, 6, 9, 11, 12, 16, 18, 21].—See Increased Freight Rates, 1969, at §3(1), n. 66; Transit Provisions on Wheat case at §3(1), n. 147.

Determination of Undue Prejudice

65. In general.—[Vols. 2, 6, 19, 21].—Record establishes the existence of elements necessary to constitute a prima facie showing of undue preference and prejudice, i.e., a disparity in rates, competition between Chicago and Kankakee and other Illinois transit points accorded lower rate, a control by respondents of rail rates via Kankakee and Chicago to eastern destinations, substantially similar transportation conditions, and injury to Chicago. Facts justifying such inequality have not been shown. It does not matter that respondents' proposal stems from a legitimate competitive motivation. Self-interest of the carrier may not override the requirements of §3(1). See 263 US 515, 524.—Corn and Corn Products, Illinois to Official Territory, 332 I.C.C. 485 (490-91)*.

66. What considered, generally, in determination.—[Vols. 2, 6, 9, 12, 14, 16, 17, 19, 21].—Undue prejudice cannot be predicated upon the mere existence of a difference in rates and some evidence of competition. The record must show that the rate disparity has operated to the complainants' disadvantage in the marketing of their products. No such finding is warranted here. Nor may such a fact be presumed in instances where, as here, the evidence regarding competition is very general in nature and the record indicates that the assailed rates are not the determining factor in the marketing of the considered commodity.—Arketex Ceramic Corp. v. Aberdeen & R.R. Co., 325 I.C.C. 784 (792-93).

The 6 percent increase in rates on grain and grain products in the west found unduly prejudicial to protestants and others similarly situated and unduly preferential of their competitors. Historically, these rates progressed in one-half cent steps but the general increase table herein progressed in one-cent steps so that rates from nearby country points to common markets, and from country origins to competing elevators increase unevenly, causing numerous disruptions of rate relationships and also eroding geographical advantages of nearer shippers.—Increased Freight Rates, 1969, 337 I.C.C. 436 (439-41).

The 6 percent increase in transcontinental rates on fresh fruits and vegetables that include unspecified factor for mechanical protective service is unduly prejudical to protestants and preferential of their competitors. Southern shippers of these commodities to same destinations have separately stated charges for protective service which are not subject to the 6 percent increase. Removal of preference and prejudice ordered.—Id., p. 446-50.

Absent showing of preference and prejudice, Commission would find no unlawfulness in manner in which increase was published as the practice of including protective service within a line-haul rate was approved in *Refrigeration*, 319 ICC 113.—Id., p. 450.

67. Differences in and comparisons of rates. —[Vols. 2, 6, 9, 11-19, 21].—While flat increases proposed in intraterminal, interterminal, and intraplant switching charges in western and southern districts and Pocahontas region may fall to a heavier degree on some particular switching points than others because carriers' charges vary at and within the different terminals, resulting in varying levels of increase, evidence as to such disparities is not shown to result in §3(1) violations any more than did that noted by the court in considering like increases in eastern district in 216 F. Supp. 199. However, protestants are free to seek relief in a subsequent proceeding directed to proving undue inequities in specific situations.—Increased Switching Charges, 322 I.C.C. 560 (563)*.

Complainant at Meadowbrook, W. Va., suffers gross disparities in inbound rates on zinc dross, skimmings, and residue from specified official territory origins compared with reduced rates available to its nearest competitor at Josephtown, Pa. Complainant must bid for those commodities against competitors in a common market, in order to keep its plant running, and the disparities in favor of the Josephtown competitor are not shown to be justified by any dissimilarity of transportation conditions warranting the lower level of rates to Josephtown. However, disparities between Josephtown and Meadowbrook in percentages of first class of rates from other official territory points are not shown to be so gross as to warrant a finding of undue prejudice to Meadowbrook in rates from all origins in that territory; consequently, the finding of undue prejudice and order requiring removal thereof are limited to origins named in appendix B and others taking the same rates.—Matthiessen & Hegeler Zinc Co. v. Baltimore & O. R. Co., 323 I.C.C. 601 (614-5).

The substantial disparity in rate levels between Erwinville, La., and points in the South as compared to movements of similar distance originating in the southern territory, which disparity was due to the location of Erwinville in the southwestern territory, was found to be unduly prejudicial to the Erwinville shipper and unduly preferential of its southern competitors, and therefore in violation of §3(1).—Big River Industries, Inc. v. Aberdeen & R.R. Co., 329 I.C.C. 539 (547).

Although the Commission has held in numerous proceedings that a mere showing of a difference or disparity of rates is not enough to prove the higher rates unduly preferential and prejudicial, complainant has shown more than a mere difference of rates. It has shown that of all the carriers who participate in movements from Edwinville, La. (southwestern territory) to southern destinations only two defendants have failed to accord to movements from Erwinville rates similar o those accorded from origin points in the southern territory for movements of comparable distances. Moreover, to all destinations in the South except those controlled by the two defendants the Erwinville rates are reasonably related to the rates for movements of same distances from southern origins.—Id., p. 542.

70. Distance.—[Vols. 2, 6, 9, 11, 13-19, 21].—Port equalization within reasonable limits is generally required where distances between respective ports and interior points are approximately the same. Rail distances from involved Arkansas origins to Mobile are generally comparable to those to New Orleans, Lake Charles, and Texas gulf ports, to which defendants maintain a lower rate on export rice than to Mobile. Defendants maintain the same level of rates from Arkansas to Mobile as to the west side ports on similar commodities, and evidence of relative costs does not establish that equalization on rice would be an unreasonable burden on them, or that there are substantial differences in transportation conditions. Assailed rates to Mobile found unduly prejudical to extent they exceed the rate to New Orleans and the west side ports.—Alabama State Docks Dept. v. Alabama, T. & N. R. Co., 323 I.C.C. 185 (188, 189)*.

That many origins of zinc dross and related commodities are much nearer to Josephtown, Pa., the site of complainant's principal competitor, than to complainant's plant at Meadowbrook, W. Va., does not justify disparities in inbound rates as great as those assailed, and certainly not the difference shown in favor of Josephtown in relations of the rates to first class. Where longer hauls are involved and distances to the two competing points are approximately equal, the measure of the rates reflects a disparity, Meadowbrook over Josephtown, so gross as to be unjustified on any theory, especially that of carrier connection, in absence of a clear showing that such competition exists to an extent warranting the difference. Assailed rates from certain origins found unduly prejudicial and nonprejudicial basis prescribed.—Matthiessen & Hegeler Zinc Co. v. Baltimore & O. R. Co., 323 I.C.C. 601 (610-11).

Distance considered, and since different carriers participate in the compared movements, Commission found that the general increase of 6 percent in rates on grain, feed, and feed ingredients to points in Virginia and Northeast does not violate §§2 or 3.—Increased Freight Rates, 1969, 337 I.C.C. 436 (441-5)

Commission concluded that examiner correctly found that the differences in distances for movements herein are not such as to preclude a finding of undue preference and prejudice. However, comparable distances do not, alone, establish undue preference and prejudice.—Transit Provisions on Wheat at Twin Cities, Minn., 341 I.C.C. 235 (242-43)*.

71. Cost of Service.—[Vols. 2, 18, 19, 21].—Shipper's allegation of undue preference and prejudice not justified where cost of rendering service to points in question differs. A disparity in rates between two points is not undue preference and prejudice unless it is not justified by cost of respective services or other transportation conditions (263 US 515, 524). See also discussion of cost considerations as a basis for differences in rates in *Stanislaus County v. United States*, 236 F. Supp. 46. Shipper seeks rates on sulphur from western Canada to St. Louis and East St. Louis which are not more than 2 cents higher than the rates from the same origins to Chicago. It contends the 67-cent rates under investigation are unduly prejudicial to it and unduly preferential of its competitors in the Chicago area in violation of section 3 of the Act. The cost data of record, based on actual movements from Alberta, indicate that the present rates to Chicago and St. Louis-East St. Louis yield similar returns above the respective out-of-pocket costs. Use of Western District costs for movements of average distances from Canadian Pacific origin points to East St. Louis resulted in out-of-pocket costs ranging from 61.9 to 65.5 cents over various tariff routes at the published minimum weights; over the shortest authorized tariff route from Calgary, Alberta, Canada, to East St. Louis, shipper developed an out-of-pocket cost of 59.95 cents for minimum tank car shipments. Its study was based on the application of Rail Form A to western district territorial cost scales. Thus, the lower 59.5-cent rate sought by shipper would not exceed defendants' out-of-pocket costs. These comparisons of costs are significant as an indication that the present relationship is not unfair.—Sulphur, Canadian Origins to East St. Louis, Ill., 326 I.C.C. 288 (290, 305).

See also same case under §1(5), n. 72.

72. Long maintenance of adjustment.—[Vols. 2, 6, 11].—See Increased Freight Rates, 1969, at §3(1), n. 66.

76. Similarity of circumstances and conditions.—[Vols. 2, 6, 9, 11-13, 16-19, 21].—Prerequisite to a finding of a §3(1) violation is a subsidiary finding that the transportation services at the preferred and prejudiced points are performed under substantially similar circumstances and conditions, and existence of carrier competition at the one point and its absence at the other has been held to create a dissimilarity of conditions which generally renders the prohibition of §3(1) against undue prejudice inapplicable. However, existence of facts, such as differing circumstances and conditions, justifying an inequality of treatment is a matter of defense to be proven by satisfactory evidence; general assertions of competition requiring reduced rates to the preferred point are insufficient as a defense where a complainant's competitor at such point enjoys lower inbound rates on the same commodity.—Matthiessen & Hegeler Zinc Co. v. Baltimore & O. R. Co., 323 I.C.C. 601 (602-3).

The Commission's tariff rules do not require that rates reduced to meet competition be symbolized to indicate the type of competition that is being met, or in fact for what reason, if any, they are reduced. Therefore, merely referencing reduced rates to the preferred point by the letter H (said to indicate that they were established to meet highway competition) does not warrant a finding of dissimilarity of conditions justifying lower rates to one competing point than to another.—Id., p. 611.

Disparity in rates constitutes undue prejudice only where transportation conditions are substantially similar. Disparity in rates maintained between Pacific northwest and San Francisco Bay counties and those maintained between Pacific northwest and Stanislaus County, Calif. does not violate §3(1) as operating conditions are not substantially similar due to differences in geographic location, community of interest, and carrier competition.—Stanislaus County v. Atchison, T. & S. F. Ry. Co., 329 I.C.C. 40 (54)*.

77. —What constitutes similarity or dissimilarity.—[Vols. 2, 6, 9, 12, 21].—To establish a violation of §3(1) it is essential that the transportation characteristics and circumstances surrounding the movement from or to both the alleged preferred and prejudiced points be substantially similar. There is no unlawfulness in maintenance of import rates on iron and steel articles higher than domestic rates from United States producing points, since the rail rates from the alleged prejudiced points apply on traffic of a different nature than that from the alleged preferred points; moreover, there is no showing of a competitive relationship between the points allegedly prejudiced and preferred.—Southern States Cooperative, Inc. v. Baltimore & O. R. Co., 323 I.C.C. 400 (408).

Substantial dissimilarity exists in operating conditions on movements between Pacific northwest and Stanislaus County, Calif. and between Pacific northwest and San Francisco area counties inasmuch as Stanislaus County is an inland, agricultural area containing two motor carrier terminals whereas the latter specified counties are highly metropolitan, contain deep water harbors, are economically interdependent, and contain 32 motor carrier terminals.—Stanislaus County v. Atchison, T. & S. F. Ry. Co., 329 I.C.C. 40 (46-52)*.

80. Preference within carrier's control.—[Vols. 2, 6, 9, 11-19, 21].—A finding of unlawful preference and prejudice in proposed reduction of export rates on flour from western origins to Gulf ports but not to Lake ports is necessarily limited to rates subject to respondents' control. Protestant railroads serving Lake ports other than Chicago were unwilling to join with respondent Burlington in reduced rates to Chicago, and do not indicate willingness to concur in such reductions even if published by all respondents. Respondents do not serve the Minnesota and Wisconsin ports, and an order requiring them to alter the rates on flour to such ports would be ineffectual without protestants' concurrence.

However, respondents serving the origin area exercise control over rates to both the Gulf ports and Chicago; in the circumstances, the finding of Unlawfulness of the proposed rates from origins other than on the Burlington must be limited to undue prejudice to Chicago.—Wheat and Flour, Midwest & S.W. to Gulf-Chicago—Export, 322 I.C.C. 581 (610).

That several large railroads have declined to participate in proposed reduced rates on all freight in straight or mixed carloads, minimum 10,000 pounds, within southern territory and between that territory and St. Louis, on one hand, and points intermediate thereto in Illinois, Indiana, and Missouri, on the other, does not extablish any violation of §3(1) because localities served by those roads do not receive benefit of such reductions. There can be no undue preference or prejudice unless both the preferential and prejudicial rates are within control of the same carrier or group of carriers.—Freight, All Kinds, Southern and IFA Territories, 323 I.C.C. 730 (738).

The movements from Guion to "interior" southeast destinations are joint-line operations conducted by MoPac and defendant southern railroads. Although originating carriers are different, the delivering carriers, except to border points, are the same and movements from both preferred and prejudiced origin points to southeastern destinations, except border points, are under the common control of defendants collectively who effectively participate in and control the factors of undue preference and prejudice.—Silica Products Co., Inc. v. Gulf, M. & O. R. Co., 332 I.C.C. 449 (453-54)*.

Since defendents had no control over the lower level of gathering rates from South Dakota, and the mere fact that they participate in proportional rates from Minneapolis and Duluth does not make them participants in the assailed lower through rates to ultimate destinations, it follows that they cannot be found to have practiced undue prejudice and preference.—Public Serv. Com. of N. Dak. v. Great Northern Ry. Co., 340 I.C.C. 739 (749).

89. Competition with other rail carriers.—[Vols. 2, 6, 12, 19, 21].—See Increased Freight Rates, 1969, at §3(1), n. 70.

90. Competition with water and/or truck carriers.—[Vols. 2, 6, 9, 11-19, 21].—To constitute a valid defense to an allegation of undue prejudice, carrier competition, where found, must be sufficient to sustain a finding that there is a dissimilarity of transportation conditions to the preferred and prejudiced destinations. Defendants' general assertions that the preferential reduced rates accorded complainant's competitors were compelled by motor competition is not supported by any showing as to any particular motor carrier rate or motor carrier whose competition forced such reductions, and they virtually concede that, at least from six origins, they could not show that the reduced rates were the result of motor competition. Disparities so gross as those shown in inbound rates from certain origins to complainant's plant and to that of its nearest competitor cannot be justified on theory of motor competition in absence of a clear showing that such competition exists to an extent warranting the disparity. —Matthiessen & Hegeler Zinc Co. v. Baltimore & O. R. Co., 323 I.C.C. 601 (602-3, 611, 613).

Upon remand from district court, Commission held that higher all-rail rates on crude sodium sulphate from a point in Canada are not unduly prejudiced by lower all-rail rates mainly from origins in California to the same destinations in Oregon and Washington, because water competition exists from the California origins and not from Canada. Water route offers lower rail-water rates than the corresponding all-rail rates from California to Oregon and Washington, compelling reductions in all-rail rates. This competitive situation is not present from the complaining Canadian origin.—Saskatchewan Minerals v. Chicago, M., St. P. & P. R. Co., 335 I.C.C. 8 (17-18)*.

Competition from water carriers has been recognized as a differentiating circumstance and condition justifying rate difference. See *Export Soybeans,* 309 ICC 445. Record herein shows the existence of new, different, and exceptionally severe water carrier competition which, furthermore, is largely unregulated and offers extremely low rates. Additionally, respondent's rail service to certain points is joint-line whereas barge competition is single line. No violation of §3 has been shown.—Soybeans & Wheat, Ark. & La. to La. Ports, 341 I.C.C. 898 (903-904).

Protestant's allegations that it will be "shut out of the Arkansas market" by proposed rates are so general as to be insufficient to show the injury precedent to a finding of undue prejudice.—Id., p. 903.

91. Market competition.—[Vols. 2, 9, 12-19, 21].—Though the rates on barley from Montana, Wyoming, Colorado and Idaho to Minneapolis and Duluth are on a lower level, there has been a competitive justification of one kind or another which did not exist at North Dakota origins. Different competitive conditions create different transportation conditions, and justify different rates. [Barringer & Co. v. U.S., 319 US 1, 7].—Public Serv. Com. of N. Dakota v. Great Northern Ry, Co., 340 I.C.C. 739 (750).

To establish undue prejudice, assailed rate disparity must be shown to have operated to complainants' undue disadvantage in marketing of their products. Basic assailed rates on sugar from western producing points to central territory destinations, established to restore former relation to cane sugar rates from eastern producing points that had been disrupted by motor-competitive reduction of the latter, are still on a higher level, distance considered. This lessened disparity, still favorable to complainants, cannot be said to unduly prejudice them; rather, higher level of assailed rates impels conclusion that any disadvantage encountered by complainants in the common market is not due to transportation circumstances and conditions. Willingness of western producers, in exercise of their managerial discretion, to sell in the central territory market at lower prices than their eastern competitors is no basis for compelling them to absorb higher rates; such factors as marketing practices and increased beet sugar supply were found in 319 ICC 686 not to be controlling in establishment of a §3(1) violation.—American Sugar Refining Co. v. Ahnapee & W. Ry. Co., 322 I.C.C. 717 (718, 721).

See also Sulphur, Canadian Origins to East St. Louis, Ill., §1(5), n. 28.

95. Nature and extent of competition.—[Vols. 2, 21].—Complainant shipper of silica sand from Guion, Ark. to Southeastern destinations has proven that assailed rates create a disadvantage in marketing such product by evidence of a marked decline in business and consumer witness testimony. Coupled with proven disparity in rates between complainant and competing shippers, this evidence constitutes a prima facie showing that assailed rates are unduly prejudicial, preferential, and unlawful.—Silica Products Co., Inc. v. Gulf, M. & O. R. Co., 329 I.C.C. 181 (188-9).

Persons, Localities, and Particular Descriptions of Traffic

106. Localities; regions; territories.—[Vols. 2, 6, 9, 11-19, 21].—A locality may show that it has been prejudiced within meaning of §3(1) other than by evidence of shippers or receivers of freight.—Alabama State Docks Dept. v. Alabama, T. & N. R. Co., 323 I.C.C. 185 (189)*.

See also National Starch & Chemical Corp. v. A., T. & S. F. Ry., §3(1), n. 147 below; Transit Provisions on Wheat at Twin Cities, Minn., §3(1), n. 147 below.

106a. Ports.—[Vols. 9, 11, 12, 14-19, 21].—Proposed reduced export rates on wheat from origins in 8 western States to gulf ports do not unduly prefer those ports while subjecting Chicago and other Lake ports to unjust prejudice. Severity of both truck and truck-barge competition for movement of export wheat to the gulf ports and absence of such competition via the Lake ports precludes a finding of substantial similarity of material transportation circumstances and conditions in connection with the compared movements.—Wheat and Flour, Midwest & S.W. to Gulf-Chicago—Export, 322 I.C.C. 581 (606).

But competitive factors impelling reduction of the rates on wheat to gulf ports do not obtain in connection with similar movements of flour; no truck shipments, and only three bargeloads, are shown to have moved to any of those ports. Neither volume and regularity of movement of flour to the gulf ports and comparatively light movement to Lake ports, nor revenue reductions resulting from the proposals, operate to establish dissimilarity of transportation circumstances and conditions; the Lake ports are entitled to nonprejudicial rates on flour for export even though volume of movement is substantially less than that through the gulf ports. Proposed line-haul rates on flour to the gulf ports, including port handling charge, are on lower basis than present export rates to the Lake ports, though mileages to the latter are substantially less. Other transportation circumstances respecting the compared flour movements are not shown to differ in any material degree.—Id., pp. 606-7.

Some 40 percent of total flour exports consists of relief flour purchased by the Federal Government for its own account or for account of various relief agencies for overseas distribution, and approximately one-third thereof has been moving via Lake ports. While transit time and availability of service are considerations in exportation of relief flour, the record is persuasive that the difference in rates resulting from the proposed reductions to the gulf ports would adversely affect movement through the Lake ports, as neither the Government nor the relief agencies would continue to accept offers for movement via the latter at greater cost than via the former. Failure of witnesses for the Government, the relief agencies, or the millers to support extension of the reduced rates to the Lake ports is not significant; those interests are more concerned with costs than with routes via particular ports. The ports not favored with the reduced rates are the parties susceptible to injury, and the Lake ports and allied interests have presented extensive evidence.—Id., pp. 607-9.

Availability of flour traffic, which is an important segment of total exports, has been significant in development of regularly scheduled steamship service from the Lake ports, and loss of the relief flour would result in less service. Regular steamship service must be maintained to preserve seaport status, and continued flow of flour through those ports is essential to that end and thus to economic development of the ports. Since 1959 the Government, the City of Chicago, and private interests have spent over $50 million to establish Chicago as a seaport, and significant amounts have been expended at other ports. The considered rates, to extent that their application is more extensive to Gulf than to Lake ports, will divert tonnage from the latter, with resulting injury.—Id., pp. 608, 609.

Argument that respondent Burlington (which has reduced export rates on both wheat and flour from origins on its lines to Chicago) can supply enough tonnage to satisfy demands of the Lake ports cannot be accepted. The equality of treatment extended by the Burlington affords no excuse to the other respondents to ignore the restraints imposed by §3; they are not saved from an adverse finding merely by showing that another railroad has established nonprejudicial rates. Though respondents do not control rates to the other Lake ports, and a finding of unlawful preference of the gulf ports and concomitant unlawful prejudice to the Lake ports must therefore be limited to Chicago, that port is entitled to nonprejudicial rates from origins in considered area on the Santa Fe and the Rock Island; accordingly, the proposed rates on flour to the gulf ports from origins other than on the Burlington are found unduly prejudicial.—Id., pp. 609-10.

Mobile is shown to be at a competitive disadvantage in relation to west side gulf ports insofar as it attempts to participate in the export rice traffic at higher-level rates. While the sought rate was established to New Orleans and Lake Charles to meet barge-truck competition, it was extended from all Arkansas origins, including those on defendants' routes, to Texas ports without similar competitive necessity. No substantial differences in transportation conditions are shown, distances are comparable, and defendants maintain the same rates to Mobile as to the west side ports on other commodities. Assailed rate disparity is large enough to influence shippers to use the west side ports; Mobile is entitled to compete on equal basis for considered traffic, and to do so must have the sought rate available from the same origins over all routes in same manner as the competing ports. Defendants effectively participate in and control the factors of the resultant preference and prejudice, and have not shown any special facts justifying the inequality of treatment. Assailed rates found unduly prejudicial to extent they exceed those to the west side ports named.—Alabama State Docks Dept. v. Alabama, T. & N. R. Co., 323 I.C.C. 185 (189-90)*.

In 231 F. Supp. 422, the court concluded that when Congress amended §3 of the act (49 Stat. 607, 1935) to include "ports", the amendment was intended to "afford competing ports a forum in which to complain if rate adjustments which tend to concentrate the movement of traffic through one or a limited number of ports and to deprive other ports of an opportunity to handle a part of such traffic" and "encourage and promote the freedom of movement of export, import, and coastwise commerce through the ports of the country." We concur with Commission's decision that the lack of commodity movement through complainant port is substantially the result of rate inequality imposed by the railroads and is the type of injury that Congress wished to preclude. Undue prejudice ordered removed. —Lake Charles Harbor & Term. Dist. v. Atchison, T. & S. F. Ry., 329 I.C.C. 669 (676).

In the light of the relative competitive positions of the respective ports in the instant proceeding, carrier Santa Fe's refusal to join with other carriers in extending equal rates from Oklahoma origins on its line to Lake Charles, La. diminished that port's opportunity to compete for Oklahoma export flour on an equal basis with Texas ports. Furthermore, the motor-carrier competition which defendants rely on to justify lower rates to the Texas ports is no defense since such competition is relative only to bulk wheat and should have no influence on flour rates. To conclude otherwise is to lend validity to the defendants' argument that a port should not have equal flour rates unless it has equal rates on bulk grain. This argument rests on the fiction of a through rate with transit privileges.—Id., p. 677.

The effect of the higher rate charged by the defendants to Lake Charles, La. is to hold the traffic involved for movement to Texas ports. This disadvantage amounts to undue prejudice where transportation conditions are substantially similar.—Id., p. 678.

Commission found no violation of §3(1) would result from approval of proposed reduced rate herein. The protestant Gulf ports have garnered an overwhelming portion of the export traffic in corn and soybeans. Moreover, 85 percent of issue traffic arrives at Gulf ports not by rail but by exempt barge and truck and respondents should have an opportunity to compete. Additionally, this proposal will encourage movement of new traffic through as many ports as possible and Congress and Commission have consistently held that freedom of movement through the ports is to be encouraged.—Corn and Soybeans, Midwest to Pacific Northwest, 339 I.C.C. 465 (473-4).

See also City of Chicago v. United States, n. 29, above.

112. Commodities; particular traffic. —[Vols. 2, 6, 9, 11-17, 19, 21].—Since the transportation of livestock requires special equipment which can be used only for that purpose, as well as (requiring) additional loading, feeding and holding facilities, cancellation of carload rates on livestock was held not to be unduly prejudicial.—Cancellation of CRI & P & Soo Line Rates—Livestock, 340 I.C.C. 463 (467)*.

117. —Relation to distance.—[Vols. 2, 6].—Protestant millers would be unduly prejudiced by the application of out-of-line charges in addition to the proposed rates. Although applicants justify the out-of-line charges on the ground that the distances from the intermediate points at which the charges would apply are greater than the short-line ratemaking distances from the origins to the same destinations, they disregarded the fact that the intermediate points are on the direct routes which must be used under the tariffs and that the points are less distant from the destinations than are the origins. Denied.—Grain, To, From and Within Southern Territory, 340 I.C.C. 846 (853-854).

118. Port differentials or equalization.—[Vols. 2, 6, 9, 17, 18].—See Paper, Central Territory to North Atlantic Ports, §1(5), n. 503.

Regulations, Practices, Services, and Facilities

132. Preferential or prejudical regulations and practices.—[Vols. 2, 6, 9, 11].—Defendant railroads' ratemaking practices found prejudicial to complainant shipper and preferential of shippers and origins in Southern territory as defendants' maintenance of higher combination rates from Erwinville, La. and participation in southern rate levels places them in control of both preferred and prejudicial rates to destinations they serve, which is unlawful under §3(1).—Big River Industries, Inc. v. Aberdeen & R.R. Co., 329 I.C.C. 539 (542)*.

The Commission found that defendants' establishment of uniform mileage scales of rates from Guion and southeastern origins to southeast destinations did not fully remedy the unlawfulness under §3(1), and that subsequent publication by defendant southern railroads of lower point-to-point rates within southeast created additional undue preference and prejudice in violation of the outstanding order herein; ordered removed. Also, the Commission further found the assailed point-to-point rates and distance scales of rates (except to the crossing points) presently maintained by the defendants to be unduly preferential and prejudicial.—Silica Products Co., Inc. v. Gulf, M. & O. R. Co., 332 I.C.C. 449 (453-54)*.

136. Absorption of charges.—[Vols, 2, 6, 9, 11, 12, 14, 16, 17, 19, 21].—Defendants' tariff provision limiting absorption of switching charges to less than that absorbed by other switching carriers at New Orleans is violative of §3(1) inasmuch complainant railroad's consignors and consignees thus pay more for substantially similar services. Also, port of New Orleans is disadvantaged to export-import traffic when line-haul carriers absord all switching charges at other Gulf ports. See Lake Charles, 329 ICC 669.—Public Belt R. Comm. v. Aberdeen & R.R. Co., 335 I.C.C. 162 (175-80).

Commission found that proposed cancellation of wharfage absorption at indicated Gulf and South Atlantic ports by respondent railroads would not result in undue preference or prejudice as respondents have no control over the situation. Where absorption is practiced, the carriers directly serving the ports bear the expense and participation in joint rates by other carriers does not render them participants in wharfage arrangements.—Cancellation of Wharfage Absorption, 335 I.C.C., 477 (527-8).

Protestant railroads' proposal to limit their absorption of switching charges at Shreveport, La., in response to respondent's proposed increased switching charges violates §3(1) in that it would unduly prejudice shippers at Shreveport who are accorded less than full absorption and unduly prefer shippers at other cities where protestants fully absorb switching charges.—Switching Charges and Absorption, 339 I.C.C. 65 (82).

Commission, citing *Sioux City*, 241 ICC 53, found that failure of defendant line-haul carriers to fully absorb interline switching charges at Sioux City, Iowa, while fully absorbing them at Omaha, Nebr., for same class of switching subjects shippers at Sioux City to undue prejudice and disadvantage. Although defendants have shown changes at Sioux City in nature of issue traffic but they have not shown a change sufficient to affect the ultimate findings in the Sioux City case.—Armour & Co., Et Al. v. Sioux City Term. Ry. Co., Et Al., 341 I.C.C. 118 (127).

140. Car service.—[Vols. 2, 6, 9, 11, 12, 17, 19, 21].—Following its decision in 322 ICC 541, Commission held that a shipper who guarantees to use cars all year is in a different position from one who uses cars only during harvest season. It is not unlawful for a carrier to provide dedicated service at special rates to shippers who desire the service and will pay for it. Since the rent-a-train service offered herein is available to all, the assailed provisions are not unlawful per se. Furthermore, rent-a-train shipper may only use a limited number of cars and his corn shipments must be spread over the entire year, permitting more cars to be available during the harvest season to other shippers.—Grain by Rent-A-Train, IFA Territory to Gulf Ports, 335 I.C.C. 111 (118-19).

Rent-a-train plan is unduly preferential and prejudicial when carrier-furnished cars are used but the dedication as proposed here would not be unjust and unreasonable so long as cars to be used are furnished by shippers for whom rent-a-train service is to be performed and are not taken from the pool of cars available to all shippers. Possible dedication of carrier-furnished cars on a yearly basis as proposed would remove a minimum of 86 cars from the pool of cars available to other shippers and is clearly unlawful.—Grain by Rent-A-Train, IFA Territory to Gulf Ports, 339 I.C.C. 579 (583-5)*.

Commission, citing *All Freight*, 245 ICC 207, held that proposed per-car rates which do not give shippers the right to specify the size car desired creates a presumptive situation of unjust discrimination and undue preference inasmuch as a difference in rates between shippers with same size loads would result from furnishing one shipper a larger car at a higher rate than the other shipper.—Citrus Fruits, Ariz. and Calif. to Eastern States, 341 I.C.C. 622 (635).

147. Transit.—[Vols. 2, 6, 9, 11-19, 21].—Defendants' practice of assessing a separate charge for grain, including corn, stopped in transit for milling at Indianapolis and other points east of the Illinois-Indiana border, while making no charge for such transit on grain stopped for milling at points in the western district and Illinois Freight Association territory, is not shown to be unduly prejudicial or preferential in violation of section 3(1) of the Act since the transit charge is the normal charge for that service throughout the territory in which Indianapolis is located. At the allegedly preferred points west of the Illinois-Indiana border, the transit arrangements are precisely the same as are uniformly maintained throughout the western district. Any disparity existing between the transit arrangements available to the complainant and its western district competitors is occasioned by differing territorial transit practices which defendants must adopt to compete successfully for traffic rather than by the failure of the defendants to accord all transit operators in a given territory the same transit arrangements—National Starch & Chemical Corp. v. A., T. & S. F. Ry., 325 I.C.C. 658 (664-8).

Protestants' allegations of preference and prejudice arising from provisions for milling-in-transit were found unwarranted because protestants have shown no evidence that competitive injury will result. General declarations as to such injury unsupported by facts, and mere showing of a disparity of rates are insufficient for a finding of undue preference and prejudice. In addition, various mills having transit privileges more liberal than those proposed herein allege that proposals unlawfully prejudice them because Twin Cities mills have certain advantages as in disposing of millfeed and selling flour to local bakeries. These are advantages of location not attributable to the proposals and are not unlawfully prejudicial.—Transit Provisions on Wheat at Twin Cities, Minn., 341 I.C.C. 235 (243-44)*.

Removal of Prejudice

160. Removal of undue prejudice.—[Vols. 2, 6, 9, 11-19, 21].—Even though it may be that establishment of inbound rates on zinc dross, skimmings, and residue to Meadowbrook, W. Va., bearing same relation to first class as the preferential rates to Josephtown, Pa., the site of complainant's nearest and principal competitor, would be of little benefit to complainant, because the shorter distances from many origins to Josephtown would still afford that point rate advantages, this does not justify a different and lower basis of rates in relation to first class from specified official territory origins to Josephtown than to Meadowbrook. Undue prejudice found to exist in assailed rates to Meadowbrook from specified origins should be removed by establishment of rates that reflect no greater percentage of the docket 28300 class 100 rates than rates on those commodities from the same origins to Josephtown, subject to same minimum weights.—Matthiessen & Hegeler Zinc Co. v. Baltimore & O. R. Co., 323 I.C.C. 601 (614, 615).

When the mandatory rate-break rule was initially prescribed it was considered essential to preclude discrimination between carriers, markets, and shippers. The railroads were the only significant carriers of grain and grain products and an adjustment which did not provide equality of transportation charges, and afford some protection of the revenues of the carriers, would cause unjust discrimination and preference. As a consequence the rates permitted movement over circuitous routes and numerous free transit stops and the rate level prescribed was sufficiently high to cover the cost of such services.—Rate Structure Investigation, Part 7, 329 I.C.C. 824 (844)*.

However, the rate-break system places emphasis on factors other than underlying transportation service,thus discouraging rates based primarily on cost or competitive need, and the mandatory rule runs contrary to the freedom of railroads to negotiate and establish rates to meet shipping public's need. Restriction of this freedom should be limited to those areas where necessary to foreclose publication of unlawful rates and should be of limited duration. Since equality via the different routes originally affected by the mandatory rate-break rule has been lost through establishment of limited transit single-and multiple-car rates by particular railroads over their own lines, the orders entered in 1934 and 1936, to extent requiring observance of rate-break combinations and proportional rates prescribed as exclusive basis of charges on grain at points from which proportional rates are applicable were vacated and set aside.—Id., pp. 842-45.*

To remove preference and prejudice found to exist, respondents will be required to revise their tariffs to provide an increase of 5 percent in lieu of 6 percent in those transcontinental TOFC rates on fresh fruits and vegetables that include a factor for mechanical protective service.—Increased Freight Rates, 1969, 337 I.C.C. 436 (449-50).

See also Silica Products Co., Inc. v. Gulf, M. & O. R. Co., at §3(1), n. 132.

Section 3. (1a) Export rates on farm commodities; Commission's power to carry out policy.—[Unchanged, See vol. 11, p. 9158; for statute and Cross Reference, §5(b).]

Notes of Decisions

Volume 15—p. 12002; Volume 16—p. 12638.

Section 3. (2) Payment of freight as prerequisite to delivery. —[Unchanged. See vol. 9, p. 7386, vol. 11, p. 9158, vol. 15, p. 12003.]

Amendments see footnotes, vol. 2, p. 1220, vol. 15, p. 12003; historical notes, vol. 2, p. 1221, vol. 12, p. 10229, vol. 14, p. 11432.

Historical Note

By provision of §108 of the Truth in Lending Act, Public Law 90-321, 82 Stat. 146, responsibility for administrative enforcement of that act is assigned to the Commission with respect to any common carrier which it regulates and, for the purpose of enforcing compliance therewith, the Commission may exercise any other authority conferred on it by law. Also, while the Board of Governors of the Federal Reserve System is directed to prescribe regulations to carry out purposes of the Truth in Lending Act (12 CFR Part 226, 34 FR 2002, Feb. 11, 1969), the statute specifically provides that such Board authority does not impair the authority of any other agency responsible for administrative enforcement to make rules respecting its own enforcement and compliance procedures.

Notes of Decisions

Volume 2—p. 1221; Volume 6—p. 5072; Volume 9—p. 7387; Volume 11—p. 9159; Volume 12—p. 10229; Volume 13—p. 10946; Volume 14—p. 11433; Volume 15—p. 12003; Volume 16—p. 12639; Volume 17—p. 13294; Volume 18—p. 14050; Volume 19—p. 15122; Volume 21—p. 16513.

Liability for Freight Charges of Parties to Shipment

21. Consignor's liability.—[Vols. 2, 6, 9, 12, 15, 17, 18].—Clauses of the uniform bill of lading govern rights of the parties in railroad's suit against consignor for freight charges on 11 tank cars of oil shipped from Cushing, Okla., to West Frankfort, Ill.; and, being prescribed by Congress and the Commission, they have the force of Federal law. Thus, when carrier failed to notify consignor that West Frankfort was designated in a station list as a prepay station and, instead, accepted the shipments without prepayment, entered in a nonrecourse agreement with consignor, and delivered shipments to consignee without collecting freight charges from it, carrier could not thereafter collect the charges from consignor. As tariff laws are not aimed at who must pay the rate but rather at what rate shall be paid, the parties are free to stipulate who shall pay the prescribed rate; therefore, when bills of lading containing a no-recourse clause was executed and no provision was made for prepayment, delivery of consignment to consignee and his acceptance thereof relieved consignor of liability for the freight charges. Carrier's suit dismissed.—Atchison, T. & S. F. Ry. Co. v. Midland Cooperatives, Inc., 306 F. Supp. 723 (724-6).

In railroad's suit against shipper to recover freight charges on shipment which moved under bills of lading containing a "non-recourse" clause, consignor is not relieved of its primary responsibility for freight charges on basis of that provision when it did not sign the no-recourse statement therein. Nor does alleged agreement of ultimate consignee to pay the freight charges relieve consignor of its liability to carrier, since the railroad merely transported cargo from one to the other without any notice of or participation in dispute between them on that matter. Furthermore, plaintiff was permitted to join the consignee as a direct defendant in instant suit; and while obviously railroad cannot recover twice, it would seem that, under §3(3), it may recover jointly and severally from both shipper and consignee to whom transshipped where no contrary intention is shown by the bills of lading or the undisputed facts of record. Summary judgment for plaintiff entered.—Chicago & N.W. Ry. Co. v. T. Frederick Jackson, Inc., 336 F. Supp. 1141 (1141-2).

In railroad's action to recover freight charges on shipment from El Paso, Tex., to California points, pursuant to defendant's direction, although plaintiff is not entitled to collect charges from defendant (consignee named in bills of lading covering prepaid movement to El Paso) by claiming a "diversion" of shipment by consignee within §§3(2) and (3), defendant's status as an agent or principal is another matter. Original shipment terminated at El Paso where consignee exercised such substantial control over the cars as to amount to a "delivery"; and a further agreement was necessary for forwarding shipment to California. A new contract, for which no bills of lading were issued, was made for moving the cars to California and, viewing the record in a light most favorable to the railroad against whom the lower court directed a verdict, a jury verdict might have been found against defendant as original consignor under the new contract. Therefore, as to that issue, lower court's judgment must be reversed and cause remanded for a new trial.—Southern Pac. Co. v. Brown, Alcantor & Brown, Inc., 404 F. 2d 187 (190-91).

22. Consignee's liability.—[Vols, 2, 6, 9, 12, 15, 17-19, 21].—Provisions of uniform bill of lading govern rights of the parties to an interstate shipment and, as they are prescribed by Congress and the Commission, have the force of Federal law. Since tariff laws are not aimed at who shall pay the freight rate but rather what rate shall be paid, the parties are free to stipulate who shall pay the rate prescribed thereby. Therefore, when uniform bills of lading covering shipment of 11 tank cars of oil to West Frankfort, Ill., (listed as a prepay station) contained a signed no-recourse clause and carrier, without making provision for prepayment of the charges, accepted the shipments and delivered them to consignee, the acceptance of delivery established liability of consignee to pay all freight charges.—Atchison, T. & S.F. Ry. Co. v. Midland Cooperatives, Inc., 306 F. Supp. 723 (724-5, 726).

Railroad may not recover in its suits against consignees of goods for freight charges allegedly due where the carrier issued bills of lading and marked them "Prepaid" or "To be prepaid" and, relying on that representation, the consignees accepted delivery and paid the purchase price and full freight charges to consignor who never remitted to carrier. As stated in 276 F. Supp. 367, aff'd 409 F. 2d 882, where there is no binding precedent which prohibits examination of the equities of the case, and no overpowering public policy requiring strict application of statute that forbids granting any rate preference, the established principle fixing consignee's liability for lawful freight charges does not require double payment by consignee. Plaintiff carrier made full and proper freight charges and extended credit to, and looked for payment from, consignor (shipper) by stamping the bills of lading as prepaid and, since defendant consignees accepted delivery and made full payment to shipper prior to shipper's bankruptcy, they are not responsible for shipper's nonpayment. Judgment for defendants.—Missouri Pac. R. Co. v. Lake Charles Grain & Groc. Co., 320 F. Supp. 1064 (1065-6).

On appeal from lower court's directed verdict for defendants, railroad cannot recover additional freight charges from defendant (consignee) for transporting shipment from El Paso, Tex., (destination named in bills of lading) to California points, on theory that there was a diversion of shipment by consignee within provisions of §§3(2) and (3). Considered shipment reached El Paso (charges prepaid) as indicated on the bills of lading, and when consignee exercised substantial control over the cars it amounted to a delivery which terminated the bills-of-lading contract and which necessitated a further agreement for transporting it therefrom; thus, since the cars were not in transit when consignee directed that they be moved to California, there was no diversion or reconsignment as contemplated by the statute. Therefore, as the shipment terminated at El Paso and a new contract was made for its movement to California, plaintiff is not entitled to recover claimed charges, by invoking §§3(2) and (3), from defendants.—

Southern Pac. Co. v. Brown, Alcantar & Brown, Inc., 404 F. 2d 187 (189-90).

In railroad's action against consignee of the goods to recover freight charges allegedly due on shipment which moved under bill of lading that carrier had prepared and marked "freight prepaid," when the railroad affirmatively marked "prepaid" on the bill of lading, in effect, it directed consignee to reimburse shipper-consignor for charges shipper had prepaid; and, when consignee in paying its bill to consignor included the freight charges and could not obtain reimbursement thereof from consignor, which was apparently insolvent, consignee was not liable to railroad for the charges which in fact had not been paid. Lower court's holding that the principle fixing a consignee's liability for payment of lawful freight charges, as established in cases cited, does not mandate double payment by consignee as a matter of absolute liability to guarantee carrier's collection of payment, and that defendant consignee could properly raise the defense of estoppel on grounds of payment in full to consignor on a prepaid bill of lading, affirmed.—Missouri Pac. R. Co. v. National Milling Co., 409 F. 2d 882 (883-4, 886)*.

While a consignee or reconsignee who takes delivery of shipment is liable for charges then billed even if not collected, consignee who reconsigned the shipment is not liable for such charges; but if there are charges beyond those billed, the beneficial owner at time of delivery is liable for them if (prior to delivery) carrier has been notified of beneficial owner's name and address, and if proper notice has not been given, consignee who reconsigned is liable for additional charges neither billed nor collected. Therefore, when there were no additional charges on considered carload of lumber, and defendant consignee had given delivering railroad written notice to release the car to a third party and to show consignee as shipper on the freight bill with all charges to follow the car, carrier which released car to specified third party (now bankrupt) without collecting billed freight charges is not entitled to collect such charges from consignee who reconsigned the car.—Union Pac. R. Co. v. Hall Lumber Sales, Inc., 419 F. 2d 1009 (1010, 1012-13)*.

See also Chicago & N.W. Ry. Co. v. T. Frederick Jackson, Inc., n. 21 above; Southern Pac. Transp. Co. v. Campbell Soup Co., §6(7), n. 222.

23. —Consignee as agent.—[Vols. 2, 9].—On rehearing, in railroad's suit to recover unpaid freight charges for transportation of shipment from El Paso, Tex., (to which bill-of-lading charges were prepaid) to California points, as defendant (bill of lading consignee) directed, provisions of recently presented tariff defining "diversion or reconsignment" and authorizing a reconsignment after a shipment reaches a destination and application thereof to the undisputed facts, including fact that plaintiff applied a through tariff rate from point of initial shipment to that of final delivery, impels the court to conclude that the contract of carriage was not terminated in El Paso. It follows that when defendant (consignee) exercised substantial control over the shipment, directing railroad to transport the cars to California points without written notice to delivering carrier that it was acting only as agent and giving it name and address of beneficial owner of the property, under provisions of §3(2), defendant became liable for accrued unpaid freight charges as a diverting consignee.—Southern Pac. Co. v. Brown, Alcantar & Brown, Inc., 409 F. 2d 1331 (1332)*.

25. Third person's liability.—[Vols. 2, 9].—Changes in the Act and the provisions of uniform bill of lading since the decision in 108 F. 2d 994 are not inconsistent with holding therein that, by its conduct in giving effect to consignee's written direction to deliver shipment to another and collect the freight charges from the other party, the railroad agreed to accept liability of new consignee for the charges (if it accepted delivery) in place of original consignee's liability had it accepted delivery. When defendant consignee of carload of lumber gave delivering railroad written direction to release the car on arrival to a third party, and to show consignee as shipper on the freight bill with all charges to follow the car, that was a clear expression of original consignee's desire that the third party be held liable for the charges due. Therefore, having been notified that freight charges were to follow shipment delivered to the third party (now bankrupt), carrier which released the car to third party named without collecting the billed charges is not entitled to collect such charges from defendant reconsignee.—Union Pa. R. Co. v. Hall Lumber Sales, Inc., 419 F. 2d 1009 (1010-12, 1013-14)*.

30. Determination as to which party is liable.—[Vols. 2, 9, 13, 16].—In absence of some contractual basis, the statute imposes liability on beneficial owner of goods shipped for the freight and demurrage charges only if there is a reconsignment or diversion of the shipment accompanied by written notification to the delivering carrier of the name and address of the beneficial owner. And general allegation by plaintiff railroad, suing to recover demurrage charges on 53 carloads of pig iron, that defendant (which had agreed to purchase 36 of the carloads) was consignee's principal is insufficient evidence of a principal-agent relationship between consignee and defendant that would relieve consignee of his independent legal obligation to pay freight charges on goods delivered to him.—Southern Ry. System v. Leyden Shipping Corp., 290 F. Supp. 742 (745-6). [Not arising hereunder.]

Regulations of the Commission

37 FR 5304, March 14, 1972, Part 1325: Extension of Credit to Candidates for Federal Office or Their Representatives, in implementation of the Federal Election Campaign Act of 1971 (Public Law 92-225), new Part 1325, as set forth, added effective May 5, 1972 unless modified or amended by further order of the commission.

37 FR 10446, May 23, 1972, part 1325: Extension of Credit to Candidates for Federal Office or Their Representatives. Credit regulations set forth in notice of proposed rule making and order (37 FR 5304) prescribed to become effective May 5, 1972.

Section 3. (3) Liability of shipper-consignee for freight where delivery is made to another party upon instruction.—[Unchanged. See vol. 11, p. 9159.]

Notes of Decisions

Volume 17—p. 13295; Volume 21—p. 16514.

2. Construction and interpretation.—[Vols. 17, 21].—Plaintiff railroad having been permitted to join ultimate consignee of considered shipment as a direct defendant in its suit against shipper-consignor to recover freight charges, also seeks summary judgment against consignee as the party to whom delivery was made, under provisions of §3(3), even though it was not a named party on the bills of lading. Obviously plaintiff cannot recover twice but it would seem that it may recover jointly and severally from both shipper and consignee to whom transshipped where no contrary intention is made to appear. Although neither counsel cites any direct authority either way, §3(3) is statutory authority to affix joint liability on the consignee as well as the consignor. Summary judgment for plaintiff entered.—Chicago & N. W. Ry. Co. v. T. Frederick Jackson, Inc., 336 F. Supp. 1141 (1142).

See also Southern Pac. Co. v. Brown, Alcantor & Brown, Inc., §3(2), n. 22.

Section 3. (4) Interchange of traffic.—[Unchanged. See vol. 11, p. 9160.]

- Amendment, see footnotes, vol. 2, p. 1234, vol. 11, pp. 9160, 9161; historical note p. 1234.

Notes of Decisions

Volume 2—p. 1235; Volume 6—p. 5077; Volume 9—p. 7390; Volume 11—p. 9161; Volume 12—p. 10231; Volume 13—p. 10947; Volume 14—p. 11433; Volume 15—p. 12004; Volume 16—p. 12640; Volume 17—p. 13295; Volume 18—p. 14051; Volume 19—p. 15124; Volume 21—p. 16514.

Interpretation

3. In general.—[Vols. 2, 6, 9, 14, 16, 18, 21].—The statute, as interpreted by the Supreme Court in 330 US 567, has as its purpose the preservation of the inherent advantages of barge transportation. Ex-barge traffic may not be discriminated against; thus, when railroads voluntarily enter into joint rail-motor rates under §216(c) which result in discrimination against water carriers, they are necessarily in violation of §3(4), since fact that authority to establish such joint rates is found in part II of the Act does not exempt the railroads from provisions of part I which would otherwise apply. Accordingly, railroads may not enter into joint rates with motor carriers unless requirements of §3(4) are observed. Unlawful discrimination against ex-barge traffic ordered removed.—Oil Country Iron or Steel Pipe, Midwest to Okla. & Tex., 332 I.C.C. 540 (542-3)*.

Applicability

10. In general.—[Vols. 2, 6, 9, 11, 14, 16, 18, 21].—In action to enjoin Commission decision and order requiring railroads to remove discrimination against connecting barge lines, which resulted from reduced joint rail-motor rates established pursuant to §216(c), there is no merit in plaintiffs' argument that because such rates are authorized in part II of the Act, sections in part I dealing with discriminatory rates are inapplicable to joint rail-motor rates. As the Supreme Court held in 323 US 612 and 387 US 397, because of the National Transportation Policy the various parts of the Act may be, indeed, must be construed as a whole; and, while latter cited case dealt with questions of transportation rather than rates, the same logic found therein must be used when a question of analogy arises under the Act which also involves transportation, carriers and rates. To take the whole in one instance implies that the whole is taken in a like situation.—Atchison, T. & S. F. Ry. Co. v. United States, 300 F. Supp. 1351 (1353-7)*.

For the court to hold that the Commission has no power to regulate discrimination in joint rail-truck rates simply because participating carriers entered into such rates under a provision of part II of the Act or because trucks are not specifically designated as connecting carriers under part I thereof would fly in the face of the NTP; such a holding could not be ascribed as the intent of Congress. Therefore, under the language of the NTP and the IC Act, joint rail-motor rates are to be regulated pursuant to §3(4) of part I of the Act. Accordingly, since careful examination of the record shows substantial and ample evidence to support the Commission's decision, the cause is dismissed with prejudice and with costs.—Id., p. 1357.

Interchange

37. Installation of connections. —[Vols. 2, 6, 9, 19].—Primary consideration in this proceeding is whether the switch connection or interchange facility is required by public convenience and necessity. Without a reasonable showing by defendant of how much traffic would move, it is impossible to assess the inconvenience to defendant's yard and terminal facilities. Barring such traffic showing expense which would be incurred by defendant, proposed interchange facility cannot be justified. Commission concluded that interchange by physical connection or intermediate carrier is not required by public convenience and necessity.—Missouri Pac. R. Co. v. Louisiana & A. Ry. Co., 332 I.C.C. 569 (579-81).

39. Failure or refusal to afford facilities.—[Vols. 2, 6, 9, 14, 15, 16, 18, 19].—Penn Central's restriction of access to its Flexi-Flo rail-motor terminals to certain "favored" motor carriers found not justified as common carrier responsibilities bars exclusion of carriers of competing transport modes from access to publicly offered services and facilities despite absence of specific language authorizing Commission to require carriers to furnish such services to competitors (see 387 US 397).—Mutrie Motor Transportation, Inc., Ext.—Ex-Rail, 111 M.C.C. 251 (267-8)*.

Discrimination Between Connecting Carriers

41. In general.—[Vols. 2, 6, 9, 12-15, 17-19, 21].—Section 3(4) prohibits rail carriers from unduly prejudicing any connecting line in the distribution of traffic not specifically routed by shipper; and, though condition (e) in 1923 order approving Southern Pac.'s control of Central Pac. Ry. does not apply to preferential routing, provisions in railroads' 1924 agreement (purporting to embody all the *Control* case conditions in a contract) for mandatory routing of all unrouted traffic violate the plain meaning of §3(4) since such preferential treatment is not justified by differences in operating conditions. Furthermore, such provisions for mandatory and exclusive routing of unrouted traffic are contrary to the national transportation policy as are, also, the agreement provisions for preferential solicitation; and the Pacific Railroad Acts afford no justification for mandatory preferential solicitation much less undue prejudice against connecting lines in the distribution of unrouted traffic and the attendant economic disadvantage contrary to §3(4).—Central Pac. Ry. Co. Control, 328 I.C.C. 345 (357-8)*.

Protection afforded barge lines as connecting carriers by §3(4) cannot be negated by voluntary establishment of joint rail-motor rates pursuant to §216(c) since, regardless of obligations assumed by motor-carrier participants, rail participants in such rates must continue to comply with provisions of part I of the Act which would otherwise apply. As found in the prior report, divisions received by rail participants in considered joint rail-motor rates are a proper measure of discrimination against complaining water carriers; and, based on such divisions, assailed local rates on ex-barge pipe from St. Louis and Kansas City, Mo., to Tulsa and Oklahoma City, Okla., result in discrimination against the barge lines as connecting carriers when, even taking into account the additional rail costs for handling ex-barge traffic, they exceed divisions received by rail participants in reduced joint rail-motor rates between those points. Railroads ordered to remove the unlawful discrimination found to exist.—Oil Country Iron or Steel Pipe, Midwest to Okla. & Tex. 332 I.C.C. 540 (541-3)*.

Complainant herein found not to be subject to undue discrimination in switching arrangements inasmuch as complainant has no team tracks with which to reciprocate such switching. Complainant need not show that it is the victim of discrimination but only that it is not afforded equal and reasonable interchange facilities. Nor is an application under §§1(18) and 1(20) necessary as Commission may impose the sought extension of line on an unwilling carrier. See 213 ICC 351.—Missouri Pac. R. Co. v. Louisiana & A. Ry. Co., 332 I.C.C. 569 (581, 579).

43. Difference in rates—[Vols. 2, 6, 9, 13-19, 21].—Commission, citing *Consolidated Mining*, 299 ICC 231, held that defendant's failure to absorb same amount of switching charges for complainant as it absorbs for complainant's competitors is unlawful discrimination against complainant in violation of §3(4).—Public Belt R. Comm. v. Aberdeen & R.R. Co., 335 I.C.C. 162 (180-81).

Commission found that proposed increase in lake cargo rates on coal without a similar increase in the all-rail, unit-train rates would result in discrimination against the connecting water carriers.—Coal, Ill., Ind., and Western Ky. to Chicago, 339 I.C.C. 493 (499-500).

That no barge movement of flour has occurred from Kansas City to Memphis was held to be immaterial, since barge rates exist, there are statements of record that facilities exist to handle potential movements and reductions in rates would provide the incentive for such movements. Without adjustment of rates applicable on ex-barge flour from Memphis to the same destinations, proposed reductions would be in violation of findings in American Barge Line (316 ICC 759), and would violate sections 2 and 3(4).—Grain To, From and Within Southern Territory, 340 I.C.C. 847 (853).

44.—In divisions.—[Vol. 2].—See Oil Country Iron or Steel Pipe, Midwest to Okla. & Tex., n. 41, above.

Section 3. (5) Terminal facilities; use of and compensation for.—[Unchanged. See vol. 11, p. 9162.]

Amendments, see footnotes, p. 9162; historical notes, vol. 2, p. 1234, vol. 9, p. 7396, vol. 14, p. 11435.

Notes of Decisions

Volume 2—p. 1254; Volume 6—p. 5081; Volume 9—p. 7396; Volume 11—p. 9162; Volume 12—p. 10232; Volume 13—p. 10948; Volume 14—p. 11435; Volume 15—p.12006; Volume 16—p. 12641; Volume 21—p. 16523.

1. Interpretation, generally.—[Vols. 2, 6, 9, 13, 14, 16].—Although opposing carrier, East Coast, does not own facilities at the Dodge Island port (near Miami) or is not entitled as a matter of right to enjoyment of these facilities, Port Authority plans contemplate East Coast's use of the port terminal. And, although East Coast's opposition to considered application is that, as sole rail carrier having physical connections with the new port, it can adequately handle all rail traffic to and from port including switching of Seaboard cars, nevertheless, its tracks, being used entirely for serving shippers in City of Miami and area of port, can themselves be considered terminal facilities. However, whether they be considered terminal facilities of East Coast or main-line track leading to port's terminal facilities, they are within scope of §3(5); it is not required that terminal facilities and tracks for reasonable distance outside of such terminal be owned by same carrier. Thus, Seaboard's proposed use of East Coast's tracks is within Commission's jurisdiction under §3(5).—Seaboard Air Line R. Co.—Use of Terminal Facilities, 327 I.C.C. 1(3).

4. Terminal facilities, construed.—[Vols. 2, 6, 14, 15, 16].—The facilities on Dodge Island (near Miami) of the Dade County Seaport Department are to be used primarily for serving users of the new port, and in this respect, operation at the facility will be little different from that conducted at the old port. And, inasmuch as the use of the facilities, in terminal operations, rather than their classification by the parties is determinable, the department's trackage constitutes terminal facilities as contemplated by §3(5).—Seaboard Air Line R. Co.—Use of Terminal Facilities, 327 I.C.C. 1 (2-3).

5. Trackage of which common use may be required.—[Vols. 2, 6, 9, 14, 21].—See Seaboard Air Line R. Co.—Use of Terminal Facilities case, n. 1 above.

7. Just compensation. —[Vols. 2, 6, 9, 14, 15, 16].—Section 3(5) contemplates that after the right of petitioner to use terminal facilities of another carrier has been determined, the interested carriers shall have an opportunity to agree upon terms and compensation for such use. However, if the Commission is called upon to fix the compensation, prescribed terms and compensation must, under §3(5), be ascertained on the principles controlling compensation in condemnation proceedings. (discussed in 198 ICC 4).—Seaboard Air Line R. Co.—Use of Terminal Facilities, 327 I.C.C.1 (8-9).

Section 4. Long and short haul charges; competition with water routes. (1) Charges for long and short hauls and on through route.—[Unchanged].

Amendments, see footnotes, vol. 2, pp. 1261, 1262, vol. 11, p. 9163, vol. 18, p. 14056, vol. 21, p. 16524; historical notes, vol. 2, p. 1262, vol. 9, p. 7398, vol. 11, p. 9164.

Notes of Decisions

Volume 2—p. 1265; Volume 6—p. 5088; Volume 9—p. 7399; Volume 11—p. 9164; Volume 21—p. 10233; Volume 13—p. 10949; Volume 14—p. 11436; Volume 15—p. 12007; Volume 16—p. 12642; Volume 17—p. 13298; Volume 18—p. 14057; Volume 19—p. 15129; Volume 21—p. 16524.

Constitutionality and Construction

2. Construction; rules in general.—[Vols. 2, 6, 9, 11-16, 18, 19, 21].—In suit to enjoin Commission decision that the mere fact that railroads voluntarily entered into joint rates with motor carriers under §216(c) does not relieve them of their duty to comply with §4, and that joint rail-motor rates which result in higher charges for a shorter haul than for a longer one over the same route is precisely what is prohibited by §4(1), there is no merit in plaintiffs' argument that, since such joint rates are permitted under part II of the Act, sections in part I dealing with discriminatory rates are inapplicable. The Supreme Court held in 323 US 612 and 387 US 397 that, because of the National Transportation Policy, the various parts of the Act may, and indeed must, be construed as a whole; therefore, the reviewing court must hold that, under the language of the NTP and the IC Act, the long-and-short-haul provisions of §4 are applicable to considered joint rail-truck rates. The Commission can, within its statutory grant, exercise jurisdiction over the rates under §4(1) and, since its findings are amply supported by the record, the complaint is dismissed with prejudice and with costs.—Atchison, T. & S.F. Ry. Co. v. United States, 300 F. Supp. 1351 (1353, 1356-7)*.

Transportation Affected

34. Joint rail-motor rates.—[Vols. 16, 21].—Mere fact that authority to establish joint rail-motor rates is found in part II of the Act, rather than part I, does not exempt railroad participants in such rates from provisions of part I which would otherwise apply; obvious reason for including the authority in part II is that only upon its enactment were motor carriers subjected to Commission regulation and joint rail-motor rates permitted. Therefore, railroads that voluntarily enter into joint rates with motor carriers under §216(c) are not thereby relieved from their duty to comply with §4; and when considered joint rail-motor rates result, in some instances, in higher charges for a shorter than a longer movement over the same route, in same direction, and the shorter movement is included in the longer, that is exactly what is prohibited under §4(1). Thus, though the departures occur on motor-carrier part of the service, railroad participants in joint rail-motor rates are in violation of §4 unless they make out a special case for relief therefrom; §4 relief authorized in prior report, affirmed.—Oil Country Iron or Steel Pipe, Midwest to Okla. & Tex., 332 I.C.C. 540 (541-2, 543-4)*.

Enforcement of Long-and-Short-Haul Clause

38. —Necessity for showing charging and receiving greater and lesser compensation.—[Vols. 2, 6, 9, 11-14].—Complainant shippers have failed to prove that defendants' failure to fully absorb interline switching charges violated §4 because they have not shown the charging of greater compensation for transportation of a like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included in the longer distance.—Armour & Co., Et Al, v. Sioux City Term. Ry. Co. Et Al., 341 I.C.C. 118 (128).

62. —Minimum weights considered in connection with rates.—[Vols. 2, 9, 13, 15].—Under the proposed tariff rule which provided for the nonapplication of domestic rates on import and export traffic where there are in effect commodity rates or rates derived from exceptions ratings published to apply specifically on import or export traffic, the aggregate charges of such traffic with minimum weight of 75,000 pounds would require higher charges from the intermediate point than from the more distant point resulting in unauthorized fourth-section departure; proposed schedule ordered cancelled.—Application of Domestic Versus Import or Export Rates, 339 I.C.C. 9 (14).

Aggregate-Of-Intermediates Clause

138. When rates unlawful within meaning of clause.—[Vols. 2, 6, 9, 11, 12, 15-17, 19, 21].—Commission found no violation of §4(1) as the assailed rates on carload shipments of automobile parts over respective routes from Detroit, Mich. to either Orvil, Tex. or Rincon, N. Mex. were domestic rates restricted so as not to apply on export traffic and were not intermediate rates within the meaning of §4(1) and may not be used as part of a combination on export shipments.—Fabricas Auto-Mex., S.A. v. N. Y. Central R. Co., et al, 332 I.C.C. 1 (9).

161. Publication of rates subject to rule 56.—[Vols. 9, 11-14].—Although aggregates of intermediate rates lower than applicable single-factor transit rates, published on commodity descriptions which would include complainant's shipments, were in effect when some of shipments moved, hold-out rule conforming to rule 56 of Tariff Circular 20, in tariff naming the single-factor rates, did not make the lower combinations on the transit point applicable, being in substance merely a promise to publish such rates where lower. However, under that holding out and provisions of §4(1), complainant is entitled to reparation to basis of the lower aggregates, regardless of their level.—Atlantic Creosoting Co., Inc. v. Southern Ry. Co., 323 I.C.C. 533 (538-9).

Relief from Long-and-Short-Haul Provisions

165. Authority of Commission to grant relief, generally.—[Vols. 2, 6, 11, 15, 17, 21].—Petitioner's contention that the Commission cannot, upon protest, lawfully grant long-and-short-haul fourth-section relief without considering whether the rates violate other sections of the Act or the national transportation policy (with reliance on *Mechling*, 376 US 375), is not applicable in the instant proceeding, which does not consider the lawfulness of specific rates under any section of the Act. The instant proceeding is in contrast to proceedings in which issues concerning given rates are considered under section 4 and other sections of the Act.—Commodity Rates East of the Rocky Mountains, 329 I.C.C. 212 (214-15)*.

176. "Special cases" construed.—[Vols. 2, 6, 9, 11-19, 21].—Relief for technical departures from §4 in reduced export rates on wheat from origins in 8 western States to gulf ports is essential for maintenance of a rate adjustment consistent with railroad geography and to preclude publication of rates lower than necessary to meet severe truck and truck-barge competiton for the traffic. Charges for competitive truck movements from the higher-rated intermediate railroad points are actually greater than from the more distant railroad origins, since highway distances are greater, and applicant railroads are attempting to meet the truck and truck-barge competition at both origin and intermediate points. Applicants have established a special case; relief granted.—Wheat and Flour, Midwest & S.W. to Gulf-Chicago—Export, 322 I.C.C. 581 (587-8, 589-91, 611).

A fourth-section order granting relief from the long-and-short-haul provision supplemented by an order granting outside-territory relief is not an unlimited order; its purpose is to cover long and short haul departures which, of necessity, arise when the methods favored by the Commission, such as mileage-scale groupings, are followed in establishing a rate structure. Clearly this situation, while of a continuing nature, is limited in scope and comes within the special-case requirement of §4(1) of the Act.—Commodity Rates East of the Rocky Mountains—Fourth Section Application, 329 I.C.C. 212 (215)*.

The Commission found that circumstances warrant modification of supplemented fourth section order 18982 so as to provide that this proceeding be automatically reopened whenever rates established under said order are contested by protest, or in an investigation or complaint proceeding for reconsideration pertaining thereto. The burden of proof under §4 of the act upon such reopening will be on the proponent of the involved rates. Findings in the prior report were modified in accordance herewith, and an order issued modifying the outstanding supplemented order as required—Id., p. 216.

Although a special case was found to exist for the establishment of proposed compensatory rates, the purpose of which was to afford origin millers an improved opportunity to compete with destination millers in the sale of flour, the application was denied since the proposal would have resulted in violations of §§2, 3(4), and 3(1).—Grain, To, From and Within Southern Territory, 340 I.C.C., 847 (854).

Compelling Character of Competition Warranting Relief

215. Investigation by the Commission; character.—[Vols. 2, 9, 18, 21].—In action to set aside Commission order granting railroads relief from long-and-short-haul clause of §4(1), defendants rely on opinion in the *Seatrain* case, 168 F. Supp. 819, to support their argument that, since the statute requires no hearing, a §4 order is rule-making procedure within the Administrative Procedure Act and the pertinent scope of judicial review of the order is not whether the findings and conclusions are supported by substantial evidence, but whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accord with the law. However, even under the *Seatrain* decision, the order must contain sufficient findings so that a court can determine if the Commission gave consideration to proper criteria required by statute to be taken into account in determining the §4 question; thus, order under review is fatally defective because (ultimate facts or conclusions therein being no more than the legal conclusions found insufficient in Seatrain) it is not supported by findings which show on their face a sufficient basis for issuance of the order.—Seaboard Allied Milling Corp. v. United States, 306 F. Supp. 879 (882-3)*.

And decision in the *Mechling Barge Lines* case, 376 US 375 (after *Seatrain*), directly holds that (1) the Commission's power to issue a §4 order depends on due consideration of §§2 and 3 discrimination and preference provisions, (2) if §2 and §3 issues are raised and contested in a §4 proceeding, merits thereof must be decided before §4 order can be issued, and (3) except for situation where consolidation of §§2 and 3 issues with the §4 procedure would excessively delay the proceedings, protestants cannot be required "to begin anew" by §13 and §15 proceedings to adjudicate those issues. Thus, though an evidentiary hearing was held in *Mechling*, whereas none was held nor requested in instant case, the court finds nothing to support defendants' position that §4 order in question was a "preliminary determination" that protestants (plaintiffs) did not prove their allegations as to discrimination and preference of proposed rates and that, as order stated, their contentions that it violates other sections of the Act could be fully adjudicated in complaint and investigation proceedings. Commission order vacated and case remanded for further proceedings consistent with the court's opinion.—Id., pp. 883-4.

Authorization of Relief

234. —Denial of relief.—[Vols. 2, 6].—In view of our findings that the proposed proportional rate would be unjust, unreasonable, and unduly prejudicial to Chicago, Ill., in violation of §§1(4) and 3(1), the application for §4 relief may not receive our approval even though all other factors meet the statutory standard of proving a special case justifying such relief.—Corn and Corn Products, Illinois to Official Territory, 332 I.C.C. 485 (488-9)*.

236.—Construction of general order of authorization.—[Vols. 2, 6, 9, 12, 19, 21].—The order granting general relief from the long-and-short-haul provision of §4(1) supplemented to include outside-territory relief, as used by the applicants, has been interpreted to cover rates established for competitive reasons. It may be that such coverage was not contemplated by the division in the prior report, but the scope of the supplemented order is that extensive. Were competitive rates to be excluded, there would be little use for the order, and for coverage to be determined by the reason for establishment of the rates would be too indefinite and difficult to prove. Since the requests for relief were unopposed, the supplemented order as to past rates established thereunder is affirmed, but it is modified as to its future effect by automatically reopening this proceeding when any rate purportedly established under the supplemented order is contested and the proponent of the rate will be required to prove that fourth-section departures will not occur or establish a justification for fourth section relief.—Commodity Rates East of the Rocky Mountains—Fourth Section Application, 329 I.C.C. 212 (215-16)*.

Qualification on Authority of Commission

243. More distant rate reasonably compensatory.—[Vols. 2, 6, 9, 11, 12, 14, 16-19, 21].—In suit by southern-territory flour mills to set aside Commission order granting defendant railroads relief from long-and-short-haul clause of §4 in connection with proposed rates (filed concurrently with application) on wheat flour from southwestern and w.t.l. territories to destinations in southern territory, considered order is fatally defective because it is not supported by findings which show on their face "sufficient basis for the issuance of the order," even under doctrine of the *Seatrain* case, 168 F. Supp. 819, which narrowly limits the scope of judicial review of §4 orders. The order sets out various contentions of the parties in some detail and, also, states that proposed rates are not approved but are subject to complaint, investigation, and correction if in conflict with the Act; but the Fourth Section Board's ultimate conclusions that (1) allegations of protestant (plaintiffs) as to discrimination and undue preference and prejudice "are not supported by facts of evidence" and (2) "proposed rates appear to be reasonably compensatory and not otherwise unlawful" are clearly no more than the legal conclusions found insufficient in cited case.—Seaboard Allied Milling Corp. v. United States, 306 F. Supp. 879 (882-3)*.

Moreover, after the *Seatrain* decision, the Supreme Court held in the *Mechling Barge Lines* case, 376 US 375, that the Commission's power to grant §4 relief depends on the facts established and agency judgment in exercising "a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned *and in view of the preference and discrimination clauses of the second and third sections*." The court also rejected the argument that unlawfulness of the rates could be later adjusted in §13 and §15 procedures, holding that to require filing of complaint and investigation procedures *after* the §4 order would be "splintering" the proceedings and would "needlessly subject appellants' claims to the rigors of circumlocution so deadly to effective administrative and judicial processes." Nothing in the *Mechling* decision supports defendants' attempt to distinguish it on the fact that an evidentiary hearing was held in that case, whereas none was held or requested in instant case. Therefore, considered Fourth Section Order is vacated; case remanded for further proceedings consistent with the court's opinion.—Id., pp. 883-4.

Section 4. (2) Competition of railroads with water routes; change of rates.—[Unchanged. See vol. 9, p. 7433.]

Amendments, see footnotes, vol. 2, p. 1345; historical note, vol. 2, p. 1345.

Notes of Decisions

Volume 2—p. 1345; Volume 9—p. 7433; Volume 12—p. 10242; Volume 14—p. 11440; Volume 15—p. 12016; Volume 16—p. 12651; Volume 19—p. 15143.

Section 5. (1) Pooling; division of traffic, service, or earnings.—[Unchanged. See vol. 11, p. 9176.]

Amendments, see footnotes, vol. 2, p. 1347; vol. 11, pp. 9176, 9177; historical notes, vol. 2, p. 1347, vol. 16, p. 12651; vol. 21, p. 16535.

Historical Note

The Commission recommends that §5(1) be amended to establish an expedited procedure for approval of smaller traffic pooling arrangements that do not appear unduly to restrain competition, in the interest of fuel conservation.—Annual Report, 1975, p. 77.

Notes of Decisions

Volume 2—p. 1348; Volume 6—p. 5131; Volume 9—p. 7434; Volume 11—p. 9177; Volume 12—p. 10242; Volume 13—p. 10953; Volume 14—p. 11441; Volume 15—p. 12016; Volume 16—p. 12651; Volume 17—p. 13305; Volume 18—p. 14063; Volume 19—p. 15143; Volume 21—p. 16535.

6.—Express revenue distribution.—[Vols. 2, 9, 14-17, 19].—Decision in 150 ICC 423 approving the issuance of bonds, distribution of stock, and the pooling of earnings by REA, formed by railroads pursuant to a joint venture agreement to conduct railway express business, did not constitute approval of REA's non-negotiable debt to the railroads as necessary to the joint venture; the opinion emphasized that only the pooling of earnings plan in the contract was approved under §5(1), and fact that the Commission described other contract provisions does not mean it approved them. Also, decision in

230 ICC 487 which approved, as necessary for performance of carrier's services, REA's issuance of notes as evidence of its non-negotiable debt cannot be read as retroactive approval of the debt when, apart from describing it, the Commission nowhere indicated its views as to debt's legality; the same is true of Commission order approving REA's 1959 notes. Therefore, as there was no specific §5 approval of the non-negotiable debt as necessary to the joint venture, challenged transactions involving the debt—unlike those involving the notes—are not exempt from the antitrust laws by §5(11).—REA Express Agency, Inc. v. Alabama G. S. R. Co., 343 F. Supp. 851 (857-8, 859-60).

16. Assent; carriers involved.—[Vols. 9, 12, 17, 19, 21].—See Official-Southern Divisions, §1(4), n. 141.

Section 5. (2) Unifications, mergers and acquisitions of control.—[Unchanged. See vol. 11, p. 9179, vol. 15, p. 12018.]

Amendments, see footnotes, vol. 6, p. 5138, vol. 11, pp. 9179-9181; historical notes, vol. 6, p. 5138, vol. 9, p. 7440, vol. 11, p. 9181, vol. 12, p. 10244, vol. 13, p. 10955, vol. 14, p. 11443; vol. 17, p. 13307. Section 213, vol. 10, p. 8081, vol. 21, pp. 16537, 16538.

Historical Note

The Commission proposes legislation requiring prior approval of all acquisitions of control of class I railroads, motor carriers, and class A water carriers and freight forwarders, in order to empower the Commission to examine intercorporate transactions for possible impairment of a carrier's operations, in which case divestiture could be ordered.—Annual Report, 1975, p. 9.

Notes of Decisions

Volume 11—p. 9182; Volume 12—p. 10244; Volume 13—p. 10955; Volume 14—p. 11443; Volume 15—p. 12018; Volume 16—p. 12652; Volume 17—p. 13307; Volume 18—p. 14066; Volume 19—p. 15146; Volume 21—p. 16538.

2. Construction and interpretation.—[Vols. 11-19, 21].—Terms of §5(2)(d) are sufficiently broad to permit consideration of rail petitioner who interchanges traffic and competes with control applicant as a "railroad in the territory involved", since §5(2)(d) does not attempt to describe conditions under which petitioner may be included in transaction, define the transactions in which inclusion may be sought, nor limit inclusion to transactions of same type or instances where inclusion will not prejudice the case of another participant. No transaction within §5(2) is excluded from the scope of paragraph (d) thereof. Therefore, Commission has authority to entertain petition for inclusion without regard to nature of inclusion or other specific relief sought therein.—Missouri Pac. R. Co.—Control—Chicago & E. I. R. Co., 327 I.C.C. 279 (295-6)*.

***Application and purpose:* [Vols. 14, 19].—The lawful reduction of taxes is a proper objective of a §5(2) proceeding; and, to the extent that heavy tax burdens are reflected in transportation costs, the Commission deems relief from such burdens to be in the public interest.—Norfolk & W. Ry. Co.—Control—Lake Erie & F. W. R. Co., 328 I.C.C. 219 (222-3).**

Fringe benefits are now generally recognized in American industry as being an integral part of employee compensation, and this has long been so in the railroad industry; thus, rights with respect to insurance and hospitalization are within the reach of §5(2)(f).—Southern Ry. Co.—Control—Central of Georgia Ry. Co., 331 I.C.C. 151 (175-6)*.

***Authority permissive:* [Vols. 12-19, 21].—Although order of bankruptcy court authorizes trustee of carrier in reorganization, effective upon the Commission's ratification, to acquire by conveyance or condemnation a right-of-way and certain track-**

age owned by complainant, a public corporation of the State of New Jersey, the Commission has no power to compel a carrier to acquire trackage rights or a line of railroad. Whether the transaction be under §5 or §1(18), the Commission's authorization to a carrier to engage in a transaction is permissive, not mandatory, and the Commission may not sanction a transaction unless an appropriate application is submitted to it.—Industrial Corp. of S. Hackensack, N.J. v. N.J. & N.Y. R. Co., 324 I.C.C. 272 (273-4).

Orders granting authority under section 5 are purely permissive in nature, and any conditions attaching thereto are not sanctions since the parties may elect, or not, as they see fit, to exercise the authority so granted. In view of the permissive nature of the authority granted, such conditions do not constitute a revocation of operating rights contrary to the provisions of section 212(a). Therefore, notice and other procedures prescribed in proceedings under section 212(a) are not applicable to proceedings under section 5 and the Commission may limit or restrict a carrier's certificate without prior notice of such possible action under its power to approve applications subject to such just and reasonable terms and conditions as the public interest and the national transportation policy may require.—Thurston Motor Lines, Inc.,—Control and Merger, 104 M.C.C. 1 (11-12).

Certificate: [Vols. 11, 13, 15].—See Daily Express, Inc.—Control and Purchase, n. 45 below.

Contracts: [Vols. 12, 15, 17-19, 21].—It is not the entering into a conditional, executory contract that is prohibited by §5, but rather the unauthorized effectuation thereof. When carriers contemplate joint action under §5(2)(a)—whether it be a purchase, lease, contract to operate or other bilateral transaction, the customary practice is to formulate the transaction in terms of an agreement which is an executory contract made contingent upon Commission approval. Without that kind of threshold agreement, most transactions specified in §5(2)(a) could not, as a practical matter, be initiated. That is the context in which to construe the language of §5(2)(a)(i) making it lawful, with our approval, for any carrier or two or more carriers jointly to contract to operate the properties of another.—Seaboard Air Line R. Co.—Trackage Rights, 331 I.C.C. 361*.

Control by a noncarrier: [Vols. 11, 14, 19, 21].—In view of the chain of circumstances which began six months earlier (when options to purchase stock of two-carrier "complex" were acquired), noncarrier applicant's previous acquisition of one household goods carrier was part of a single transaction subject to §5(2) from which it cannot be separated. Actions of parties in control of applicant in acquiring the purchase options and causing applicant to be formed for purpose of acquiring control of the two carriers, and applicant's purchase of first carrier's stock and filing instant application for authority to acquire control of another household goods carrier, were all part of original plan of acquisition, by a noncarrier, of control of two motor carriers. And applicant's argument that the options were not exercised, and there was no agreement to purchase stock of second carrier when control of the first was acquired, is not convincing when the evidence is considered as showing a single transaction within §5(2), as it should be, rather than as two separate unrelated transactions.—General Movers Corp.—Control—Martin Van Lines, Inc., 101 M.C.C. 748 (750, 760-61)*.

Dual operation: [Vols. 11, 13, 14, 18].—Although the control and merger provisions of §5(2)(b) limit railroads in acquiring control of motor carrier operations, these limitations were not intended to be applied rigidly in interpreting the ability of the Commission to confer new grants of motor carrier authority as a result of applications filed pursuant to the provisions of §207. Rather, the Commission has accepted the policy of §5(2)(b) as a guiding light, and has occasionally issued certificates to railroad subsidiaries without restriction where "special circumstances" prevail, i.e., where unrestricted operations by the rail-owned carrier are found on specific facts and circumstances to be in the public interest [355 US 141, 149, 150, 152]. However, the Commission has exercised in conservative fashion its discretion in determining on the specific facts and circumstances that the public requires a grant of unrestricted operating authority to a rail-owned carrier. See also,

§207(a), n. 35—Southern Pac. Transp. Ext.—Elimination of Restrictions, 117 M.C.C. 224 (326-7).

Exempt and nonexempt operations: [Vols. 18, 19, 21].—See Miller Van Lines, Inc., Certificate of Registration Case, §206(a) (6), (7), n. 75.

Findings required under §5(2): [Vols. 17-19, 21].—The Commission is not required to select between control applicants and award the control of a railroad to one applicant or the other; such approach is not in conformity with its mandate under the act. All cases considered under §5(2) must be determined in light of accepted principles for testing whether any of the proposals are consistent with the public interest.—Southern Pac. Co.—Control—Western Pac. R. Co., 327 I.C.C. 387 (397).

1940 act: [Vols. 13, 18, 19, 21].—Since all transactions enumerated in §5(2)(a) involve two or more carriers, the essence of a violation of §5(4) is participation in a pertinent transaction involving two or more carriers without first having obtained the Commission's approval. There is nothing in complaint by a public corporation of the State of New Jersey, which owns trackage over which defendant is alleged to be unlawfully operating, that identifies complainant as a carrier by railroad, and it is a reasonable inference from contents of the complaint that it is not. As there is no indication that the subject matter of the complaint concerns any carrier other than defendant, there can be no violation of §5(4), and there is therefore no basis for ordering defendant to halt operations over the involved trackage.—Industrial Corp. of S. Hackensack, N.J. v. N.J. & N.Y. R. Co., 324 I.C.C. 272 (274).

By enacting the Transportation Act of 1940, which embodied §5 in its present form and relieved the Commission of its duty under the 1920 act to work out and adopt a national plan for consolidation of railway properties, Congress intended not only to transfer the function of initiating consolidations from the Commission to the carriers, but also to eliminate certain practical obstacles that previously had precluded desirable consolidations. Its purpose was to facilitate mergers and consolidations when, subject to such terms, conditions and modifications as the Commission might prescribe, they would meet certain tests of public interest, justice and reasonableness. Thus, under the provisions of §5(2), the public interest scale is at balance, weighted neither for nor against merger in a particular case; and that balance can be tipped solely by evidence bearing upon public interest.—Great Northern Pac. & B. Lines, Merger—Great Northern, 331 I.C.C. 228 (245-6)*.

Revenues, carriers' gross operating: A non-carrier corporation affiliated with a regulated motor carrier whose gross operating revenues exceed $300,000 violates §§5(2) and 5(4) when it acquires control of another regulated motor carrier without Commission approval; the carrier affiliate's revenues must be considered in determining whether the provisions set out in §5(10) apply exempting transactions where the aggregate gross operating revenues of "such carriers" has not exceeded $300,000 for the statutory period preceding the transaction despite the omission of specific language to that effect in the amended §5(10).—Red Arrow Securities Corp.—Investigation of Control, 104 M.C.C. 265 (272).

Speculation; trafficking in certificates: [Vols. 12, 15-18, 21].—Sale of liquidating carrier's stock by controlling stockholder who had held the stock for one year is insufficient to show that he is trafficking in operating rights, since he has valid personal and medical reasons for the sale of such ownership interest.—St. Johnsbury Trucking Co., Inc.—Control and Merger, 104 M.C.C. 137 (140).

Vendees cannot be considered to have engaged in trafficking in operating rights since the proposed sale of their intrastate rights, which are similar to those interstate rights held by vendor, are unregistered, i.e., do not underlie or support certificates of registration issued to vendees under the amended provisions of §206(a). Nor does the record show that the latter two carriers were lawfully engaged in operations in interstate commerce under the former second proviso of §206(a) as of Oct. 15, 1962, insofar as such intrastate rights are concerned, since it is not apparent that they have filed any of the necessary instruments required by §206(a)(7) entitling them, without additional proof, to "grandfather" certificates of registration. Under these circumstances a finding of unfitness because of alleged trafficking in operating rights would be inappropriate here.—Lyons Transp. Lines, Inc.—Control and Purchase, 104 M.C.C. 599 (602-03).

State certificate: [Vols. 11, 14, 19, 21].—In accordance with the plain meaning of liquidating carrier's state certificate, transportation may be performed in both directions over the described regular and connecting routes. While the intrastate regular routes are described in terms of transportation in only one direction, and authorization for return movements follows the last of those routes, the use of the plural word "routes" in such authorization requires the conclusion that all of the regular routes are generally referred to rather than only the last one; further, the connecting routes listed immediately after the express authorization for return movements applies to joinder movements over other regular routes rather than just the last one specified. In addition, intermediate and off-route point service on certain routes is phrased in the conjunctive, that is to say that such operations are from and to all such points as opposed to service merely to the designated points.—St. Johnsbury Trucking Co., Inc.—Control and Merger, 104 M.C.C. 137 (140-41-42).

Vehicles operated: [Vols. 15-19, 21].—See Sawyer Transport, Inc.—Purchase—R. C. Wilson, n. 45 below.

3. Public interest.—[Vols. 11-19, 21].—In action to set aside Commission order authorizing Missouri Pac.'s control of Chicago & E.I., and denying plaintiff authority to acquire control of the same railroad, the Commission did not act arbitrarily on basis of an error of law in holding that, in light of great public benefit flowing from the control, MoPac's §5(4) violation (acquiring a measure of control without prior approval) did not necessarily require denial of its application. Public interest may require denial of a §5(2) application where a statutory violation is flagrant, in open defiance of Commission authority; however, where the evidence shows that applicant acted in good faith, public interest in strict enforcement of §5(4) may be comparatively small. The Commission weighs a §5(4) violation when it determines whether proposed §5(2) transaction will be in the public interest; it applies a balancing test and the preference for denying applications of §5(4) violators will yield to a clear showing of public interest in approval thereof.—Illinois Central R. Co. v. United States, 263 F. Supp. 421 (424-6, 429-30)*.

Record supports the Commission's findings that, considering the mitigating factors shown, MoPac's §5(4) violation was not flagrant, that such violation was comparatively minor in light of public benefits derived from proposed control, and that public interest considerations overwhelmingly favored approval of its control application. Also, substantial evidence fully supports its conclusion that an "end-to-end" affiliation with MoPac would result in modernization and improvement of C&EI's physical plant and its ability to serve shippers and connecting railroads whereas, in contrast, a "side-by-side" affiliation with plaintiff (a competitor) would lead to C&EI's subjugation and disintegration or its continued operation as a self-restricted, financially weak system. Therefore, the court cannot find that the Commission improperly struck a balance between requirements of §5(2) and 5(4); the Commission's result is not arbitrary or in violation of the law; order sustained.—Id., pp. 423, 430.

A motor carrier may purchase operating rights and property of another if the Commission finds the proposal consistent with the public interest and, in granting approval, the Commission may impose just and reasonable terms and conditions. The adequacy, economy, and efficiency of transportation service in the area are factors which the Commission must consider in determining consistency with the public interest; and it has consistently disapproved purchase of rights that would result in new, unneeded, competitive service. On the record, the Commission could properly find that vendor's operations in both North and South Carolina were not substantial and its authority was dormant, and that service proposed by plaintiff (vendee) thereunder would constitute a new, unnecessary service inconsistent with public interest in an area adequately served by other carriers. Substantial evidence supports the Commission's finding that public interest would not be promoted by authorizing purchase of those dormant rights, and conditioning its approval on cancellation thereof; no error of law is shown; complaint dismissed.—Houff Transfer, Inc. v. United States, 291 F. Supp. 831 (834-5, 837)*.

In determining the matter of public interest in proposed control transaction, of paramount importance is the preservation of acquired railroad as a prosperous competitive rail carrier under control of end-to-end railroad rather than its eventual subjugation and disintegration under control of parallel railroad or its continued operation as a self-restricted financially weak system as at present. Statutory violation of §5(4) does not automatically defeat control application if overriding public interest considerations are plainly evident. Therefore, although for 8 months applicant had the power to control railroad to be acquired, it did not exercise that power; and control application cannot summarily be denied merely for the sake of returning wrongdoers to status quo ante. Approved.—Missouri Pac. R. Co.—Control—Chicago & E. I. R. Co., 327 I.C.C. 279 (322-4)*.

In consolidated proceedings involving control applications of two railroads seeking to acquire another, the Commission is not required to select between them, but must apply the accepted principles for testing whether any one of the proposals before it is consistent with the public interest. In applying the standards set out in 287 US 12, neither application will result in more adequate, economical or efficient transportation service than presently provided, promote better use of transportation facilities, or preserve reasonable competition in transportation. Moreover, fact that involved carriers are not in financial difficulties is not controlling, since consolidations of prosperous carriers can be approved upon showing that the public intrest would be benefited thereby; however, weighing the benefits to be received from coordination savings against losses in traffic and revenue by intervening carriers, loss of employment by affected employees, downgrading of acquired carrier largely engaged in overhead traffic movements and elimination of an active competitor for rail traffic, the adverse effects resulting from approval of either application exceed any benefits accruing to the public therefrom; applications denied.—Southern Pac. Co.—Control—Western Pac. R. Co., 327 I.C.C. 387 (397, 404-5).

In considering proposed merger, Commission's concern with financial condition of carriers is primarily in connection with administration of the law in accordance with objectives of the national transportation policy. Without financing well being, a national system cannot long exist as a privately owned enterprise. However, §5(2) does not require a showing of penury of imminent bankruptcy for approval of a transaction but rather that such transaction be consistent with public interest, where public interest is defined by reference to purposed of transportation legislation. See *Texas*, 308 US 255.—Pennsylvania R. Co.—Merger—New York Central R. Co., 327 I.C.C. 475 (493-4).

To the extent that heavy tax burdens are reflected in transportation costs, the Commission deems relief from such burdens to be in the public interest; thus, the lawful reduction of taxes is a proper objective of a §5(2) proceeding.—Norfolk & W. Ry. Co.—Control—Lake Erie & F. W. R. Co., 328 I.C.C. 219 (222-3).

While there may have been practical justification for imposition (in the public interest) of condition in 1923 order in control proceeding, 76 ICC 508, requiring Southern Pacific to prefer the Union Pacific route via Ogden, Utah, the Denver & R.G.W.'s competitive position has materially changed and improved due to shortening of its lines, improvement of schedules, and modernization of facilities and equipment, and it is now able to compete on an equal basis with Union Pacific for interchange of Southern Pacific freight through Ogden. Therefore, present effect of discriminatory practices of Southern Pac. and Union Pac. against the Rio Grande in the preferential solicitation and routing of traffic results in a stifling of competition between Union Pac. and Rio Grande on transcontinental traffic and relegates latter railroad to a secondary status as a transcontinental carrier. So that it will be just and reasonable and consistent with the public interest under present conditions, the condition should now be modified by striking therefrom name of the Union Pac. as the only connection of Southern Pac. on transcontinental traffic moving via Ogden.—Central Pac. Ry. Co. Control, 328 I.C.C. 345 (347, 349, 356-7)*.

In determining whether proposed acquisition of control of short line railroad is in the public interest, consideration must be given to its effect upon adequacy of transportation service to the public. Moreover, as a prerequisite to approval, authority under §5(2)(d) requires the inclusion of another railroad in the involved territory upon petition by such railroad and upon a finding that such inclusion is consistent with the public interest. Under joint control of two competing rail carriers, neutrality of acquired railroad's operation and service and equal opportunity to all connections to solicit business would be insured; moreover, the degree of financial backing, operating experience, equipment and services available under joint control would further buttress rail operations in northeastern Ohio to benefit the public; hence, inclusion of New York Central in the transaction under terms found to be equitable is in the public interest.—Norfolk & W. Ry. Co.—Control—FP&E Co.—Purchase, 330 I.C.C. 672 (681).

As judicially construed, "consistent with the public interest" means compatible with, or not contradictory or hostile to, the public interest. It is not a concept without ascertainable criteria but has a direct relation to adequacy of the national transportation system, to its essential economy and efficiency, and to appropriate provision and best use of transportation facilities. In determining whether proposed rail merger is consistent with the public interest, the Commission is required by §5(2)(c) to weigh, among other considerations, (1) effect of the transaction upon adequate transportation service to the public, (2) effect on the public of inclusion, or failure to include, other railroads in the transaction, (3) the total fixed charges involved, and (4) the interest of carrier employees involved. Terms of the merger must be just and reasonable as well to the railroads' stockholders. Also, implicit in the statutory standards or criteria for the Commission's decision on a merger application is its responsibility to preserve an adequate balance of transportation service.—Great Northern Pac. & B. Lines, Merger—Great Northern, 331 I.C.C. 228 (247)*.

While the Commission's primary concern is the development of an efficient and economical transportation system, its consideration necessarily extends to other matters affecting the well-being of the several States and communities involved. Economic effect or impact of proposed merger on various communities (basis of much of the opposition by the States and towns) would be primarily in the nature of temporary dislocations and, in many instances, would be offset by positive benefits. Moreover, record does not show that well-being of the area and communities involved would best be served by denying the applications; to the contrary, the evidence indicates no long-term serious adverse effect upon them. Proposed mergers, properly conditioned, augur an era of increased railroad strength resulting in a benefit to, not a burden on, communities in the northern tier of States.—Id., pp. 283-4, 288-9.

In its broadest sense, the public interest as applied to approval of a proposed purchase transaction under §5(2)(b) must be predicated upon conditions which would best promote interstate transportation in the interest of the public and commerce of the people.—St. Louis SW Ry.—Pur.—Alton & S. R., 331 I.C.C. 515 (532).

On reconsideration transfer of a portion of vendor's contract carrier rights previously found to be dormant, approved as consistent with the public interest because vendee's specialized, tailored service thereunder would meet the individual need of the two supporting shippers, whose operations were expanding, for a complete service under vendor's operating rights.—H. Prang Trucking Co., Inc.—Purchase—Hyer Trucking 97 M.C.C. 611 (614)*.

Management arrangement presented in §5 application for control through management is not in conformity with the established policy of the Commission against the creation, preservation, or extension of duplicate operations by separate motor carriers under common control, which operations, except for the fact of common control, would be competitive with each other; therefore, since applicants' proposed management arrangement is found to be inconsistent with the public interest, the application must be denied.—Weiss—Control—Hart & Clark Transfer Co., Inc., 97 M.C.C. 682 (685).

The public interest warrants approval of proposed control and merger, despite prior §5 violations by applicants (whose operations have been commonly controlled through family relationship, stock ownership, or management, at various times in past several years), only insofar as it would permit continuation by acquiring carrier of an overhead regular-route service between points on acquired carriers' regular routes and points beyond. Though, under such restriction, rights of acquired carriers could not be used for purely local service, evidence does not show that they conducted local operations under a combination of their regular routes prior to the unlawful common control; and evidence of shipments they transported thereafter cannot be given the same weight as would be accorded to it in connection with other §5 transactions. There is no overriding public interest which would warrant continuance of the local operations, particularly in view of evidence that existing carriers provide the area with abundant service.—Buckingham Transp., Inc.—Control and Merger, 97 M.C.C. 700 (714-17).

The Commission cannot approve any §5 transaction as being consistent with the public interest unless all the necessary facts have been found. And when control application seeks approval of only a portion of a single transaction (proposed control cannot be approved without concomitant approval of continued control of another carrier previously acquired by applicant without approval), the whole of which is subject to §5, a finding that proposed transaction is consistent with the public interest is impossible. Denied, without prejudice to applicant's submitting the entire transaction for the Commission's consideration.—General Movers Corp.—Control—Martin Van Lines, Inc., 101 M.C.C. 748 (750, 761)*.

The appropriate issue in the proposed purchase transaction is whether approval — not divestiture—is consistent with the public interest. Divestiture is one means of ending a violation found to exist under §5(4) and/or precluding the resumption thereof. Power to require divestiture upon such a finding is prescribed under §5(7). Here, the record does not reflect any unlawful actions effected by applicants or Greyhound which would raise the issue of their fitness to consummate the proposed transaction. Greyhound will only possess the power to exercise control over the affairs of the new company to be formed following Commission approval. Under these circumstances, §§5(4) and 5(7) which were not invoked by any parties of record or by the Commission, are not in issue.—Jefferson Lines—Purchase—Jefferson Transportation, 104 M.C.C. 497 (512).

See also Associated Truck Lines, Inc.—Purchase—Marion Trucking, §5(2), n. 48 below; Cooper Motor Lines, Inc. v. United States, n. 126, below; Greyhound Corp.—Control—Tex., N. Mex. & Okla. Coaches, note 7 Passenger service, below; McLean Trucking Co.—Control—Chicago Exp., Inc., note 45 below; Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger case, n. 7 below; Overnite Transp. Co.—Purchase—Rutherford Freight Lines, n. 48 below.

5. Jurisdiction of the Commission.—[Vols. 11-19, 21].—In plaintiffs' (protestants before the Commission) court action asserting that Commission approval of purchase of certain motor carrier rights by intervening defendant lacks substantial supporting evidence and that it does not accord with the law, the Commission's finding that vendor's operations under the purchase rights constituted substantial service is supported by evidence of record. The function of weighing evidence on the factual question of what constitutes substantial service in a case is one for the Commission; and not for the court. The Commission's findings that, considering all the evidence, the purchase rights were not dormant and the transfer would not create a new competitive service, and that proposed purchase transaction would be consistent with the public interest, are not without factual foundation and are not unsound in law; therefore, plaintiffs' action is dismissed.—Blue Ridge Transfer Co., Inc. v. United States, 283 F. Supp. 858 (859, 860-61)*.

In suit to set aside Commission order denying plaintiffs' application to purchase motor carrier authority, the Commission has broad discretion in a §5 proceeding which prohibits the court from substituting its judgment for that of the agency; also, a Commission order cannot be set aside in absence of a finding that its actions are arbitrary, capricious or an abuse of discretion or unsupported by substantial evidence. Judicial review is complete when the court finds a rational basis for the Commission's conclusions. However, those guiding principles do not convey complete autonomy; rationality of agency's decision must encompass its fact findings, interpretation of pertinent law, and its application of the law to the facts. Commission denial of plaintiffs' application was based on its finding that the rights were dormant and need for reinstitution of such services was not proved; however, in interpreting and applying the legal concept of "dormancy," the Commission improperly applied an improper standard of law; therefore, its conclusions must be set aside. Case remanded to the Commission for hearing de novo in keeping with the court's opinion.—Arrow Transportation Co., Inc. v. United States, 300 F. Supp. 813 (817-8)*.

Plaintiff's suit alleging that, through purchase of majority of its voting stock without prior Commission approval, defendant (owning and controlling a railroad) would unlawfully acquire control of plaintiff and, through it, its wholly-owned motor carrier, is based on §5(2) and (4); however, key word in those sections is "control" and the statutory scheme makes it abundantly clear that Congress, by leaving it to the Commission to determine whether control exists in a particular case, intended to create exclusive primary jurisdiction in the Commission in "control" matters. Defendant's offer to buy plaintiff's stock does not fall within §5(2) simply because each owns the stock of a carrier; unless defendant controls the railroad and acquires control of motor carrier through purchase of plaintiff's stock, Commission approval is not required. Question of whether unlawful control would result from the stock purchase is for the Commission's determination; thus, since merits of the case are not pending before the Commission, and the court lacks subject matter jurisdiction, plaintiff's action is dismissed.—B. F. Goodrich Co. v. Northwest Industries, Inc., 303 F. Supp. 53 (55-7, 60)*.

The Commission's jurisdiction under §5 is plenary and covers all phases of a transaction. The complete transaction proposed, including sale of vendor's equipment and real estate, not merely tne transfer of its water-carrier permit, requires prior approval.—Ingram Corp.—Purchase—Barrett Line, Inc., 324 I.C.C. 263 (266, 268).

When the Metropolitan Commuter Authority, a newly organized governmental corporation of New York State, acquired all the capital stock of Long Island R. Co., it was not a carrier and did not then control any carrier subject to regulation by Commission; therefore, its acquisition of control of Long Island through purchase of stock from Pennsylvania R. Co. did not require our approval. However, recently authorized purchase of two of Long Island's branch lines by wholly owned subsidiary of Pennsylvania as part of a transaction occurring after instant proceeding, was subject to Commission's jurisdiction since both vendor and vendee were carriers within meaning of §5.—Pennsylvania R. Co.—Merger—New York Central R. Co., 327 I.C.C. 475 (488-9).

Normally, the Commission will not entertain an application under §5(2) where one of the parties is a noncarrier; nor will it assert jurisdiction over the transaction if it is assumed that a parent-subsidiary relationship exists between noncarrier lessee and railroad in which the noncarrier is controlled by the railroad; thus, since pleadings and record are not sufficient to show specific terms of the lease agreement, character and description of pier operations to be performed by lessee, or description of lessee to determine whether or not it is a carrier as defined in §1(3) or is controlled by or controls a carrier, the Commission has no jurisdiction under §5(2) as to operating agreement or as to allegation that such arrangement amounted to abandonment violation of §1(18-20); motion to dismiss, granted.—Brotherhood of Ry. S. S. Clerks v. Reading Co., 328 I.C.C. 11 (12-13).

Congress gave the Commission jurisdiction over railroad mergers in 1920; and under §5, as enacted in 1940, it is authorized to approve carrier-initiated, voluntary plans of merger or consolidation, subject to appropriate conditions, where such plans are consistent with the public interest. However, the Commission is not restricted to the specific proposal presented for approval; it may determine what modifications or conditions are necessary to meet the public interest test and, in imposition thereof, it is not limited to those proposed, favored, or agreed to by applicants or by other parties. Among other things, the Commission must consider the effect of proposed merger on competitors and on the general competitive situation in the industry in light of objectives of the national transportation policy; however, the public interest scale is balanced, weighted neither for nor against a particular merger, and the balance can be tipped solely by evidence bearing upon public interest. Moreover, although proposed merger might otherwise violate the antitrust laws, §5 gives the Commission authority to approve it as a proper means of effectuating the national policy.—Great Northern Pac. & B. Lines, Merger—Great Northern, 331 I.C.C. 228 (245-8)*.

Commission found that Northwest Industries, a noncarrier did not need Commission authorization to acquire control of one rail carrier, but since it is now a noncarrier person having control of a carrier, its acquisition of control over a second carrier, by merger proposed herein, is subject to Commission's jurisdiction.—Chicago & N. W. Ry. Co.—Merger, 331 I.C.C. 236 (240).

Commission has jurisdiction over the proposed merger of a common carrier by rail into a noncarrier inasmuch as such noncarrier will acquire railroad's common carrier status and will, in that capacity, lease and acquire trackage rights over the lines of other railroads. However, proposed control of the noncarrier seeking to acquire control of the railroad corporation and its subsidiaries by another noncarrier, a holding company, is not within this Commission's jurisdiction. Application for authority under §5(2) dismissed.—Southern Pacific Transportation Co.—Merger, 334 I.C.C. 866 (868, 871).

Commission has jurisdiction under §5(2) over involved transactions since applicant, a corporation formed by railroad employees to purchase the railroad, would acquire vendor's leases of, and trackage or joint use rights over, the line of other railroads. However, approval under §1(18) is also necessary since §5(2) does not deal with licensing of a noncarrier applicant that has never performed common carrier service.—North Western Employees—Pur.—Chicago & N. W. Ry. Co., 342 I.C.C. 58 (64-5).

Although §1 (18) and §5(2) are complementary in these circumstances, they are not mutually exclusive. Therefore, authorization herein is withheld until applicant complies with §1(18) publication requirements prescribed in 49 CFR 1120.4—Id., p. 65-6.

The towing company sought to be purchased herein is not a water carrier within the meaning of §5(13) and Commission's jurisdiction cannot be invoked so long as its operations remain within the exemption of §302(e). (See IML 343 F. Supp. 32).—Katy Industries—Control—Cenac Towing, 342 I.C.C. 666 (667).

Congressional resolution consenting to Washington Metropolitan Area Transit Regulation Compact between the States of Maryland and Virginia and the District of Columbia, which transferred to Washington Metropolitan Area Transit Commission the jurisdiction of Interstate Commerce Commission over all persons and carriers subject to provisions of the compact to the extent provided therein, when read in conjunction with those provisions, is controlling of the jurisdictional issue respecting transactions within scope of §5(2), subject to the phrase "except as otherwise specified in the compact" and its counterpart "except to the extent in this Act specified" in §20(a) of the compact. There is no exception reserving jurisdiction under §5 to ICC or permitting it to exercise concurrent jurisdiction with WMATC, and the legislative history indicates intent to vest exclusive jurisdiction over such transactions in WMATC. Congress, when it consented to creation of WMATC, suspended application of §5, and ICC has no jurisdiction over control transaction involving only carriers subject to WMATC.—D.C. Transit System, Inc.—Control—W. V. & M., 93 M.C.C. 621 (624-5).

Section 5 applications are appropriate proceedings in which to determine the bona fides of liquidating carrier's practice of routing single-State traffic between points in that state through a point in another state. —Thurston Motor Lines, Inc.—Control and Merger, 104 M.C.C. 1(11).

The Commission's authority to impose employee protective conditions under §5 is found only in its power to impose just and reasonable conditions in approving transactions under the statute. Therefore, in view of denial of proposed purchase transaction, it is unnecessary to further consider employee union's argument that adversely affected employees are entitled to severance pay even if the application is denied, which argument is premised on the grant of temporary authority under §210a(b) that it asserts was in anticipation of possible approval of the purchase.—National Freight, Inc.—Purchase—Pittsburgh Wheeling Exp., 97 M.C.C. 642 (655).

Remand from the U. S. District Court to the Commission for further hearing on the question of competitive service does not limit such further hearing solely to the issue of competition and traffic diversion. The reviewing court has no power to restrict the Commission on the matters which it may consider on reconsideration so long as the Commission corrects any legal error found by the court. Thus the Commission may properly consider the issues with respect to the conversion of certain of vendor's irregular-route rights and the duplication of operations created by vendor's sale of certain intrastate operating rights.—Interstate Motor Freight System—Purchase—Eaton Truck, 104 M.C.C. 248 (256)*.

The Commission has jurisdiction over subject matter of bus line's petition for reopening of, and issuance of a general §5(9) supplemental order requiring respondent Greyhound to live up to its representations in, eight earlier §5(2) proceedings in which respondent acquired operating rights encircling petitioner's routes; order requested would, in effect, require that Greyhound cease described practices begun after the acquisitions which are alleged to be unreasonable and inconsistent with representations (assuring public benefit, improved service, and no adverse effect on existing carriers or service) made to, and relied upon by, the Commission in the acquisition proceedings. Respondent's argument that the Commission has no power to issue supplemental order sought, since §212(a) precludes such action, is not relevant; order which accepted the petition and assigned the matter for hearing invoked whatever sections of the Act would be appropriate with respect to which violations, if any, might be proved; thus, no action contrary to §212(a) was undertaken.—Mt. Hood Stages, Inc.—Petition for Modification, 104 M.C.C. 449 (450-51, 456-8)*.

Argument that issuance of the order sought would constitute modification of respondent's authority contrary to §212(a), since its operations are entirely consistent with terms and conditions of its certificates, is irrelevant and incorrect; respondent is not alleged to have operated contrary to its certificates and its certificates are not the sole measure of legality of its activities, as they do not specify all orders, requirements, and statutes with which carrier is required to conform, or practices in which it may not engage. And there is no merit in the further arguments that, since earlier acquisition proceedings were closed without express reservation of power to issue supplemental orders, and since adherence to its representations was not a condition to approval of the acquisitions, a supplemental order specifically enforcing such representations may not be issued. Certificates are not licenses to destroy a competitor by practices inconsistent with commitments made to secure such authority; and, if false representations are willfully made, the certificate can be revoked without resort to §212(a), and those responsible are subject to criminal penalties.—Id., pp. 457-8.

The relief sought is also available under §216 which imposes a duty on passenger carriers to establish reasonable through routes with other carriers and to establish and observe reasonable rates and practices, etc., relating to passenger service; and if it appears that the public interest will otherwise suffer, the Commission may undertake to fix the terms and conditions under which through routes shall operate. Consequently, though all legislation dealing with interchange problems is cast in general terms, and there is no language in the Act which specifically commands passenger carriers to interchange buses with other such carriers, respondent's contention that through-bus arrangements between it and petitioner cannot be required, on just and reasonable terms, is rejected. Therefore, while relief is available under §216(a) as well as §5(9), since §5(9) is the most comprehensive for accomplishing desired objectives, "It fits the bill." Respondent's motion to dismiss for want of jurisdiction is denied.—Id., pp. 455-6, 458-9.

Jurisdiction over the proposed merger is reserved for 2 years after consummation of the transaction; however it must be extended to all employees of the merging carriers rather than only to those who appeared in the proceeding as protestants.—Yellow Transit, Inc.—Merger—Wilson, Inc., 104 M.C.C. 737 (765).

See also Greyhound Lines, Inc. v. United States, §5(9), n. 10; Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger Case, n. 52 below; Oregon-Washington R. & Nav. Co. v. United States, n. 56 below; United States v. Navajo Freight Lines, Inc., §5(11), n. 1.

6. Corporate simplification.—[Vols. 11-19, 21].—Signal, a contract carrier subsidiary of Leaseway, a holding company controlled by the O'Neill family, is authorized to acquire three contract carriers; Dean and Marc's by purchase and Payne by control and merger, Marc's authority to be restricted to service to be performed under a continuing contract with Sears, Roebuck & Co., as the operating rights of Dean and Payne now are. The intercorporate structure of the O'Neill family holdings is summarized showing several corporate reorganizations involving considerable corporate simplification, made subsequent to Commission admonitions in prior reports.—Signal Delivery Service, Inc.—Purchase—Marc's Delivery Corp., 104 M.C.C. 280 (281-84, 287-88).

7. Competition.—[Vols. 11-19, 21].—The mere possibility of adverse effect on competition in the New York metropolitan area, important as that area is, would not outweigh the positive advantages proceeding from Norfolk & Western unification in the large heavily industrialized and densely populated 13-state area which would reap the concrete benefits of the new system. Moreover, substantial improvements in service resulting from enlarged surviving carrier's system should attract new industry to the territory involved which, in turn, will benefit railway labor through raising and stabilizing employment levels. Furthermore, surviving carrier shall actively solicit routing via Buffalo, N. Y., gateway on lines other than Pennsylvania lines so long as Pennsylvania holds stock interest in Norfolk & Western and Wabash.—Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 324 I.C.C. 1 (15-16, 29).

An important motive behind applicant's proposed control of parallel railroad is the desire to deny expedient access to the Chicago gateway to the end-to-end rail line seeking to acquire control of the same railroad and, also, to the short line petitioning for inclusion in either approved control transaction. If successful, this design would fortify considered applicant against increased competition from two strong, long-line rivals, as well as permit the elimination of competition from the short line. Such curtailment of competition is not justified in the record. On the contrary, the sharpening of competition contemplated by approving the control sought by the end-to-end applicant will foster benefits in service and possibly rates for shippers and clear the transportation channels to promote freer movement of commerce between territories to the advantage of shippers and carriers.—Missouri Pac. R. Co.—Control—Chicago & E. I. R. Co., 327 I.C.C. 279 (288)*.

With carrier systems of the size involved here, it would be virtually impossible to discuss competition from the view point of each individual shipper, commodity, station, and routing involved. Cases cited by petitioner are inapplicable as none involved a consolidation or other proceeding under §5(2). Commission previously decided that public benefits outweighed the possible reduction or elimination of competition.—Pennsylvania R. Co.—Merger—New York Central R. Co., 328 I.C.C. 304 (308-10)*.

On further hearing and reconsideration in merger proceeding, the Commission reviews the issue of competition in light of its conclusion (on reexamining legislative history) that the 1940 amendment of §5 was not negative or restrictive toward mergers but, rather, was designed to promote and foster rail mergers where consistent with public interest. In determining consistency with public interest, consideration must be given to the competitive consequences involved; but the preservation of competition among carriers (though still a value) is significant chiefly as it aids in attaining objectives of the national transportation policy. Thus, fact that merger of applicant Northern Lines will result in elimination of previously existing competition, while relevant to evaluation of the competitive consequences, is not controlling or conclusive and does not automatically compel denial of the applications. A rail merger may be approved as consistent with the public interest even though it eliminates competition between railroads and even where it presents a direct conflict with the antitrust laws.—Great Northern Pac. & B. Lines—Merger—Great Northern, 331 I.C.C. 228 (269-71)*.

Therefore, competition between Great Northern and Northern Pacific in an area extending across the northern tier of States to the Pacific Coast, preservation of which was crucial to the prior denial, should not be the decisive factor in reconsideration of proposed merger. As to many communities and shippers in the area, those lines are not, in fact, competitive with each other; as to the area points common to both lines, the number of stations where rail competition would be entirely eliminated is small, and those stations do not provide any great volume of applicants' business; and, as to competitive effects beyond the northern tier States, data of record indicates that there is, and after merger will continue to be, substantial intermodal and intramodal competition at points in applicants' territory which, commercially, are the most significant.—Id., pp. 271-4.

Furthermore, denial of the applications for the purpose of preserving the competitive *status quo* would merely perpetuate existing dominance of GN and NP in the northern tier States, with the Milwaukee line relegated to an increasingly marginal and deteriorating role. On the other hand, notwithstanding elimination of competition between the Northern Lines, a properly conditioned merger—with the new company competing against a substantially strengthened Milwaukee—will serve to actually enhance rail competition, achieve a more desirable competitive pattern and, at the same time, afford substantial benefits to the shipping public throughout the territory involved. Proposed merger transactions, subject to the conditions imposed, will be consistent with the public interest; approved.—Id., pp. 271, 275-6, 288-92.

In view of the Commission's established policy against the creation, preservation, or extension of duplicate operations by motor carriers under common control, which operations, except for the common control, would be competitive with each other, proposed management arrangement presented in §5 application of two individuals for authority to acquire control of applicant carrier through management cannot be found consistent with the public interest. Noncarrier individual applicants manage (and own 48 percent of stock of) a regulated motor carrier whose regular- and irregular-route authority substantially embraces area in which applicant carrier is authorized to operate; and fact that one of the commonly controlled carriers would perform regular-route general commodity service, and the other would conduct irregular-route specified commodity operations, warrants no departure from the Commission's policy.—Weiss—Control—Hart & Clark Transfer Co., Inc., 97 M.C.C. 682 (685-6).

Protestants' contentions that the proposed unification of operating rights will adversely affect their operations is, as to one protestant, not supported by the record since the record shows that the volume of traffic interchanged between this protestant and acquired carrier remained constant subsequent to the contract between applicants and even showed an increase for certain months over the previous year. As to the other protestant, it has expressed generally fear of serious consequences from approval of the transaction without proof of specific loss of traffic or revenue which neither warrants denial of the application nor the imposition of a tacking restriction in view of the fact that after unification of applicants' operating rights it will be required to operate over circuitous routes between Georgia and Tennessee while protestant may operate directly between points in the two states.—Thurston Motor Lines, Inc.,—Control and Merger, 104 M.C.C. 1(10).

Protestant's potential loss of a valuable interline connection which its predecessor had previously enjoyed with vendor cannot, standing alone, form a basis for approval or denial of a purchase application, since it is a private agreement between carriers which can be terminated by either or both of them at any time. Further, the evidence does not show that vendee has refused or will refuse to interline traffic with protestant as vendor has done in the past, nor is it conclusive that protestant, which might not wish to interline with vendee for competitive reasons, cannot find other similar interline arrangements, in spite of its contention that it has been trying unsuccessfully to do so since its predecessor's previous arrangement with vendor was terminated.—Sharpe Motor Lines, Inc.,—Purchase, 104 M.C.C. 127 (134).

While the service proposed by vendees differs in certain operational respects, there is a broad field in which both types of service overlap. However, it is clear that both applicants seek authority to transport substantially the same commodities between substantially the same points and, therefore, both services in this respect, must be considered competitive with one another and with the similar joint-line or single-line services of protestants, and, at least as to protestants, present competition by two potential additional carriers in lieu of the past competition afforded only by vendor.—Lyons Trans. Lines, Inc.—Control and Purchase, 104 M.C.C. 599 (607).

While applicants here concede that they have never interlined traffic with each other the Commission held that the lack of interchange between the parties was not controlling where it was clearly established that each has participated in substantial interchange operations with other motor carriers to and from their respective authorized territories.—Branch Motor Exp. Co.—Control—Middle Atl. Transp., 109 M.C.C. 807 (820).

See also Central Pac. Ry. Co. Control case, n. 3 above. Norfolk & W. Ry. Co.—Control—FP&E Co.—Purchase case, n. 3 above.

Diversion of traffic by more aggressive carrier:—[Vols. 16, 17, 19, 21].—In merger application proceeding, Commission found no evidence of any substantial adverse effect upon competition in the immediate territory to be served by enlarged surviving carrier; at least one connecting carrier may be helped by proposed unification.—Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 324 I.C.C. 1 (15, 31).

Approval of acquisition of control resulting in extension of applicant's railroad would probably not be warranted if its proposed operation would substantially endanger or impair operations of other common carriers; however, the Commission is not required to insulate protesting lines from all risks in their transportation business in areas where strong rail competition exists nor need it determine with mathematical precision the amount of traffic that might be diverted. The involved traffic is mostly shipper-routed and thus influenced by service (speed, transit privileges and facilities, care in handling, shipper conveniences, etc.) and other factors not readily ascertainable from any tabulation of car movements no matter how accurately compiled; furthermore, applicants are as prone to minimize as protestants are to exaggerate the susceptibility of traffic to diversion.—Missouri Pac. R. Co.—Control—Chicago & E. I. R. Co., 327 I.C.C. 279 (293-4)*.

However, protestant's use of data processing system to determine estimates of car movements subject to diversion did not consider nature or ownership of equipment in which shipments were transported, railroad upon which shippers or receivers were located, complete route of movement, reconsignment or diversion in transit, availability of facilities which govern stoppage in transit, or use of transit privileges; thus, applicant's estimate of traffic diversion more nearly reflects the losses to be incurred by other carriers. And, under circumstances shown, such losses are not so large as to warrant a denial of control application. Moreover, benefits to be derived by acquired carrier as subsidiary of applicant and to the shipping and traveling public outweigh adverse effects to competitors, particularly in view of imposition of *Detroit, T. & I. R. Co. Control* traffic conditions as revised in *Toledo, P. W. R. Co. Control* case. And, since applicant has agreed on the record to protect routes and interchanges of protestant, imposition of that condition would serve no useful purpose.—Id., pp. 293-4, 307-9.

About 60 percent of traffic of railroad to be controlled is overhead traffic delivered to it by its connections at each end of the central route. Moreover, record does not show that traffic now moving over the central route tends to be fixed by commercial and transportation considerations important to shippers, nor is there any substantial "in transit" storage in Utah or Nevada or any other special factors to tie traffic to railroad's route for any length of time. Thus, the best interests of either control applicant would require solicitation for its own long-haul route rather than a route in which controlled railroad's connections would share.—Southern Pac. Co.—Control—Western Pac. R. Co., 327 I.C.C. 387 (401-2).

Although vendee would probably be more aggressive in seeking traffic at considered intermediate points on vendor's regular route, record does not show that the foreseeable increase in competition would be detrimental to protestant carriers' operations. Existing carriers often lose some traffic where a stronger and more aggressive carrier takes over operations of a less stable carrier, but that factor is not sufficient by itself to justify finding that purchase application should be denied, that service at intermediate points should be canceled, or that service at such points under the unified rights should be restricted.—Overnite Transp. Co.—Purchase—Rutherford Freight Lines, 97 M.C.C. 568 (575).

Protestants' contention that vigorous activity by vendee under temporary authority has disrupted the existing competitive balance with respect to other carriers in the area served by vendor and points served by vendee by diverting traffic from the carriers now serving the area is not supported by the evidence. Moreover, vendee's exhibit shows that each of the protestants realized its largest operating revenues in 1964, after vendee had already operated the vendor's rights for over two years, and all had lower operating ratios than in 1963. Denial of the transaction or imposition of a restriction on the rights sought to be purchased based merely on protestants' apprehensions of loss of traffic or disruption of the existing competitive pattern is not warranted.—Interstate Motor Freight System—Purchase—Eaton Truck—104 M.C.C. 248 (255-56)*.

When the purchasing carrier is stronger financially, has more and better equipment and facilities than the selling carrier, some readjustments in competitive relations of carriers and an intensification of competition between points in the liquidating carrier's territory almost always occur; however the protestants have sufficient financial strength to make the necessary adjustments and meet the competition without difficulty. The extent to which protestants claim that their operations would be affected is speculative and conjectural, and in the absence of a showing with some particularity how much traffic they would lose or to what degree their operations would be harmed, their apprehensions may be accorded little weight.—Ryder Truck Lines—Control and Merger, 104 M.C.C. 328 (338-39).

Protestants' contention that the proposed transaction threatens present and potential competitive relationships between the two carrier applicants, protestants and others is unfounded. Here the record demonstrates that the carrier applicants have actively utilized their involved operating rights and in so doing have maintained closely coordinated activities with Greyhound for many years; that these operations as well as the established service which applicants would render as feeder and bridge carriers serving Greyhound, protestants, and other carriers, will continue to be effected autonomously by the two carriers, and where as here carrier applicants have interlined or interchanged passenger traffic with one another and with Greyhound for a long period, it must be assumed that competing carriers have adjusted themselves to this mode of operations. Further, protestant MK&O is not an effective competitor for applicant, and at best, its annual revenues which would be subject to diversion would not adversely affect its operations to any material extent.—Jefferson Lines—Purchase—Jefferson Trans., 104 M.C.C. 497 (510).

Protestant's contention that its existence or ability to continue operations is threatened by the proposed transaction is not borne out by the record in the absence of any concrete evidence demonstrating the extent, if any, that Transcon's operations would be impaired, considering this protestant's strength in the South and Central States, and its accelerated growth on a system wide basis as compared with Greyhound.—Id., (510).

Commission, citing *Gordons*, 87 MCC 149, held that lack of interchange movements does not, by itself, create a presumption of harm to competing carriers out of potentially expanded service to be conducted by acquiring carrier. General fears of potential diversion, contrasted with specific evidence of probable harm, do not constitute proof that harm will result from involved transaction. See *McLean*, 97 MCC 693—Caravan Refrigerated—Pur.—Bilyeu Refrigerated, 109 M.C.C. 843 (854).

Protestants have not shown in any significant degree the manner in which they would be adversely affected by approval of this transaction but have evinced only an apprehension of injury or of traffic diversion which is entitled to little consideration. See 90 MCC 636.—Matlack, Inc.—Control—Southern & T. I. Mc-Cormack, 109 M.C.C. 861 (867-8).

Monopoly: [Vols. 13-15, 17-19, 21].—In considering the claimed antitrust aspects of this transaction, it is to be observed generally that the passenger bus industry has an inherently, although somewhat limited, monopolistic nature which reflects the public utility characteristics of for-hire transportation. Thus there is no merit to the suggestions of protestant MK&O and intervenor, the Department of Justice, as to the creation of a "third force". Moreover, the fears of protestant MK&O and the Department that the future development of carrier applicants (or a system of strong independent carriers which might include those two carriers) would be foreclosed by virtue of the attainment by Greyhound of control over their affairs through the transaction are unjustified and entitled to little consideration absent a showing, contrary to the record here, that the business of protestants and other carriers would be affected in any material way. Any reduction in competition and/or adverse affects resulting to protestants and other carriers are readily outweighed by the public benefits of record.—Jefferson Lines—Purchase—Jefferson Trans., 104 M.C.C. 497 (511-512).

In view of Greyhound's participation at the hearing, and considering that its company witnesses and evidence introduced in support of the §5 application were available for cross-examination, dismissal of that application because of its nonjoinder as a necessary party thereto is not required. In view of the foregoing, however, Greyhound must be considered a necessary party applicant. Approval is conditioned upon the filing, by Greyhound Lines, Inc. of a verified statement indicating its assent to and joinder in the §5 application on this basis.—Id. 507.

Union of first and sixth largest tank line carriers in nation does not per se connote monopoly nor does fact that Chemical Leaman will be allowed to serve a larger portion of the United States in single line service allow this conclusion. Numerous tank line carriers remain, and their operations are large and growing. Tank carriage is relatively new and faces an accelerated demand for service.—Chemical Leaman Tank Lines, Inc.—Pur.—Ryder, 104 M.C.C. 686 (694, 699).

New and different service: [Vols. 16, 19, 21].—The Commission did not depart from its "new service" doctrine—that acquisition of motor carrier operating rights that will permit purchaser to establish a new competitive service in an area already adequately served by other carriers is not consistent with public interest in the absence of evidence showing a real need for the new service—in approving intervening defendant's proposed purchase of motor carrier rights which it found were not dormant because vendor had been rendering substantial service thereunder. Evidence presented did not require a finding of dormancy; and since record shows that vendor, in addition to holding out its services, actually had been conducting substantial operations under its certificate, proposed purchase would not result in any significantly new competition by vendee with other carriers in the area. Complaint dismissed.—Blue Ridge Transfer Company, Inc. v. United States, 283 F. Supp. 858 (859-61)*.

In approving §5 purchase application where the evidence clearly showed that the service proposed by vendee from and to points in Arizona and California would constitute a new service not previously performed by vendor in conjunction with vendee or any other carrier, and applicants have not shown inadequacy of existing services, or a need for the service proposed, protestants are entitled to protection from the establishment of additional competition. Where the institution of a new service is proposed, applicants must show a need therefor, and may not escape the required showing by contending that protestants have not submitted positive proof of diversion of specific traffic as a result of the proposed transaction.—Braswell Freight Lines, Inc.—Purchase—Shayler, 101 M.C.C. 1 (17).

Unification of applicants' operating rights would not result in the creation of multiple new and different services since applicants, in addition to interchanging traffic with each other also engaged in interline operations with other carriers on traffic moving to and from their respective territories.—Thurston Motor Lines, Inc.,—Control and Merger, 104 M.C.C. 1 (8-9).

In view of the fact that liquidating carrier has been actively participating in the handling of traffic to and from surviving carrier's territory through interchange with numerous carriers including surviving carrier, the proposed operations following consummation herein would not constitute a new service in the sense that the protestants have not been faced with the competition.—Ryder Truck Lines—Control and Merger, 104 M.C.C. 328 (338).

Approval of the proposed purchase would result in a new competitive service in Colorado with other household goods carriers, since applicants freely admit that they had never participated in traffic together; further, vendee's witness testified that vendee did not interline traffic originating at or destined to Colorado with motor carriers other than vendor, and that even its household movements on military tenders were confined to that area within vendee's specifically authorized territory.—Fogarty Bros. Transfer, Inc.,—Purchase—Transport Van Lines, 104 M.C.C. 665 (667).

The institution of single-line service in lieu of joint service is not a new service.—Michigan Express, Inc.—Control and Merger—Cushman, 104 M.C.C. 894 (897).

A new competitive service will result where applicants had not interlined traffic with each other prior to commencement of operations under temporary authority nor did one of the applicants have any participation in interline movements with other carriers serving points in the other applicant's territory. Applicants failed to show that a new competitive service is required by public interest, and proposed operations would be detrimental to protestants. Denied.—Ryder Truck Lines—Control—Merchants Frt. System, 109 M.C.C. 654 (664-7).

See also Cooper Motor Lines, Inc. v. United States, case, n. 48 *Discontinued*, below. Fogarty Bros. Transfer—Purchase—Grennon & Son, n. 110 *Restrictions*, below.

Passenger service: [Vols. 14, 21].—Where a carrier has invested substantial funds in equipment and solicitation of traffic and has succeeded in establishing a charter service known to and relied on by the public in the territory traversed by its regular routes, any substantial inroads on revenues derived from those operations could materially affect adversely its ability to continue efficiently the regular-route operations it is obligated as a certificated carrier to provide to the traveling public, a result obviously inconsistent with public interest. That the carrier was under no duty to provide charter service at the outset is immaterial, since, upon establishment of efficient and remunerative charter operations, its well-being and the traveling convenience of its patrons are inextricably bound to future continuance of such an efficient and profitable service. Operations established under the incidental charter authority of §208(c) are therefore entitled to the same degree of protection against new competition as those established under rights conferred by a certificate.—Eagle Charter Bus Service, Inc.—Purchase—Eagle Bus Lines, 93 M.C.C. 705 (709).

Approval in this purchase proceeding will create two independent and competitive motor carriers performing a similar transportation service between the same terminal points, Boston, Mass., and Rochester, N.H., albeit over different routes, whereas only one, vendor, has operated heretofore. Generally, such a result is not looked upon with favor unless the evidence shows a need for the additional service without any material harm to existing carriers. However, although protestant is concerned primarily with a possible diversion of traffic from it between Boston and Rochester, it has failed to adduce any evidence concerning the volume of its passenger traffic and revenues earned therefrom between those two points; therefore, there is no basis for finding that it would be materially harmed by the introduction of a new carrier. Under these circumstances, the operating rights which vendor would retain pose no obstacle. Approved.—Eastern Massachusetts Street Ry. Co.—Lease—Trailways, 101 M.C.C. 410 (414).

In the prior report it was found that, since Greyhound's purpose in seeking authority to acquire control of bus lines operating in Texas and New Mexico in order to conduct St. Louis-El Paso through-bus operations was to preclude Continental Trailways from instituting a through-bus operation over such routes in combination with acquired carriers, approval of proposed transactions would not be consistent with the public interest; however, applicants' through-bus operations were viewed therein not as conveniences and services to the public, but solely as competition-foreclosing practices against Continental. Also, the present satisfactory arrangements, which proposed transactions would preserve, were considered not to be threatened by possible sale to hostile persons of stock of one of acquired carriers held by independent executor of deceased stockholder's estate, but rather were considered as a threat to services of carriers other than Greyhound, who provide support to acquired carriers' operations.—Greyhound Corp.—Control—Tex., N. Mex. & Okla. Coaches, 101 M.C.C. 655 (670-1)*.

On reconsideration, however, Greyhound's dominance in the motorbus industry does not require that considered applications be denied; since its share of the market would not be increased as a result of proposed transactions. Acquired carriers have no bus competition over their routes; like all bus companies, their major competition is the private automobile; also, they would continue to operate autonomously as feeder or bridge carriers. Moreover, Greyhound already controls the pattern of those carriers' service, and has for many years, to the extent that it would if proposed transactions were approved. Accordingly, subject to condition that acquired carriers' existing routes and channels of trade with other bus lines, via existing junctions and gateways, be kept open, and certain other conditions, proposed transactions may be found consistent with the public interest; approved.—Id., pp. 672-5.

In determining that a portion of contract carrier authority previously found to be dormant should be revitalized, and in approving proposed purchase thereof, the five criteria of §209(b) were considered in detail.—H. Prang Trucking Co., Inc.—Purchase—Hyer Trucking, 97 M.C.C. 611 (613)*.

Where protestants contended that all traffic was subject to diversion by the use of dormant rights and the Commission found pursuant to the test of substantiality that route segments considered were not dormant; it was held that without specific evidence to contrary, it cannot be assumed that the diversion to applicants of a substantial amount of protestants' traffic will occur, especially where service under temporary authority led to the opposite conclusion.—Branch Motor Exp. Co.—Control—Middle Atl. Transp., 109 M.C.C. 807 (822).

The test of substantiality, *New Dixie*, 75 MCC 659, used to determine the issue of dormancy was not whether service in certain regional or local areas was representative but whether service over each route segment, when measured against the system of operations as a whole, was substantial and important to the transferor's network of regular routes.—Id., p. 815.

See also Associated Truck Lines, Inc.—Purchase—Marion Trucking, §5(2), n. 48 below; McCloud River Trucking Co.—Purchase—Zamboni, n. 48 below.

Single-line service: [Vols. 16-19, 21].—Commission held that a restriction against service between certain points in Michigan and Ohio recommended by hearing examiner should not be imposed. Although applicants were not substantial competitors in the area to be served they have conducted modest operations. What is contemplated is the institution of single line service in lieu of joint service, which is not a new service. There is no basis for conclusion that vendee's operations will be detrimental to protestants.—Michigan Express, Inc.—Control and Merger—Cushman, 104 M.C.C. 894 (897).

See also Eazor Express, Inc.—Control and Merger Case, §5(2), n. 110 restrictions. Eazor Exp., Inc.—Purchase—Fleet Highway Freight Case, n. 126 below.

Transcontinental traffic: [Vols. 16-19, 21].—Although rail carriers no longer have the monopoly in freight transportation they enjoyed in 1923, record shows existing non-rail competition is not as effective in the area as in others. Therefore, no grounds exist for concluding that coordination of any of the concerned facilities is necessary to preserve the inherent advantages of rail transportation available in the affected area. Moreover, both control applicants possess a southern transcontinental route; and, while one operates a central route in competition with carrier to be acquired, the other provides the only single-line service between Chicago and the Pacific Coast, thus servicing these points in the same elapsed time as the central route railroads. Accordingly, the southern single-line railroad does not need a central route to compete successfully with other rail applicant; further, its control of Western Pacific would lessen intramodal rail competition as substantially as exclusive control of that route by competing applicant. Nor is there a compelling reason to attempt to achieve a balance in competition between competing applicants or terminate existing competition between the two central railroads. Elimination of Western Pacific as an independent carrier would not strengthen competition in the western region.—Southern Pac. Co.—Control—Western Pac. R. Co., 327 I.C.C. 387 (400-1, 403).

7a. Agreement not to compete.—[Vols. 12, 13, 17, 18, 19].—On further consideration the Commission noted that, for Commission purposes, vendor stockholder's agreement not to compete should not be treated by motor carrier, who is redeeming its stock, as an intangible asset subject to amortization. However, the Commission expressed no opinion to the reduction of net income by such amortization for income tax purposes, because that is a matter subject to interpretation under the Internal Revenue Code.—La Casse—Control—Interstate Exp., Inc., 101 M.C.C. 567 (572)*.

8. Price to be paid.—[Vols. 11-19, 21].—Agreed terms of stock exchange in proposed rail merger found just and reasonable for all stockholders when, under the exchange ratio, common stock of new company will be exchanged for that of merging lines: (1) Northern Pacific stock, on a share-for-share basis; (2) Great Northern stock, on share-for-share basis, plus one-half share of new preferred stock for each share held; and (3) Burlington stock, on basis of 3.25 shares for each share held by minority stockholders (with remaining 97.18 percent, owned by Northern Pac. and Great Northern, being cancelled). While problems concerning Northern Pac.'s natural resources properties caused difficulty in negotiating fair and equitable terms, stock exchange ratio was determined primarily on the basis of earnings rather than property values; and reflected the higher market value of Great Northern stock while preserving for Northern Pac. stockholders equal participation in future earnings of the combined enterprise. Record shows that exchange ratios are just and reasonable, in that they meet requisite tests: (1) they are results of arms-length bargaining and (2) they fairly reflect contribution of each group of stockholders to the combined system.—Great Northern Pac. & B. Lines, Merger—Great Northern, 331 I.C.C. 228 (253-60)*.

Although proposed price of $1,231,195 for acquired carrier's stock having book value of $131,186 and appraised values of $833,049 including, and $462,851 excluding, intangibles is substantial, it is not excessive in light of favorable operating results achieved by another subsidiary carrier under acquiring carrier's control, in contrast to its prior deficit operations.—Arkansas-Best Freight System, Inc.—Control—Delta, 93 M.C.C. 474 (481-2); and proposed price of $5,000 for stock of another carrier, having negative book value of $31,030 including intangibles, appears not excessive, considering earnings and economies anticipated as result of merger.—Id., p. 483; also, estimated increase in survivor's annual earnings of $3,095,567 after merger of existing subsidiary carrier, and increase of $403,969 in net income after income taxes, do not appear excessive in view of rapid rehabilitation of liquidating carrier under survivor's control.—Id., p. 843.

Protestant's contention that the purchase price is excessive is based upon an unrealistic theory for computing the period for recoupment thereof. On the basis of acquired carrier's net operating revenue, protestant claims it would take a span of 120 years for surviving carrier to regain the total purchase price. However, considering applicants' giving effect statement for the year ending December 31, 1965, showing an increase in net income after taxes of approximately $260,000, and taking into account the greater operating economies and efficiency which would result from the combining of operations, surviving carrier could reasonably be expected to recoup the purchase price in from 3½ to 4 years.—Thurston Motor Lines, Inc.—Control and Merger, 104 M.C.C. 1 (10-11).

In determining whether consummation of a proposed transaction, and incidental payment of the consideration involved, would be consistent with the public interest, the question as to whether the price agreed upon should be approved cannot be determined abstractly and apart from other aspects of the transaction. The consideration is only one of the factors to be weighed, in the light of the national transportation policy, in determining whether a proposed transaction would be consistent with the public interest. The instant transaction promises definite benefits to the public through the preservation and continuance by a strong, well-managed and soundly financed motor carrier of the motor service formerly conducted by liquidating carrier, which has experienced financial difficulties, thus furnishing a basis for one expeditious, efficient and economical service to the public. On the other hand, it is not apparent, under the circumstances here presented, how payment of the purchase price would be injurious to the public. The benefits which would accrue to the public from the proposed transaction outweigh any question as to the reasonableness of the consideration to be paid by surviving carrier.—Ryder Truck Lines—Control and Merger, 104 M.C.C. 328 (335).

The higher price per share to be paid to employee stockholders appears to have been necessary to persuade the individual employees to agree to sell their holdings; however, the question of reasonableness of the total purchase price is the proper area of investigation rather than the manner in which the proceeds are to be divided among the stockholders of liquidating carrier.—Id., p. 326.

Considering all circumstances, price for purchase herein does not appear unreasonable as Commission has consistently held that a price arrived at by contracting parties as a result of arms' length bargaining is entitled to great weight unless contrary is established by definitive evidence.—Consolidated Freightways Corp. of Del.—Control, 104 M.C.C. 658 (660-1).

8a. Minority stockholders' rights.—[Vols. 12, 14-18, 21].—The price to be paid for protestant minority stockholders' shares should be determined as of the last day before the stockholder vote on whether to merge the two companies, since (1) the market price thereafter would be affected by allowance by any buyers and sellers for the fact that the ratio of value might end up as set forth in that voting; (1) operations and operational results, already influenced by surviving carrier's acquisition of control, would thereafter become more distorted by management decisions and policies dictated by surviving carrier as controlling person; and (3) the merger, approved by a majority of stockholders on the next day would have long since been effected were it not necessary to seek Commission approval and determination of stock values. However, the selection of a date does not mean that the relative value of the stocks as of that date should not make allowance for such later events as could then have been reasonably foreseen, including but not limited to improvement in liquidating carrier's net income under better management. Yellow Transit, Inc.—Merger—Wilson, Inc., 104 M.C.C. 737 (752-53).

While the Commission has the authority to impose terms and conditions including any modifications of those proposed and could require that liquidating carrier's minority stockholders be paid in all cash, all stock, or part in each, the original proposal whereby such stockholders would receive 0.15 shares of surviving carrier's stock plus some cash (or all cash where fractional share would otherwise be issuable) for each share in liquidating carrier, appears to be just, reasonable and consistent with the public interest. Therefore, determinations will proceed only on how much cash should be given in addition to the 0.15 shares of surviving carrier's stock. In order to determine the cash amount to be paid the value of both stocks in cash terms must be fixed. The outer limits of inquiry will involve divisions of joint line revenue, and the book value of liquidating carrier's equipment which was subject to an improper write down by surviving carrier under the previous control transaction.—Id., p. 753.

8b. Credit and financial structure considered.—[Vols. 12, 14-19, 21].—That proposed control transaction will result in overcapitalization of acquiring carrier by $1,135,208, compared with its present overcapitalization of $556,200, does not require denial, considering the carrier's size and facts that approximately 50 percent of its capitalization represents equity, that its ratio of long-term debt to combined long-term debt and stockholders' equity will be a favorable 56.8 percent, and that evidence supports conclusion that the overcapitalization will be eliminated within a reasonable time. However, approval is conditioned to preclude it from declaring and paying any cash dividends until the overcapitalization has been eliminated. —Arkansas-Best Freight System, Inc.—Control—Delta, 93 M.C.C. 474 (484).

While on further consideration use of carrier's credit to finance in part acquisition of their stock is still objectionable, the facts herein are sufficiently different from *Urner—Control—Maryland Transp. Co.* (40 MCC 1) as not to warrant denial. The carriers have satisfactory earning records, which support their earning projections; and their current financial status has improved over that previously considered. And although their revised balance sheets show an over capitalization, this situation may be regarded as temporary and, based on income projections, should be eliminated within 3 years. Moreover, a policy of retaining earnings, followed for number of years by these carriers, should serve further to create a more favorable debt-to-equity relationship within a reasonable period of three years.—LaCasse—Control—Interstate Exp., Inc., 101 M.C.C. 567 (572-4)*.

In initial report the Commission denied the application for two main reasons: (1) vendee Ind-O-Transport, Inc. failed to show it would be financially strong enough to begin operations as a motor carrier and (2) rights to be purchased substantially duplicated rights of carrier Parkhill Truck Co. which vendee is commonly controlled with, and which, except for the common control, would be competitive with Parkhill's operating rights. Upon further amendment in the instant application the merger of Transport into Parkhill and substitution of Parkhill as vendee to acquire vendors' rights met the objections raised in the prior reports and the transaction was approved and authorized. Ind-O-Transport, Inc.—Purchase—Niman Transfer & Storage, 101 M.C.C. 593 (594, 596)*.

Applicant Leaseway Transportation Corp., a noncarrier controlling approximately 125 other corporations including seven motor carriers, proposes to purchase all outstanding capital stock of Refiners Transport & Terminal Corp., a motor common carrier; and contingent thereon Refiners proposes to purchase a portion of the operating rights of Mitchell Transport, Inc. While Leaseway's individual corporate balance sheet shows that its current liabilities substantially exceed its current assets, its consolidated balance sheet (consolidated with its subsidiaries) shows capitalizable assets exceeding capitalization by $7,059,632. However, since Leaseway proposes to obtain necessary funds from its subsidiaries through advances, cash dividends, or on open accounts, since information as to the amount and method to be used in securing these funds cannot be determined until near the time of consummation, and since information concerning these funds, insofar as any effect on the carrier subsidiaries involved, is essential in considering this transaction, approval is conditioned on filing an appropriate petition with the necessary information.—Refiners Transport & Term. Corp.—Purchase—Mitchell, 101 M.C.C. 611 (612, 614-6).

On further consideration proposed control transaction approved, contingent on consummation of concurrently approved merger into applicant of its six carrier subsidiaries. Under amended proposal applicant's projected income statement shows that it should have no difficulty in fulfilling considered stock purchase agreement, under which $66,700 of the total price of $230,000 is payable at closing and the deferred balance of $163,300, bearing 6 percent interest per annum on the unpaid balance, is payable in annual installments over a period not to exceed 8 years.—Schwerman Trucking Co.—Control and Merger, 101 M.C.C. 679 (683-5)*.

9. Reduction of tax payments; taxes generally.—[Vols. 11-14, 16-19, 21].—To the extent that heavy tax burdens are reflected in transportation costs, the Commission deems relief from such burdens to be in the public interest; thus, the lawful reduction of taxes is a proper objective of a §5(2) proceeding.—Norfolk & W. Ry. Co.—Control—Lake Erie & F. W. R. Co., 328 I.C.C. 219 (222-3).

Acquiring carrier desires to continue operating acquired carrier as a separate entity in order to avail itself of substantial tax benefits which may be carried forward through 1967, and in view thereof denial of control authority is not warranted solely by duplications in the carriers' operating rights. While those duplications are fairly substantial, acquired carrier's operations extend to New Orleans and points in Mississippi, an area in which acquiring carrier is not authorized to operate; moreover, latter anticipates a much earlier depletion of the tax benefit, whereupon it will seek merger authority. Acquisition of control is therefore approved, but the parties will be expected to file merger application no later than 1967.—Arkansas-Best Freight System, Inc.—Control—Delta, 93 M.C.C. 474 (482).

In prior report, it was found that new corporation seeking to purchase operating rights and property of one bus line, and acquire joint stock control of another, would be classified as a personal holding company under the "60-percent of adjusted ordinary gross income" test in 1964 amendment to Internal Revenue Code and that, because of the penalty tax on undistributed personal holding company income, it would not be adequately financed. However, since record does not show any capital gains as listed in IR Code definition of "ordinary gross income" or any income of the nature enumerated in definition of "adjusted ordinary gross income," new corporation's adjusted ordinary gross income for the past 3 years would consist of gross income (operating revenues) and personal holding company income (dividends); and, as dividend portion of the adjusted ordinary gross income is less than 60 percent of its ordinary gross income, it would be exempt from the penalty tax for those years. Under those circumstances, the new company would be financially fit to consummate the transaction, and approval would be consistent with the public interest; prior findings modified accordingly.—Greyhound Corp.—Control—Tex., N. Mex. & Okla. Coaches, 104 M.C.C. 652 (654-7)*.

See also LaCasse—Control—Interstate Exp., Inc. Case, n. 7a above.

10. Corporate and operating status of vendor.—[Vols. 11-19, 21].—Dormancy is not an inflexible concept nor applicable to a temporary cessation of operations alone. Dormancy has been defined as "an abandonment or termination of services the reactivation of which will result in damages either to the public interest or to intervening or protesting carriers who conducted operations during the interruption of said services." See *Arrow*, 300 F.Supp. 813. Vendor's operations were found not dormant.—Weathers Bros. Transfer Co. Inc.—Purchase, 109 M.C.C. 647 (651-2)*.

After applying the test of substantiality to applicant's past operations under a certificate of registration, Commission held that only a partial grant of authority as a common carrier was warranted for those operations shown to have been active. Mere holding out of its service by applicant is no substitute for active operation. See *McCloud*, 101 MCC 111.—Fischbsach Trucking Co.—Control and Merger—Peck, 109 M.C.C. 739 (745-7).

The "test of substantiality" is flexible, not a fixed standard. Commission must consider nature of rights involved, size and resources of the carrier tested and its authorized territory, whether regular or irregular rights are involved, and whether authority is for general or specific commodities.—Mid-American Lines—Purchase—Five J Motor Service, 109 M.C.C. 753 (756).

Test of substantiality enunciated by Commission in *New Dixie*, 75 MCC 659, applies also to the transfer of rights issued in a certificate of registration. Proof of past operations by vendor upon which applicants relied solely to support the related conversion application must be convincing and must be limited to the scope of the certificate of registration. Application herein satisfactorily meets such test; approved.—Home Transp. Co., Inc.—Purchase—Fuchshuber, 109 M.C.C. 779 (782, 787)*.

It is not expected or anticipated that irregular-route carriers of highly specialized commodities operating on a call and demand basis will be held to the same standard of frequency as, for instance, regular-route carriers of general commodities in applying the test of substantiality.—Id., p. 788*.

Commission may review nature of interstate service previously conducted by a one-State registered carrier and limit the service authorized to be transferred and converted into a certificate of public convenience and necessity to that service shown to have been actually provided. See *Palmer*, 87 MCC 160.—Id., p. 788*.

Test of substantiality stated in 75 MCC 659 has been further refined and interpreted with respect to specialized bulk carriers, such as vendor, by the findings in 104 MCC 686. As the nature of a commodity or service becomes more narrowly confined or specialized, greater leniency can be shown in determining whether vendor has conducted substantial service through-out its authorized territory. In determining whether operating authority had been actively utilized, shipments moving over the considered rights in interline service and/or pursuant to tacking operations are properly entitled to consideration. See 101 MCC 649. Commission considered vendor's entire service and found that certain certificates should be cancelled for dormancy but not others (as specified herein).—Matlack, Inc.—Control—Southern & T. I. McCormack, 109 M.C.C. 861 (865-6).

Commission has consistently held that an irregular-route carrier must show that it has rendered substantial service to a representative number of points throughout its authorized territory to successfully meet the test of substantiality set forth in 75 MCC 659. Record herein is barren of such evidence as regards vendor's operations. Vendor's use of interline service to or from authorized points does not show active and continuous service. See 109 MCC 27. Objection to a proposed transaction based upon dormancy may be overcome by a showing that such transaction serves a public need. Testimony of supporting shippers is indicative of a preference only and demonstrates that vendee would not meet any demand for service not presently being satisfactorily met by existing carriers.—Arkansas-Best—Purchase—Indianhead 109 M.C.C. 885 (889).

Commission found that not all of operations under vendor's general commodity authority are dormant. Evidence of past operations, public need, and an absence of adverse effect on protestants warrants continued delivery by vendee of construction materials, feed, salt, and liquid fertilizer, except liquid bulk commodities, but not of household goods as no evidence of transportation of such goods has been shown or has a future need for such transportation been established.—Universal Transport, Inc.—Purchase—Muck, 109 M.C.C. 871 (879-80)*.

See also Branch Motor Exp. Co.—Control—Middle Atl. Transp. at §5(2), n. 7, *reinstitution of dormant rights.*

15. Routes, rights, transferred, retained, combined.—[Vols. 11-19, 21].—Commission held that the transaction herein, if consummated, would not alter the competitive situation because consummation would result in the same number of carriers, two, providing the service at issue, as were providing it previously. Protestants' evidence of diversion is speculative on nature and the fact that vendee may be a more vigorous competitor than vendor does not warrant denial.—Fredrickson Motor Express Corp.—Purchase—Cope, 104 M.C.C. 670 (674).

Vendor permitted to retain operating rights which allow service between Atlanta, Ga., and Birmingham, Ala., while selling rights which permit some service over a different route inasmuch as vendor's serious financial difficulties make sale imperative, and it would be reasonable to assume sale would not be consummated if this service were discontinued, rendering rehabilitation of vendor's retained operations impossible.—Theatres Serv. Co.—Pur. Dixie Highways, 104 M.C.C. 778 (782-3).

Commission held, with respect to vendor's retained rights recommended to be cancelled, that the issue was not whether movements over the routes could be moved "logically," but rather, whether the test of substantial operations, stated in *New Dixie*, 75 MCC 659, had been met. Commission found that evidence of vendor's past operations successfully met such test and it was unnecessary to pass upon the question of cancelling retained rights which did not create a duplicate rights situation. Approved.—Yellow Freight System—Pur.—Norwalk Truck Lines, 109 M.C.C. 672 (674-6).

Alternate routes: [Vols. 12-17, 21].—Although the general rule is that an alternate route cannot be transferred apart from its underlying service route, in as much as vendee after the consummation of the transaction would have the identical regular route authority given to the original grantee of considered alternate routes, in that vendee holds authority over route duplicative of the portion of the service route authority that vendor would retain and the purchase will complete a route duplicating the original service route; and whereas two services would not be created since vendor will no longer serve the area in question; purchase of regular-route segment and certain alternate routes approved.—Midwest Motor Exp., Inc.—Pur.—Advance—United, 97 M.C.C. 593 (595). (But see dissent.)

Principle that alternate routes are not severable bysale from regular service routes between the same termini (49 CFR §1042.4(d)(7) is equally applicable to specifically authorized convenience routes but it has limited applicability here as it does not require convenience routes between different termini to be cancelled as result of exchange of one service route for an identical or broader service route.—Rumpf Truck Line, Inc.—Pur.—Dundee Truck, 109 M.C.C. 893 (899-901)*.

Circuitous routes: [Vols. 15, 21].—Circuity of routing, standing alone, is not enough to establish a subterfuge to avoid state regulation; where it appears that the longer interstate route is used for a logical economical or operational reason, such routing cannot be labeled a subterfuge, absent a clear indication of bad faith. While both multi- and single-State (Georgia) shipments were transported over the Georgia South Carolina-Georgia route, service was performed at intermediate points in South Carolina, as were terminal services, indicating that the route was a natural and logical choice. Further, while acquired carrier holds interstate authority that is all-Georgia which roughly parallels its interstate route through South Carolina, the all-Georgia route is seldom used. Additionally, it cannot be determined from the evidence how many shipments originated and terminated within Georgia since the waybill study presented by the state of Georgia included waybills which would not necessarily indicate a prior or subsequent interstate movement. Thus, the evidence is inconclusive and falls short of establishing that the challenged operations are spurious.—Thurston Motor Lines, Inc.,—Control and Merger, 104 M.C.C. 1 (15-16).

Commercial zones: [Vols. 15, 17, 18, 21].—Commission held that hearing examiner erred in finding that vendor, under its retained authority, could serve Moline, Ill., as a point within commercial zone of Davenport or Bettendorf, Iowa. Examiner ignored distinction made in *Commercial Zones*, 54 MCC 21 (92), between authority to serve a particular municipality and territorial authority. Hence, authority to serve "points in Iowa" is not authority to serve Illinois points.—Arkansas—Best—Purchase—Indian head. 109 M.C.C. 885 (887-8).

Common control and management: [Vols. 13, 14, 17, 19, 21].—While authority has generally been withheld where the result would be the creation, preservation, or extension of duplicate operations by separate motor carriers under common control, which operations, except for the common control, would be competitive, this policy has occasionally been departed from in recognition of the tax advantages which would accrue were an immediate unification not perfected. Accordingly, vendee is authorized to acquire control of vendor through purchase of its stock, with the admonition, that steps be taken, subject to the Commission's prior approval, to effect a merger of the carriers at the earliest practicable date.—Hall's Motor Transit—Control—Pony Express, 104 M.C.C. 353 (360-61).

Duplicate operating rights: [Vols. 12-19, 21].—Authority granted a new carrier authorized to be controlled by Transcontinental Bus System for transportation of cash letters over irregular routes in territory served by affiliated buslines is not duplicative of its parent's or affiliates' services. Transportation of property (express) by motor passenger carriers is subordinate to requirements of their passenger business and is a special service calling for commensurate compensation. Such service is not necessary for transportation of property in ordinary course of business, and many shippers will not use it, with its higher charges, for that purpose, whereas acquired carrier proposes to provide daily service between country and correspondent banks, using station wagons, at a comparatively low rate.—Continental Dispatch, Inc., 95 M.C.C. 483 (487, 491-2).

Vendor's proposed sale of certain of its operating rights while retaining authority to transport the same commodities between many of the same points is denied. A carrier has only one right to operate regardless of the number of times it may be repeated in one or more certificates; and if this right is sold, the selling carrier may not continue to transport the same commodities between the same points authorized to be served thereunder. Although such splits have been approved where the splits involved only short distances, where the highway involved was the only means of ingress and egress to and from the particular point, and where none or only a few small intermediate points were located on the segments involved, those circumstances are not present here and the grant of authority to two carriers to operate over the segments herein involved should be made only upon a showing that public convenience and necessity require both services.—Hall's Motor Transit—Control—Pony Express, 104 M.C.C. 353 (359-60).

See also East Tex. Motor Frt. Lines—Purchase—Lee at §5(2), n. 110 temporary. Eastern Massachusetts Street Ry. Co.—Lease—Trailways Case, n. 7 passenger service, above; Transport Motor Exp.—Control—Capitol Freight Lines, n. 45 conditions, above.

Extinguished rights: [Vols. 12-14, 16, 18, 19, 21].—Cancellation for dormancy is a serious action, intended to protect other carriers from revitalization of rights under which no service has been shown for substantial periods of time; moreover, opposing carriers cite no precedent which would require the Commission to cancel or restrict points internal to a carrier's overall authority and at which the carrier has shown extensive service in conjunction with its overall system, including the use of those points as joinder for the overhead traffic between the extremes of its authority.—McLean Trucking Co.—Control—Chicago Exp., Inc., 97 M.C.C. 693 (696, 697).

Liquidating carrier's Georgia irregular-route authority is not dormant since applicant's abstracts show rendition of substantial and continuous direct and interline service to a representative number of points within its authorized territory; it is immaterial that the major part of the applicant's service was conducted in the area of its regular route. Further, the situation is not distinguishable from New Dixie Lines, Inc.—Control—Jocie Motor Lines, Inc. 75 M.C.C. 659 on the basis of quantum of service nor because the vendor in that case held only irregular route authority while the instant applicant has both regular and irregular route authority. Additionally, the absence of terminal facilities is of little significance as maintenance of such facilities designed and equipped for handling less-than-truckload miscellaneous freight at other than a carrier's home base is more indicative of regular-route than irregular route operations. Thurston Motor Lines, Inc.—Control and Merger, 104 M.C.C. 1 (8).

Since there is no indication of record that liquidating carrier has handled any movements under its irregular-route specified commodity authority, it is considered to have abandoned or discontinued service in connection therewith, and this authority should be cancelled; however, considering each separate operating right as a unit, applicants have shown that the general commodity operations of liquidating carrier have been substantial and continuous.—Ryder Truck Lines—Control and Merger, 104 M.C.C. 328 (337).

Liquidating carrier's authority to transport bananas from Florida and gulf ports is not dormant even though all traffic from Florida points moved from only one of three possible origins, four shipments moved from New Orleans, two from Gulfport, and none originated in either Mobile or Galveston. Liquidating carrier's participation in the traffic meets the required standard of an irregular-route carrier i.e., it has shown a rendition of substantial service from and to a representative number of points within its separate grants of authority. The fact that the traffic has moved from a limited number of points does not justify eliminating alternative origins. Further, the protestant failed to show that he would suffer materially from the grant.—Brown Transport Corp.—Control and Merger—Osborn, 104 M.C.C. 561 (562).

Where regular-route operating rights were used sporadically and in combination with the carrier's irregular-route authorization, it cannot be found that service was an integral and appurtenant part of its authorized regular route operations; and the carrier failed to establish that it maintained equipment or facilities such as terminals and cross-dock operations commonly indicative of and associated with regular route operations. Applicants failed to show there was a need for reactivation of these rights. Denied.—Ryder Truck Lines—Control—Merchants Frt. System, 109 M.C.C. 654 (663-4).

See also Buckingham Transp., Inc. —Control and Merger, n. 52, below; Republic Van & storage Co.—Purchase—Consolidated Van, n. 48, below; Tose, Inc., v. United States, n. 45 Conditions, below.

Intermediate points: [Vols. 12, 13, 16].—In approving §5 application, the Commission rejects protestants' contention that vendor's authority to serve intermediate points on its regular routes was dormant; evidence disclosed, that while vendor's service at those intermediate points had been substantially less active than at larger points it was authorized to serve, the limited service performed is sufficient to warrant a finding that the intermediate-point rights are not dormant.—Overnite Transp. Co.—Purchase—Rutherford Freight Lines, 97 M.C.C. 568 (575).

Purchase of right to serve, as an off-route point, a point on the regular routes of both vendee and vendor, which only vendor can serve, approved where alternate routes, authorized to be purchased in the same transaction, terminate at that point; thus, adequate and efficient service in the area will be insured.—Midwest Motor Exp.,—Pur.—Advance-United, 97 M.C.C. 593 (595).

Intrastate operating rights: [Vols. 14-19, 21].—See Eagle Motor Lines, Inc.—Purchase—Victory Frt. Lines, Inc. Case, §5(2), n. 126.

Off-route points: [Vols. 11-19,21].—Off-route points having populations over 20,000 and surrounding trade territories, which are not reasonably near regular route to which they appertain, but are in some instances hundreds of miles off-route in areas foreign to those generally served by vendor, take on characteristics of principal or terminal points, as to which vendor must establish either active past operations or a need for service.—Carolina Freight Carriers Corp.—Purchase—Kilgo, 93 M.C.C. 543 (553-4)*; therefore, as to 13 such points for which vendor's authority is shown to be dormant, cancellation is required of rights for all but the one where need for revitalized service is shown, also cancellation of authority to serve three of those points under vendor's irregular-route rights. And authority to serve the off-route point of Pittsburgh is limited to traffic to and from the four sourthern States shown to have been served by vendor on Pittsburgh shipments.—Id., pp. 554-5.

Regular- and irregular-route operations: [Vols. 12-19, 21].—In light of the Commission's conclusions that no new service would emerge from vendee's acquisition of vendor's authority, that the latter authority is not dormant, and that such conversion would be warranted in the public interest, findings herein are conditioned to provide for a redescription of vendor's authority in regular-route terms rather than irregular.—Interstate Motor Freight System—Purchase—Eaton Truck, 104 M.C.C. 248 (257).*

Applicant's abstracts reflecting the nature of vendor's past operations show the existence of the possibility that vendor's operations have, in fact, already developed into a repetitive operation between predominantly major points, resulting in an unlawful conversion of vendor's irregular-route rights into regular-route rights; testimony of vendee's witnesses and the shippers supporting the proposal, and the broad territorial nature of vendor's irregular-route rights sought to be acquired, clearly establish, that approval of the section 5 application in this respect would result in vendee's unlawful conversion of vendor's irregular-route rights into regular-route rights and the establishment of a regular-route operation between points via the applicant's respective territories.—Lyons Transp. Lines, Inc.—Control and Purchase, 104 M.C.C. 599 (603-04).

The unification of regular-route with irregular-route operating rights has been found consistent with the public interest, *B. & E. Transp.*, 36 MCC 561, and it cannot be assumed that vendee would conduct unlawful operations. All of vendor's irregular-route authority, covering a vast amount of easily defined territory, will be retained and the territory outside such authority can only be served by vendor's irregular-route authority.—Red Arrow Frt. Lines, Inc.—Purchase—Galveston, 104 M.C.C. 820 (825-6).

Application to convert from irregular to regular route authority denied where some of the regular routes sought exceeded territorially the underlying irregular-route authority; and where applicant would retain all its irregular route authority resulting in the overlapping and admixture of both types of authorities making impractical the preservation of real distinction between the two types of service, and would obscure any clear understanding of applicant's already complex operating rights.—Ryder Truck Lines—Control—Merchants Frt. System, 109 M.C.C. 654 (668-70).

Split routes: [Vols. 12-15, 17-19, 21].—The proposed split of authority is approved as to that portion of vendor's operating rights which authorizes service between the same points but over a different route from those rights which vendor would retain, however, vendee's rights are restricted against service at the point where the rights sold and two of those retained meet. But as to that portion of the rights to be sold that are identical to those sought to be retained, vendor has but one operating right and may not sell and retain it at the same time; approval of the transaction is therefore conditioned upon cancellation by vendor of that portion of the retained routes.—The Davidson Transfer & Storage Co.—Purchase (Portion)—Keystone Express & Storage Co., Inc., 104 M.C.C. 389 (393).

45. Control.—[Vols. 11-19, 21].—In suit to set aside Commission order approving national bus line's acquisition of control of local bus lines, plaintiff's (protestant) claims that acquiring carrier's issuance of considered deposit receipts without prior Commission approval violated §20a(2), and that by purchasing some of those receipts it obtained prior control of local carrier in violation of §5(4), are without merit. The deposit receipts were issued, not by the carrier, but by a depository bank to acquired carrier's shareholders who deposited their stock pending Commission decision on proposed transactions; thus, as they were not "securities" within meaning of §20a, their issuance without prior approval did not void the transactions as plaintiff claims. Moreover, record amply supports the Commission's conclusion that applicant's purchase of those receipts did not amount to an unlawful acquisition of control; but even if a technical violation of §5(4) could be found, the Commission found proposed transactions were in the public interest and, therefore, it would have been justified in finding that such violation did not warrant denial of the applications.—Interstate Investors, Inc. v. United States, 287 F. Supp. 374 (382-3, 386-9)*.

Nor is there merit in plaintiff's claim that acquiring carrier's conduct with respect to issuance and purchase of the deposit receipts violated §7 of the Clayton Act. The Commission's duties under that act cannot be viewed apart from provisions of §5; applicant sought to obtain local carriers' stock (if the Commission approved) in exchange for its own stock to be issued with Commission approval; thus in considering its application for authority to issue stock, the Commission had opportunity to examine the transaction and at that time discharge its duty under the Clayton Act. Also, under §5, the Commission is given power to approve a transaction which furthers the National Transportation Policy even though it might otherwise be contrary to the goals of the anti-trust acts. In considered circumstances, proper test of control is not the Clayton Act formula, but the standards of §§5(4) and 5(5); and under those standards, the Commission properly found that control of the local bus lines had not been unlawfully acquired prior to its approval. The Commission's findings, conclusions, and order are fully supported by substantial evidence on the record as a whole; sustained.—Id., pp. 386, 388-9, 393.

Applicant railroad's acquisition of direct control of two subsidiaries of the Wabash railroad (whose property applicant is currently leasing) through outright purchase of subsidiaries' stock, rather than through a stock exchange, would facilitate and assure completion of applicant's control of the Wabash system as contemplated in the lease proceeding (324 ICC 1); and would reduce Federal income tax on subsidiaries' income, thereby relieving the public from tax burdens as reflected in transportation costs. Authorized.—Norfolk & W. Ry. Co.—Control—Lake Erie & F.W.R. Co., 328 I.C.C. 219 (222-3).

Railroad's acquisition of control of a short line railroad through purchase of stock by its noncarrier subsidiary formed for purposes of the transaction will be in the public interest only if competing rail carrier requesting inclusion as joint owner is included in the transaction. While the Commission recognizes the disadvantages of divided ownership, the railroad sought to be acquired, being a small switching and terminal line, is the type of carrier which can be owned and controlled equally and jointly by more than one railroad.—Norfolk & W. Ry. Co.—Control—FP&E Co.—Purchase, 330 I.C.C. 672 (679-80, 681).

While not condoning the method used by acquiring carrier applicant in creating a trust and causing stock to be transferred thereto prior to Commission approval, the trust was inadequate to authorize the trustee to vote the stock transferred to it without participation, suggestion or control from considered carrier; thus, carrier did not control or have the power to control the railroad it seeks to acquire; however, to avoid having a trust of this nature declared illegal, carriers are admonished to seek Commission's prior approval of such transactions in the future.—Id., pp. 680-1.

Transcontinental Bus System's continued control of a new subsidiary concurrently granted certificate for transportation of cash letters, authorized. The subsidiary's proposed service in same area as other Transcontinental affiliates will not amount to self-induced competition; its irregular-route authority will enable it to generate new and additional traffic by opening up more territory to solicitation and transportation of cash letters; furthermore, in instances where there is a combination bus-station-wagon line haul, its service will produce revenue for the buslines.—Continental Dispatch, Inc., 95 M.C.C. 483 (491).

Requiring cancellation for dormancy, as a condition to approval of control application, is a serious action intended to protect other carriers from revitalization of rights under which no service has been shown for substantial periods of time. Such condition should not be imposed as to points internal to acquired carrier's authority at which little or no direct service was shown where the carrier served all of them with considerable tonnage in conjunction with the overall use of its authority; neither should restrictions be imposed on tacking at those points as restrictions on operating rights are difficult and burdensome, and are not imposed where not clearly shown to be required in the public interest.—McLean Trucking Co.—Control—Chicago Exp., Inc., 97 M.C.C. 693 (696, 697).

In denying §5 application for control of motor carrier Wilson, the Commission held that since controlled carrier was to reacquire 3,043 shares of its outstanding capital stock, while the individuals seeking to jointly control it were to purchase only 615 shares, such terms were inconsistent with the public interest because they would place such financial burdens on Wilson as to transform it from a carrier with reasonable financial stability into one which is unsound.—Lewis—Control—Wilson Storage & Transfer Co., 101 M.C.C. 191 (196).

In approving §5 control application, the Commission held that where all there paragraphs of vendor's Sub-No. 23 certificate were intended to grant a single operating right (expressed in three paragraphs to avoid duplicating any part of the base certificate), it is possible, since considered commodities are appropriately within the description of both certificates, for vendor to lawfully transport shipments between points in radial area A under the base certificate and points in radial area B under the Sub-No. 23 certificate through joinder at a common point in Franklin County.—Daily Express, Inc.—Control and purchase, 101 M.C.C. 355 (363).

Although in seeking, through proposed stock control transactions, to obtain a route between St. Louis and El Paso (when it already has available two other routes between those points), Greyhound admitted that it sought to preclude protestant Trailways system bus line from instituting through-bus operations over such routes in combination with acquired carriers, Greyhound's dominance in the motorbus industry does not require that the applications be denied. Its share of the market would not be increased as result of the acquisitions. Acquired carriers would continue to operate autonomously as feeder or bridge carriers. Also, Greyhound now controls pattern of acquired carriers' service, and has for many years, to the extent that it would if transactions were approved. Therefore, subject to condition that acquired carriers' routes, via existing junctions and gateways, and connections with other bus lines be kept open, and certain other conditions, proposed transactions are approved as consistent with the public interest.—Greyhound Corp.—Control—Tex., N. Mex. & Okla. Coaches, 101 M.C.C. 655 (670-5)*.

In motor carrier control and merger proceeding imposition of restrictions against tacking is looked upon with disfavor, although they may be imposed if it appears that non-imposition would have an adverse effect on protestants; however, no such restriction is proper if applicants have interlined traffic from or to territory of the other. Applicants have interline traffic, and fact minimal service is shown between New York City-New England area and the Georgia territory is mainly due to the circuity involved in having to use Pittsburgh, Pa., and Charleston, W. Va., gateways. Shippers utilize this service mainly because they need dropoff service to Pittsburgh and West Virginia areas on shipments destined to Georgia territory; and need is shown for continuation of this service. Thus, since applicant will not institute a new operation and since protestants are strong, aggressive and firmly established carriers well able to meet any resulting intensified competition, application approved.—Eazor Express, Inc.—Control and Merger, 101 M.C.C. 707 (714-16).

Evidence clearly indicates that original intention of applicant, organized for that purpose, was to acquire control of two household goods carriers and, also, that parties controlling applicant never intended that control of one be acquired without control of the other. Therefore, applicant's acquisition of control of one carrier without Commission approval and subsequent application for authority to acquire control of the other constitute a single transaction subject to §5(2); and its application cannot be approved without approval of continued control of the carrier already acquired. In view of the chain of circumstances, beginning with original purchase of the stock options, applicant's acquiring control of one carrier was only part of the entire transaction; and its arguments that the options were never exercised, and there was no existing agreement to buy stock of second carrier when control of the first was acquired, are not convicing when the evidence shows a single transaction, rather than two separate unrelated transactions, to be involved.—General Movers Corp.—Control—Martin Van Lines, Inc., 101 M.C.C. 748 (750, 760-61)*.

Approval of the application would set a dangerous precedent and encourage partial avoidance of regulation in situations where a party desired to gain control of two or more carriers and felt, for some reason, that acquisition of one might not withstand close examination by the Commission. However, this is not meant to imply that such is the instant situation, nor is it a pre-judging, in absence of all the evidence, of the portion of the transaction involving applicant's prior acquisition of control of a carrier. The Commission cannot avoid its responsibility of judging an entire transaction to consider only that portion applicant chooses to submit, even though previously consummated portion, standing alone (as a noncarrier's acquisition of control of one carrier), would be beyond its jurisdiction in the event applicant accepted denial of the portion submitted for approval rather than submit the entire transaction for consideration. Since acquisition of control of the two carriers is an indivisible whole which may not be separated by consummation of a part thereof and subsequent submission of the remainder for Commission approval, the transaction must be denied; denial is without prejudice to submission of entire transaction for consideration.—Id., p. 761.

Common control of vendee and vendor found not to exist in view of showing that vendor's stockholder borrowed on own credit, interest was paid on large loan from vendee, and hiring of an independent manager not previously affiliated with vendee.—Illinois-Calif. Express—Purchase—Ariz.—Utah Express, 104 M.C.C. 578 (584-5).

Acquisition by International Utilities of 27 percent of Chemical Leaman as a result of the transaction does not indicate control in the face of strong evidence and direct testimony that the person in control of Chemical Leaman will continue to exercise that control; although if such a change were to occur, the situation would be subject to further review.—Chemical Leaman Tank Lines, Inc.—Pur.—Ryder, 104 M.C.C. 686 (705-8).

Operating rights sought to be controlled are not dormant as protestants contend. Carrier sought to be controlled was ordered to cease its complete heavy-hauling service until its authority was redescribed and it cannot be held responsible for the resulting commodity hiatus. Evidence shows that involved carrier operated extensive heavy-hauling operations both before and after issuance of a revised certificate. Absent a showing that protestants would be adversely affected by applicant's acquisition of the revised certificate, it must be presumed that service authorized thereby can be rendered without endangering or impairing protestants' operation contrary to the public interest. Application approved.—Aetna Freight Lines, Inc.—Control—Ray Carter, 109 M.C.C. 13 (24-26)*.

A certificate, included among others to be transferred under §5, issued to vendor subsequent to close of the hearing in a §5 proceeding, should not be subject to nullification on a charge of dormancy advanced by protestants. At the time of hearing, vendor was authorized under §210a to perform temporarily the services corresponding to those sought in the certificate issued. It must be presumed that public convenience and necessity still require vendor's operations. Approved.—Transport Serv.—Control—Gould, Inc. & Colo. Frt., 109 M.C.C. 359 (371-2).

Where it appears that a certificate of registration is supported by two separate underlying State certificates which duplicate each other, it is applicants' duty to show that, to extent each supports the certificate of registration, they may be divided by selling one and retaining the other. Otherwise approval of such a division of rights would create an additional carrier operating in competition with vendor in same State. Found that rights evidenced by a certificate of registration, which duplicate, are unified and cannot be split under §5—Id., p. 375-6.

Control of a motor carrier by a rail carrier approved despite violation of the Act inasmuch as rail carrier vendee has shown that it can effect substantial savings and also render faster service on less-than-carload traffic through use of motor carrier service. Advantages to the public warrant continuation of the service, and means are available to restrict the considered authority so as to overcome the reason for the prior denial of authority to control.—Canadian Ntl. Transp.—Investigation of Control, 109 M.C.C. 392 (402-3).

Subsidiaries of a large industrial corporation, which controlled two general-commodity common carriers, were authorized to acquire control of additional general and specified-commodity carriers. Commission recognizes that many concerns with substantial interest in business enterprises other than regulated motor transportation control one or more trucking companies. Affiliation with sources of traffic could not be condemned per se. Restrictions proposed by applicants were imposed.—Encinal Terminals—Control—Shippers Express Co., 109 M.C.C. 536 (541-4)*.

Shipper testimony herein evinces only a preference for applicant's service and does not show a real need for the proposed unified service. A majority of the major geographical points involved are served by protestants herein. Also the evidence indicates that it would be possible for applicant's unified service under irregular-route authority to become entirely regular route in nature, which fact alone, based on our decision in Falwell, 40 MCC 439, is enough to warrant denial.—C.O.D.E., Inc.,—Control—Nolte Bros. Truck Lines, 109 M.C.C. 552 (558).

Where a contract may be subject to more than a single interpretation, it is incumbent upon the parties to that contract to clarify the terms. Applicants failed to present the entire transaction for Commission approval where the contract contained a condition precedent requiring approval of a proposed merger and filed an application for control, with no application to merge. Denied.—Ryder Truck Lines—Control—Merchants Frt. System, 109 M.C.C. 654 (668).

Carrier to be controlled showed record of 100 shipments a week under its authority to haul bulk flour to wide variety of points. Such operations clearly show an active service has been conducted. However, other bulk authorities were cancelled for absence of evidence that such authorities had been utilized in any manner whatsoever—Peterlin—Control—Bulk Motor Transport, Inc., 109 M.C.C. 705 (709).

Conditions imposed: [Vols. 17-19, 21].—The Commission properly found that, though employee union's petition for clarification of order in which employee-protective conditions were imposed (in proceeding approving plaintiff's move to Richmond, Va., Broad Street Station from the Main Street Station it had jointly operated with Chesapeake & Ohio) was not filed for more than three years after date of the order, the union was not barred by laches. While plaintiff criticizes the union's lack of diligence, it was not mislead thereby. And, since plaintiff moved from Main Street Station more than four years earlier, obviously the move was not influenced by reliance on an interpretation that the order excluded certain junior employees or by the union's subsequent delay in moving for clarification. Furthermore, order under attack was nothing more than a clarification of a prior Commission order and, apart from Rules 101 and 102 of the Rules of Practice, §5(9) provides adequate statutory for the Commission's action. Complaint dismissed.—Seaboard Coast Line R. Co. v. United States, 283 F. Supp 866 (868-9)*.

On appeal from Commission decision and order approving motor carriers' control and merger application, conditioned on cancellation of acquired carrier's rights in three States because of dormancy, the court is limited to ascertaining whether the Commission's conclusion has a rational basis and is supported by the evidence. The examiner's thorough and careful summary of the testimony and evidence shows that the record fully justified the finding of dormancy and, also, that substantial evidence of protestants rebutted shipper testimony offered by applicants to prove that reactivation of dormant rights in two States was required by public need for acquiring carrier's unique "special services" to shippers which other carriers did not offer; moreover, even if record showed uncontradicted evidence of a special service at one point, the Commission's conclusions could still find rational support in the evidence. There being a reasonable basis of record for its decision, the Commission's refusal to reactivate the dormant rights or to grant acquiring carrier rights in named States cannot be found erroneous or arbitrary; sustained.—Tose, Inc. v. United States, 304 F. Supp. 894 (898-900)*.

Condition (i) imposed in 76 ICC 508 on Southern Pacific's control of Central Pacific specifically reserved jurisdiction to reopen that proceeding for modification of order therein, and such jurisdiction is not restricted to orders implementing authority granted in original order; it would be illogical to assume that, once a §5(2) order is entered, the Commission is forever barred from changing or correcting it to supply deficiencies, regardless of what material changes in conditions and circumstances might occur. And though petitioner Denver & Rio Grande, in view of its agreement to the conditions when imposed, may not now be heard to question their propriety at that time, the doctrines of laches and estoppel do not bar it from questioning reasonableness of any condition under existing circumstances and seeking modification thereof pursuant to provisions of condition (i). Motions to dismiss or deny its petition for lack of jurisdiction or legal power to modify condition objected to, overruled.—Central Pac. Ry. Co. Control, 317 I.C.C. 469 (482)*.

Approval of control is conditioned upon acquiring carrier gaining and exerting sufficient control of controlled carrier's securities within 120 days to enable it to fully carry out the other conditions prescribed; otherwise, it and its corporate parent are to dispose of their holdings in acquired carrier's stocks and securities. However, authority for any necessary issuance of stock or securities in connection therewith must first be obtained under §20a provisions of the Act. Furthermore, since record does not show that control would result in manipulation of revenues of controlled carrier to the detriment of other security holders and employees, financial conditions requested will not be imposed.—Missouri Pac. R. CO.—Control—Chicago & E.I. R. Co., 327 I.C.C. 279 (310-1, 324)*.

And, while railroad seeking inclusion in the transaction requires no Commission authority to enter into negotiations to purchase or lease portion of acquired carrier's line, without conditions regarding good-faith negotiations there would be no assurance that any offer it might make would be considered by acquired carrier after consummation of the control; and, on the record, the Commission would be derelict in its responsibility to serve the public interest if it failed to make such provision. Acquiring carrier is to take such steps as will assure necessary stockholders' assent to any agreement reached for sale of that line segment or for acquisition of trackage rights thereover and to notify all parties of the consummation date; consummation of control shall constitute acquiescence in an irrevocable assent to such conditions.—Id., pp. 296-7, 306.

Modification of condition (e) by striking therefrom the name of Union Pacific as the only connection of Southern Pacific on traffic moving via Ogden does not conflict with the purposes sought to be achieved by the 1923 order approving the control or with the Pacific Railroad Acts. The primary objective of the conditions imposed by the order was the protection of the competitive position of the transcontinental route of the Central Pacific via Ogden against the Southern Pacific's possible preference for its long-haul southern route via El Paso. Moreover, the Pacific Railroad Acts clearly contemplated the addition of other railroads to the Overland route; and, although they prohibit the two named lines from discriminating against each other, they do not require or authorize either the SP or UP to prefer each other to the point of unduly discriminating against another connecting line. Further, it would be unrealistic to assume that a preference in favor of UP is necessary to protect it against possible discrimination caused by the natural free competition of the Rio Grande.—Id., 328 I.C.C. 345 (354-5)*.

Furthermore, when condition (e) was included in the 1923 order, there was practical justification for it, considering Rio Grande's physical inability to compete for transcontinental business, and its acquiescence in the condition and other provisions at that time; but now it has achieved that similarity of transportation conditions which under the Act requires equality of treatment of it with Union Pacific as connecting lines of Southern Pacific at Ogden. And, fact that considerable traffic of every nature that is interchanged between respondents at Ogden required the construction of facilities therefor is not conclusive, for the Overland line is not the only route operated by them; thus, the sums of money claimed to have been spent by respondents can hardly be charged exclusively to the development and operation, pursuant to the Pacific Railroad Acts, of the Overland route. In view of changed circumstances, condition (e) is no longer just and reasonable. Modification, approved.—Id., pp. 349, 356-8.

Railroads' acquisition of joint and equal control of small switching and terminal line through purchase of stock by their newly created railroad subsidiary approved subject to imposition of employee-protective conditions and gateway conditions. Commission's jurisdiction retained for possible future inclusion of another rail carrier as joint owner if found to be consistent with the public interest.—Norfolk & W. Ry. Co.—Control —FP&E Co.—Purchase, 330 I.C.C. 672 (682-3).

Approval of control is conditioned on cancellation of provision of stock-purchase agreement found to constitute an assumption by acquiring carrier of obligation and liability, within meaning of §§20a and 214, on certain promissory notes of acquired carrier; or, alternatively, acquiring carrier may file appropriate application under §214 and defer consummation of the transaction until it is granted.—Arkansas-Best Freight System, Inc.—Control—Delta, 93 M.C.C. 474 (479).

Approval of multiple State carrier's acquisition of control of single-State carrier, through purchase of latter's capital stock, is subject to the condition that operating rights of both applicants (including those to be issued to acquired carrier in related application proceeding) which in any way duplicate the other's rights, shall be cancelled coincidentally with any act or transaction resulting in any portion of such rights being controlled by a person who does not simultaneously obtain control of the corresponding duplicating rights. Imposition of such conditions being predicated on avoidance of possible temptation to sell off duplicating general commodity rights of applicants to a third party prior to contemplated merger, termination thereof would follow approval of a merger of the carriers.—Transport Motor Exp.—Control—Capitol Freight Lines, 97 M.C.C. 721 (728).

Applicant Leaseway, a noncarrier corporation controlling approximately 125 other corporations including seven motor carriers, proposes to purchase all the outstanding capitol stock of Refiners Transport & Terminal Corp., a motor common carrier; and contingent thereon Refiners proposes to purchase portion of the operating rights of Mitchell Transport, Inc. However, since Leaseway proposes to obtain the necessary funds from its subsidiaries through advances, cash dividends, or on open accounts, since information as to the amount and method to be used in securing these funds cannot be determined until near the time of consummation, and since information concerning these funds, insofar as any effect on the carrier subsidiaries involved, is essential in considering this transaction, approval is conditioned on filing an appropriate petition with the necessary information.—Refiners Transport & Term. Corp.—Purchase—Mitchell, 101 M.C.C. 611 (612, 614-6).

On further consideration and contingent on consummation of concurrently approved merger into applicant of its six carrier subsidiaries, proposed control by applicant of Refiners Transport, Inc., and Equipment Sales & Service, Inc., through purchase of all the outstanding capital stock, approved. However, despite supplemental evidence concerning Refiners' operations, some of its rights are dormant; therefore, only the rights specified, as to which no supplemental or other data was submitted, should be canceled as a condition to approval—Schwerman Trucking Co.—Control and Merger, 101 M.C.C. 679 (683-5)*.

Commission, in accordance with its regulations governing applications for common control of carriers having duplicate operating rights stated in *Control* 109 MCC 448, approved application herein on condition that applicants submit a plan for elimination of such duplicate rights; submit reports on the developments of such plan; and provide that such rights not be severed from common ownership.—Western Gillette, Inc.—Control—Desert, 109 M.C.C. 514 (520)*.

See also Eazor Express, Inc.—Control and Merger Case, §5(2), n. 45.

Other than stock ownership: [Vols. 19, 21].—Application of noncarrier individuals, who manage (and own 48 percent of stock of a regulated motor carrier, for authority to acquire control of applicant carrier through management, denied when applicants' proposed management arrangement is found inconsistent with the public interest. Most compelling reason for such finding of inconsistency with the public interest is the Commission's well established policy against creation, preservation, or extension of duplicate operations by separate motor carriers under common control, which operations (except for the common control) would be competitive; and fact that one commonly controlled carrier would be performing regular-route general commodity service, and the other would be an irregular-route carrier of specified commodities, does not warrant departure from that policy.—Weiss—Control—Hart & Clark Transfer Co., Inc., 97 M.C.C. 682 (685-6).

The question of control, or the power of control, is one of fact which must be resolved by examination of the special circumstances present and the actualities of the intercorporate relationships resulting from approval, in light of the meaning of "control" as defined in §1(3)(b) and used in §5. Here, Greyhound would at least have the power to exercise control over the affairs of the new company to be formed and one of the companies to be acquired by it because of: (1) the purpose of the transaction—to assure Greyhound that its friendly connections utilized in part for its east-west through-bus operations would be preserved; (2) the terms of the agreement—whereby Greyhound, by virtue of its 40 percent ownership in the new company, and the provisions in the agreement and the articles of incorporation which, in effect require Greyhound's assent in those corporate actions requiring more than a majority approval of the stockholders, and Greyhound's right of first refusal on the sale of the new company's stock; (3) Greyhound's financial strength and (4) its right to withhold vital interline traffic.—Jefferson Lines—Purchase—Jefferson Transportation, 104 M.C.C. 497 (504-505).

Greyhound effectuated control and management of Oklahoma Transportation Company and its affiliates in violation of §5(4) and §7 of the Clayton Act in view of the total factual situation here presented. While Greyhound only controls 45 percent of the stock of Oklahoma, its 5 year option to purchase the remaining 55 percent could be used as one of several weapons held by Greyhound to keep the majority stockholders in line. Additionally, Oklahoma and its affiliates' routes are surrounded by those companies which are either complainants herein or affiliated in some way with Greyhound. Those carriers must therefore maintain friendly relations with one group or the other (or both) in order to enjoy interline traffic. Here, the sum of the elements equals control within the meaning of the Act.—Transcontinental Bus System v. The Greyhound Corp., 104 M.C.C. 524 (526-27).

Violations of §5(4): [Vols. 19, 21].—Whenever an applicant seeks authority to acquire control of a railroad after it has already acquired some measure of control without prior Commission approval, the conflict between §§5(2) and 5(4) must be resolved. Since denial of a §5(2) application because of a §5(4) violation may deprive the public of important transportation benefits, while approval of a §5(4) *fait accompli* rewards the lawbreaker, the Commission weighs the flagrancy of the violation in determining whether proposed control transaction will be in the public interest. A balancing test is applied by the Commission; and the preference for denying control authority to violators of §5(4) "will give way to a clear showing of public interest in approval" [371 US 115]; thus, mere similarity in degree of flagrancy of a violation as between cases does not decide the issue since public benefits of control may be greater in one case than in another.—Illinois Central R. Co. v. United States, 263 F. Supp. 421 (425-6)*.

While neither the negative character of considered unlawful control nor the self-imposed restraint of defendant railroad (control applicant) are relevant in determining whether there is a violation of §5(4), both factors may be considered in determining flagrancy thereof; the Commission considered them to be mitigating factors in instant proceeding; and there is sufficient evidence of record to support its conclusions minimizing applicant's §5(4) violation and maximizing the public benefit flowing from proposed control. The Commission's finding that the control application need not be denied simply because of the statutory violation, since applicant was not a flagrant violator of §5(4), was not arbitrary or in conflict with the law and is supported by substantial evidence of record; sustained.—Id., pp. 426-30.

Preceding creation of voting trust, control applicant clearly possessed the power to prevent a two-thirds majority of acquired carrier's class A stock from being voted at any stockholder's meeting, thereby blocking stockholder assent to various corporate transactions such as mergers, leases and sales. Although this power was not exercised nor was there an attempt to influence acquired railroad's management, the "power to exercise control" is within the meaning of the proscribed "control or management" and is in violation of §5(4). However, from and after voting trust was put into effect, applicant has had neither control nor power to control the affairs of considered railroad, and by its terms, voting trust was adequate to divest acquiring carrier of any power to control or manage said railroad. There is no requirement in law to hold a voting trust inadequate based on applicant's failure to obtain Commission's imprimatur prior to its effectuation rather than in the terms of the trust agreement or in its execution; however, to insure avoidance of unlawfulness carriers are advised to seek Commission's prior approval of voting trust.—Missouri Pac. R.

Co.—Control—Chicago & E. I. R. Co., 327 I.C.C. 279 (317-8, 320)*.

Further, where voting trust is irrevocable for 10 years, or until all securities are sold by bank (trustee) to person not affiliated with Mo-Pac, or until bank receives Commission's order authorizing Mo-Pac to acquire control of C. & E. I. or authorizing bank to release securities for any reason, there is no affiliation between bank and acquiring railroad within the meaning of §5(6).—Id., pp. 319, 321.

"Control" encompasses every type of control in fact as well as control effectuated by means of corporate and legal devices. Thus, where vendee's major stockholder caused vendee to assume custody of vendor's equipment and records, hired one of latter's owners (a past employee of vendee) to return to vendee's employ, negotiated a large loan for vendor, caused one of his subsidiaries to take title to vendor's terminal, and attempted to revitalize vendor's operating rights through spurious interline arrangements involving preparation of false freight bills and false equipment leases, such actions (and his admissions to the Commission's representative) constitute ample grounds for concluding that control in a common interest was effected notwithstanding fact that the revitalization plan was abandoned. Also, subsidiary's purchase of vendor's terminal constituted partial consummation of the transaction, begun prior to appointment of vendor's receiver and continued with certain modifications, without Commission approval in violation of §5(4). All such existing control over vendor's properties ordered terminated.—National Freight, Inc.—Purchase—Pittsburgh Wheeling Exp., 97 M.C.C. 642 (654-5, 663).

Although applicant proceeded to consummate considered transactions without first obtaining Commission approval as required under §5, in violation of §5(4), the Commission found that, if otherwise in the public interest, under existing circumstances approval of proposed transaction should not be withheld. Applicant had retained a practitioner, who after filing instant application, was seriously injured, and who advised applicant that if no protests were filed, Commission approval would be routine. Applicant, unable to see or talk to the practitioner, merely acted on his advice on being advised that no protests had been filed. Approved.—LaCasse—Control—Interstate Exp., Inc., 101 M.C.C. 567 (569-70)*.

Vendee's control of vendor was not in violation of §5(4), since in computing the number of vehicles utilized collectively by applicants the number of trip leases per month is divided by the number of days in the month to arrive at an aggregate daily average number, and this figure is added to the number of vehicles under permanent lease without regard to the number of times per month these vehicles were used; thus for the months preceding the assumption of control by vendee less than 20 vehicles were operated and therefore applicants were not required to seek approval under 5(10).—Sawyer Transport, Inc.—Purchase—R. C. Wilson, 104 M.C.C. 233 (245-46).

A proposed transaction, objectionable because common control by an individual or group of two or more companies providing duplicating service would result, may be approved if one company is merged into the other. Herein, because applicants indicated their intention to merge the operations of vendor Bulk Motor with those of applicants, the objection of common control is alleviated and the application is approved. —Peterlin—Control—Bulk Motor Transport, Inc., 109 M.C.C. 705 (706-7), 710).

See also B. F. Goodrich Co. v. Northwest Industries, Inc., n. 5 above; Buckingham Transp., Inc.—Control and Merger, n. 52 below, n. 110 fitness of applicants, below; Consolidated Freightways Corp. of Del.—Control, §5(4), n. 1; Red Arrow Securities Corp.—Investigation of Control, §5(2) revenues; Washum v. United States, 28 USC §2325, n. 40.

46. By a noncarrier.—[Vols. 12-19, 21].—Statute does not require that a noncarrier's acquisition of two or more carriers take place in any one day or at any one time to come within "transactions" which require Commission approval. The Commission has the expertise to examine knowingly the complex transactions involving services, rates and inter-relationships of carriers within its regulatory sphere; and facts presented, on application by a noncarrier (that had recently acquired control of one carrier without prior approval) for authority to acquire control of a second carrier, exemplify a situation which needs expert, knowing interpretation by the Commission. On the record, the Commission had ample evidence before it to conclude that proposed control of household goods carrier could not be separated from applicant's recent acquisition of another such carrier since, especially in view of the relationship between the two carriers, only a single transaction was involved; and fact that the purchases did not occur at the same time does not change that result. The Commission's denial, because only a portion of the transaction was presented for its approval, sustained.—Smyth v. United States, 293 F. Supp. 387 (391-2)*.

48. Purchase.—[Vols. 11-19, 21].—While Commission's previous order (324 ICC 1) contemplated acquisition of control through stock exchange, considered authority to acquire control by stock purchase, although changing the means, may, in fact, facilitate and assure completion of applicant's control of the Wabash system. Control of two Wabash subsidiaries by applicant through purchase of their stock, authorized.—Norfolk & W. Ry. Co.—Control—Lake Erie & F. W. R. Co., 328 I.C.C. 219 (222).

Commission approved this novel transaction wherein a railroad was purchased by a corporation formed by its employees, subject to certain conditions (see pages 94-100), inasmuch as such transaction will keep the involved railroad operative as required by public necessity.—North Western Employees—Pur.—Chicago & N.W. Ry. Co., 342 I.C.C. 58 (101-2).

On further consideration the Commission approved considered application after applicants further amended their proposed transaction: the approved modified plan involved merger of initial vendee (Transport) into Parkhill Truck Co. (commonly controlled with Transport and with similar operating rights to those of vendor); and the substitution of Parkhill as vendee. This proposal is satisfactory, since duplication of operating rights in vendee presents no problem, as under instant findings such duplications will be eliminated.—Ind-O Transport, Inc.—Purchase—Niman Transfer & Storage, 101 M.C.C. 593 (595-7)*.

Considering all circumstances, price for purchase herein does not appear unreasonable as Commission has consistently held that a price arrived at by contracting parties as a result of arms' length bargaining is entitled to great weight unless contrary is established by definitive evidence.—Consolidated Freightways Corp. of Del.—Control, 104 M.C.C. 658 (660-1)*.

Application herein approved inasmuch as the procedural defect (failure of all parties in control of applicant to join the application) which required denial in the initial report, 104 MCC 578, has been corrected.—Illinois-Calif. Express—Purchase—Ariz.—Utah, 104 M.C.C. 815 (817-8)*.

Applicant, a non-carrier affiliated with a railroad in Hawaii, was allowed to buy a truck line in Ohio. The purpose of §5(2)(b) is to protect competing motor carriers from dual competition of an all-motor service in addition to rail service. It was found that the distances involved between the rail and motor carriers prevented the normal prescription of restrictions for protecting motor carriers inasmuch as the grant of authority had not and probably will not result in undue restraint of competition and the public interest requires the proposed operation.—Propane Transport, Inc.—Pur.—Propane Transport, 109 M.C.C. 384 (387-90).

The financial results flowing out of the temporary operations conducted by vendee and the absence of provable detrimental effect to protestants warrant approval of this transaction. Although not controlling, operations under temporary authority are properly to be considered in determining whether the service resulting from our approval of a transaction under §5 will have a destructive effect.—Caravan Refrigerated—Pur.—Bilyeu Refrigerated, 109 M.C.C. 843 (855).

See also Consolidated Copperstate Lines v. United States, n. 126 below; Norfolk & W. Ry. Co.—Control—FP&E Co.—Purchase case, n. 45 above.

Conditions imposed: [Vols. 19, 21].—While the Commission need not impose restrictions stipulated between applicants and protestants in §5 transactions, imposition of proposed condition on transfer of vendor's contract carrier rights as a vessel furnisher, that vendee's chartering of vessels to noncarriers be limited to boats and barges owned by it, is warranted. There is no evidence that vendor has actively engaged in chartering vessels from other persons for the benefit of still others, thus acting as a conduit for the chartering of vessels, or that there is any need for such service which would warrant the transfer of such a right to vendee when it would result in introduction of virtually a new service in competition with that offered by protestants. Further, vendee has no desire to engage in such conduit operations, and it would be singularly anomalous to impose on it an unwanted duty to engage in operations which would provide detrimental competition to protestants.—Ingram Corp.—Purchase—Barrett Line, Inc., 324 I.C.C. 263 (269).

As conditions to its approval of involved transactions, Commission provided certain provisions as regards loan availability; protection of minority shareholders; future acquisitions; powers and limitations of trustees; payment of cash dividends; and contingent liability of vendor.—North Western Employees—Pur.—Chicago & N. W. Ry. Co., 342 I.C.C. 58 (73-93).

Since vendee's majority stockholder holds a forwarder permit, proposed purchase would result in control of vendors' operations by a forwarder, within prohibition of §411(a)(1), and may not lawfully be accomplished notwithstanding exception from that prohibition of carriers' acquisitions of control of other carriers under provisions of §5. Purchase approval is therefore conditioned to require that concurrently with consummation the forwarder permit be either canceled or, with the Commission's prior approval, transferred to another person.—Glendenning Motorways, Inc.—Purchase—Moland Bros. Trucking, 93 M.C.C. 194 (199).

In approving purchase of operating rights and acquisition of control by vendee, previously unrestricted purchase rights are restricted against service by vendee between points in Pennsylvania. If such condition was not imposed and if such operations were commenced and the bona fides thereof was challenged, time-consuming procedures, and perhaps extensive litigation would be required. However this restriction should not be construed as a bar to an application for Pennsylvania intrastate authority in the future.—Long Transp. Co.—Purchase—La Grou, 97 M.C.C. 631 (639).

In approving §5(2) purchase application the Commission held that although applicants are technically correct in declaring that vendor had no employees, it will not ignore the fact that there were "carrier" employees involved that were adversely affected as a direct result of this transaction; such employees should be afforded protection in the form of protective conditions.—Braswell Freight Lines, Inc. —Purchase—Shayler, 101 M.C.C. 1(11).

Vendee's overcapitalization does not constitute a bar to approval of proposed purchase since 50 percent of its total capitalization would be evidenced by stock, and its total investment in its wholly owned subsidiaries is included in capitalizable assets on a cost basis as compared with their net worth. Approval is conditioned however, on elimination of overcapitalization through non-payment of dividends by vendee to its stockholders or affiliated companies, and submission of evidence verifying amendment of its charter to reflect authority to issue necessary additional stock and the additional capital investment made by its new majority stockholder.—Refrigerated Transport Co., Inc.—Purchase—Kurtz, 104 M.C.C. 114 (117, 118).

Commission approved transaction herein as the question of vendee's financial fitness has been satisfactorily answered by its increased profitability and decreased deficits. Use of revenues from sale of vendor's equipment will eliminate major portion of indebtedness arising from this transaction but the Commission conditioned consummation of this transaction against vendee's declaration or payment of dividends unless the Commission finds that vendee is no longer overcapitalized.—Universal Transport, Inc.—Purchase—Muck, 109 M.C.C. 871 (879)*.

See also Eazor Exp., Inc.—Purchase—Fleet Highway Freight Case, Single-line service, below; Overnite Transp. Co.—Purchase—Rutherford Freight Lines, n. 70 below; Refiners Transport & Term. Corp.—Purchase—Mitchell Case, n. 8b above.

Denial, effect: [Vols. 12, 16, 17, 19, 21].—Commission approved transaction herein as vendor is facing potential bankruptcy and prompt sale of the involved operating rights is imperative if it is to avoid financial catastrophe inimical to the public interest.—Theatres Serv. Co.—Pur.—Dixie Highways, 104 M.C.C. 778 (782-3).

Discontinued operations: [Vols. 12-17, 19, 21].—In action to set aside the Commission's denial of plaintiffs' purchase application, substantial evidence of record supports its conclusion that proposed purchase was not shown to be consistent with the public interest when applicants (plaintiffs) failed to show that vendor had conducted active and continuous service under the purchase rights (both as to territory and commodities) and no public need was shown for vendee's operation of these rights. Record also supports Commission findings that the proposal contemplated sale of bare operating rights rather than those with active going concern value, and that their use in combination with vendee's rights would result in institution of a new competitive service to the detriment of existing carriers for which no need was shown. Denial of plaintiffs' application was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; action dismissed.—Cooper Motor Lines, Inc. v. United States, 284 F. Supp. 754 (756-8)*.

In action to set aside the portion of Commission order approving plaintiff's proposed purchase of another motor carrier's operating rights and property which required cancellation of vendor's rights in both North and South Carolina, substantial evidence supports the Commission's conclusion that vendor's rights in those States were dormant and that no need for plaintiff's rejuvenation thereof was shown. While plaintiff urges that as a matter of law dormancy exists only where complete abandonment and discontinuance of service is shown, the concept of dormancy is not so rigidly circumscribed. A lack of substantial service to a representative number of points in the area involved may establish dormancy. Of necessity the test is elastic; and, since many factors must be considered, a simple tally of the number of shipments in a given period cannot determine dormancy.—Houff Transfer, Inc. v. United States, 291 F. Supp. 831 (834-5)*.

On the evidence presented, the Commission could properly find that vendor's operations in the Carolinas were insubstantial and its authority dormant in relation to the commodities and territory authorized, to its own over-all operations, to volume of traffic available for transportation, and to the traffic handled by plaintiff under temporary authority; also, substantial evidence supports its ultimate finding that public interest would not be promoted by authorizing plaintiff, through purchase of the rights, to institute new, unnecessary service. Thus, viewing the underlying facts in terms of vendor's insubstantial services or in terms of dormancy of its rights, it was not necessary to show that it had abandoned and discontinued service in those States. Considered as a whole, the record supports the Commission's decision that consistency with the public interest required cancellation of the dormant North and South Carolina rights as a condition to approving purchase of vendor's rights in other areas. Accordingly, since neither abuse of Commission discretion nor error of law is shown, the complaint is dismissed.—Id., pp. 835-7.

On review of all cases cited in action to set aside Commission orders denying plaintiffs' motor carrier purchase applications because the purchase rights were dormant, the court finds dormancy to mean an abandonment or termination of services the reactivation of which will result in damages either to the public interest or to intervening or protesting carriers who conducted operations during interruption of such services. The Commission's denial was based on its findings that operations ceased after first sale of the rights by bankrupt vendor's trustee and, concomitantly, an intent to resume operations in the future had no bearing on the fact of past dormancy, and that plaintiffs did not prove need for reinstitution of service thereunder; however, in 104 MCC 274, the Commission stated that dormancy is not an inflexible concept but, rather, one that must be evaluated in light of all surrounding circumstances and, in that connection, it is particularly significant that dormancy has never been applied to a temporary cessation of operations alone.—Arrow Transportation Co., Inc. v. United States, 300 F. Supp. 813 (815, 817-8)*.

While the Commission must be satisfied that operating rights sought to be transferred in a §5 proceeding were in actual use and not dormant, the court cannot ignore fact that, unlike cases in which dormancy was found and applications denied, there were no protestants in plaintiffs' application proceeding who testified as to existence, kind, and availability of their services. On the instant record, denial of the applications would serve no public or protestant interest; protestants offered no evidence to show that approval would cause them any harm, whereas interests of plaintiffs, their shippers and connecting carriers, and the creditors of bankrupt vendor heavily weigh the scales in plaintiffs' favor. Moreover, with respect to the law of dormancy as interpreted and applied by the Commission, an improper standard of law was improperly applied. Therefore, the Commission's conclusions must be set aside and the cause remanded for a hearing de novo in keeping with the court's opinion.—Id., pp. 817-8.

Densely populated off-route points at relatively far distances from vendor's regular routes have characteristics of principal or terminal points. As no shipments are shown to 9 of 13 such points in Maryland and Pennsylvania and only one each to the other 4, rights to serve those points must be considered dormant, notwithstanding substantiality of vendor's operations as a whole. No need is shown for vendee's service from 11 of those points, and limited shipper support does not justify revival of general-commodity operations from so large a community as Hagerstown to the wide territory involved. However, Cumberland shipper ships chemical products in vast quantities to applicants' territories and, if addition of vendee's service would overcome the deficiency in existing common carrier service, volume tendered such carriers might increase substantially. Approval is therefore conditioned on cancellation of authority to serve the 12 points other than Cumberland, with latter service restricted to shipments to and from points on the unified routes in North Carolina and authorized territory south thereof.—Carolina Freight Carriers Corp.—Purchase—Kilgo, 93 M.C.C. 543 (553-5)*.

And on reconsideration, following District Court's remand for further findings and conclusions on question of vendee's right to continue to serve Pittsburgh as a off-route point in conjunction with vendor's regular route between Kings Mountain, N. C., and New York City, vendor's abstract showing 5 Pittsburgh shipments is stated to be a 10 percent representative sampling over a 6 month period which, by normal projection, becomes 50 shipments. While that may not be so "substantial" as the traffic of other, more-active carriers, it is sufficient to negate any idea of dormancy or abandonment by vendor, and it may be found to have constituted reasonably active and continuous service. In addition, testimony of six shippers concerning their need for various types of service between Pittsburgh and the Carolinas, Georgia, and Florida is considered as augmenting and supporting prior Commission decision to authorize vendee to serve Pittsburgh under the unified rights, restricted to traffic to and from the four named southern States, on the basis of prior active service. Prior report clarified and affirmed.—Id., 104 M.C.C. 188 (191-2)*.

Since all but a minor portion of vendor's certificated charter rights are dormant, reactivation thereof by vendee would be inconsistent with public interest when there is no showing that existing regular-route passenger carriers, who have properly extended their services and facilites under the permissive authority of §208(c), are not satisfactorily meeting the public need for charter service in the area embraced by vendor's operating rights. As it is doubtful that the remaining rights would be of any significant value to vendee and its plans for future operations, especially as its parent company already holds authority under the incidental charter rights to provide all service that vendee could render under the small segment of vendor's rights found not to be dormant, and there is no indication that the transaction would be consummated on terms other than unconditional approval, purchase is denied in entirety.—Eagle Charter Bus Service, Inc.—Purchase—Eagle Bus Lines, 93 M.C.C. 705 (709-10).

Concerning irregular-route vendor's seasonal movement of canning materials and supplies, the Commission is cognizant of the fact that such traffic is generally not repetitive and continuous; consequently movement of a full range of authorized commodities in connection with every origin and destination area cannot be expected. Record supports conclusion that vendor's operations have been substantial and continuous.—H. C. Gabler, Inc.—Purchase—H. Earl Pitzer, Inc., 97 M.C.C. 535 (539).

In approving §5 purchase application, the Commission rejects protestants' contention that vendor's authority to serve intermediate points on its regular routes was dormant; evidence disclosed, that while vendor's service at those intermediate points had been substantially less active than at larger points it was authorized to serve, the limited service performed is sufficient to warrant a finding that the intermediate-point rights are not dormant.—Overnite Transp. Co.—Purchase—Rutherford Freight Lines, 97 M.C.C. 568 (575).

Irregular-route vendor's operating rights, territorial and commodity, which on basis of his past operations, both before and after negotiations with vendee were begun, are not dormant and purchase thereof is approved. And in determining the scope of vendor's past operations, evidence of operations built up after commencement of negotiations may be considered if it is clear that such build-up was free from prospective purchaser's control, influence, and domination.—Miami Transp. Co., Inc., Of Ind.—Pur.—Strothman, 97 M.C.C. 600 (604).

On reconsideration, since the test under §203(a)(15) that shipper must have a "distinct need" for a service is not the same as the §209 test of whether "public convenience & necessity" require the service, revitalization and transfer of a portion of contract-carrier rights found to be dormant in prior report is deemed to be consistent with the public interest when record shows that vendee's specialized, tailored service thereunder would meet individual needs of the two supporting shippers (currently being served by vendee on other traffic), whose operations are expanding, for a complete service under considered portion of vendor's rights.—H. Prang Trucking Co., Inc.—Purchase—Hyer Trucking, 97 M.C.C. 611 (614)*.

Sale of household goods authority approved, despite vendor's failure to show service to all its authorized points and combinations thereof. Since the transportation of household goods is a highly specialized service as compared to ordinary general commodity operations, the Commission does not require the same degree of proof of regularity of operations as is required with respect to transportation services unrelated to the household goods industry; issues of dormancy or sporadic operations are considered in light of the special problems encountered, with considerable weight being given to evidence of operations by a carrier commensurate with its facilities and financial abilities. Therefore, since record clearly shows that vendor actively solicited traffic to the best of its ability and that, despite limited operating facilities, it was able to show service to most of its authorized territory, any finding of dormancy with respect to vendor's rights precluded under standards applied to household goods operations.—Republic Van & Storage Co. —Purchase—Consolidated Van, 101 M.C.C. 93 (97-8).

As the record shows definite shipper interest and need, it is in the public interest to permit reestablishment of, and vendee to purchase, vendor's dormant operating rights. And although vendee motor carrier is controlled by a railroad, there is no indication that this transaction will unduly restrain competition, cause parent railroad to compete with itself or invade territory of other carriers; therefore, special circumstances exist to permit unrestricted motor carrier operations. Furthermore, although affected shippers are aware that parent railroad is controlled by another area shipper, they still strongly endorse this application. Thus, while the Commission generally denies an application where discrimination might result from a common control relationship between applicant and a controlling shipper, considered transaction approved.—McCloud River Trucking Co.—Purchase—Zamboni, 101 M.C.C. 131 (134-6)*.

In §5 purchase application where vendor's operations before entering into negotiations for sale thereof were substantially limited and then reestablished after its owners decided to sell, the Commission held that a carrier has the right to build up all or any portion of its operation, whether in anticipation of a sale thereof or otherwise, so long as it does not come under the unauthorized control, influence, or dominion of another carrier in doing so.—Associated Truck Lines, Inc.—Purchase—Marion Trucking, 101 M.C.C. 329 (355).

Although authority for vendor to purchase considered motor operating rights between Boston and Lawrence, Mass., was granted in 1959 and authority to purchase the other operating rights herein considered between Boston and Rochester, N.H., was granted in 1963, fact that operations under these rights (between Boston and Rochester via Lawrence) were not initiated by vendor until February 1964 is of little consequence in view of its active and continued operations thereafter, even though considered application was filed in February 1964. Absent proof that vendee participated in the revitalization of such rights, a vendor may stimulate or reactivate its rights for the purpose of sale.—Eastern Massachusetts Street Ry. Co.—Lease—Trailways, 101 M.C., 410 (413).

Under criteria laid down in proceedings which involve the transfer of irregular-route, special-commodity rights where questions of dormancy are at issue, a representative showing of service is necessary to support a finding that the questioned operations have been active; but a showing of transportation activity in all the territory involved is not required. The test of substantially is a flexible standard which should take into consideration the nature of the rights and the area of operation. And, as the nature of the commodity or service becomes more narrowly confined or specialized, greater leniency may be exercised in determining whether substantial operations were conducted within the authorized territory; and, in matters such as these, repetitive or continuous traffic between each and every origin and destination point or area cannot be expected.—Lester C. Newton Trucking Co.—Purchase—Buglio, 101 M.C.C. 480 (483)*.

Thus, it is the Commission's opinion that with few exceptions the over-all operations performed by vendor, viewed in light of its size and history are sufficient to negate any contention of dormancy. While there is evidence of scant movement inbound to New Jersey, the nature of vendor's inbound rights in relation to its over-all service, the variable origins, and the seasonal nature of the transportation services required for the considered commodities are such that it would be inappropriate to dismember the rights to the extent of leaving in effect authority to conduct only one-half of a complete service. Vendor's authority to New Jersey points is generally from the same origins served outbound as destinations and embraces primarily the commodities used by the same food processors served outbound.—Id., p. 485.

Moreover, in light of vendee's temporary lease of vendor's operations, the effect of this transaction on competing carriers would be minimal. Vendee, prior o the commencement of temporary lease operations, participated in joint service involving shipments from Salisbury, Md., Philadelphia, Pa., and New York, N.Y., to points in Pennsylvania, New York, Massachusetts, Connecticut and Rhode Island. And unification of vendor's operating rights, as exemplified by operations conducted under temporary authority, would permit a continuation of such transportation in single-line operation, resulting in an improved, rather than a new, service.—Id., pp. 485-6.

In purchase proceeding involving question of dormancy of part of the purchase rights, the main issue is the scope of operations under vendor's rights. Although exhibits reflect mostly shipments moving after negotiations between the parties had begun, and, as to a portion of the operations, even after the contract was signed, there is no evidence that any of that traffic was the result of any control, influence, or domination of vendee; thus applicants' exhibits are entitled to full consideration.—Leonard Bros. Transfer, Inc.—Purchase—Ace—R. B. Van Lines, 101 M.C.C. 649 (651).

And though one exhibit consisted of trip manifests, rather than an abstract supported by freight bills, it was entitled to full consideration in refuting an allegation of dormancy when it consisted of records kept in the ordinary course of business. In addition, shipments moving through a gateway point are entitled to consideration; fact that no movements were shown to have originated or terminated at that point is of no importance.—Id., pp. 652, 653.

Where the record establishes that little or no service has been conducted under portions of vendor's rights, the mere holding out for, and solicitation of, traffic by vendor is not sufficient in and of itself, to obviate a finding that those rights are dormant. Evidence of past operations, coupled with shipper testimony establishes need for continuance of vendor's service as to certain segments of the purchase rights; however, absent other evidence of public need, cancellation of dormant portions of applicant's operating authority is warranted to preclude detriment to the operations of existing carriers who have been performing similar service to the public and to prevent the possible creation of a surplus of transportation in the areas involved.—Refrigerated Transport Co., Inc.—Purchase—Kurtz, 104 M.C.C. 114 (123).

Vendor-lessee's operations do not merit being considered as unlawful leasing of operating rights and therefore dormant despite the technical violation that inspections of lessor's vehicles at the point of interline were performed by an employee of lessor; the evidence does not disclose that vendor's sole stockholder was aware of the inspector's employee relationship with lessor and apparently vendor had relied on lessor, an established motor carrier, that the inspector was a person who could perform the equipment inspection on behalf of vendor. Further, mitigating circumstances are present in that the stockholder of vendor lacked familiarity with the motor carrier industry and there is an absence of any evidence of willful or deliberate intent to evade motor carrier regulations.—Sharpe Motor Lines, Inc.—Purchase, 104 M.C.C. 127 (132-33).

In light of the number of shipments handled by vendor and considering its limited facilities and the restricted scope, territorially, of its operating rights, vendor has rendered a continuous competitive service to the extent traffic was available at a representative number of points within its territory.—Interstate Motor Freight System—Purchase—Eaton Truck, 104 M.C.C. 248 (254-55)*.

On reconsideration, vendor's operating rights are found to be not dormant, in view of the unique factors surrounding its past operations: the sporadic nature of vendor's operations between 1958 and 1964 is explained and mitigated in some measure by the fact that the federal government is the sole purchaser for the commodities involved, that service for that purchaser hinges on an ability to outbid other carriers and that the phasing out of purchases has resulted in the closing of six of the nine sources of supply; post-1964 operations were conducted by vendor under a lease arrangement with vendee that has not been shown to be other than bona fide, and does not constitute a revitalization of long-interrupted services with a view toward activating a certificate for purposes of a §5 transaction.—Moab Truck Center, Inc. —Purchase (Portion)—W. T. Hall, 104 M.C.C. 274 (277-78)*.

To overcome apparent dormancy, applicants must show a real need for service and not just a preference for the service of applicants. Testimony of shipper failed to indicate that adequate service was difficult to secure from other carriers including protestant, or that the service offered was inferior, the supporting shipper merely indicated preference for vendee's service. Denied.—Ruffalo's Trucking Service—Purchase —Worster, 104 M.C.C. 593 (597-8).

A highly specialized carrier is not expected to show extensive operations under any particular grant of authority, but portions under which no operations at all have been conducted are dormant and should be canceled absent a showing of shipper need therefor. The burden was on applicants to identify the segments to which shipments in its abstract pertained or show need for inactive rights, which they did not do. While individual segments will not be fragmented as to territory or commodities, totally dormant segments must be canceled as a condition to approval.—Chemical Leaman Tank Lines,, Inc.—Pur.—Ryder, 104 M.C.C. 686 (700-703).

Intermediate points between Louisville, Ky. and Nashville, Tenn., (with two exceptions) cancelled as a condition to approval based upon evidence by protestants, two small distribution carriers, that vendor did not serve the intermediate points but rather interlined with them for service to those points, a practice that had been discontinued when vendee took control of vendor under temporary authority.—Theatres Serv. Co.—Pur.—Dixie Highways, 104 M.C.C. 778 (780-781).

Where vendor has suffered economic setbacks and daily faces loss of equipment through repossession by chattel mortgage holders such factors may be considered in the determination of rendition of substantial operations under the rights sought to be transferred. Under such circumstances vendor's showing of activities consisting of 326 shipments within Texas in cited period is adequate to meet the requirement. Such service may include service to a single large point. Approved.—Red Arrow Frt. Lines, Inc.—Purchase—Galveston, 104 M.C.C. 820 (823-4).

Where vendor is shown to be serving the supporting shipper under recently granted specialized authority, the test of substantiality should not be applied too stringently.—Northern Motor Carriers, Inc.—Purchase—Bonded, 109 M.C.C. 61 (66)*.

Although most of involved traffic was in one direction, 91 percent interchanged at Milwaukee, and 54 percent of single-line shipments were less than 10,000 pounds each, vendor found to have rendered service consistent with its abilities and resources and its rights may not be considered dormant. Substantial support of shippers, freight forwarders and motor carriers for continuation of vendor's services a factor in considerations. Transfer of such rights approved.—Schneider Transport & Storage, Inc.—Pur.—Lavery, 109 M.C.C. 479 (483-4).

Protestant's allegation, that vendor's authority had long been dormant, and that his service had been reinstituted as a result of the influence and domination of the vendee, found to be without merit. Applicants have shown that they are free from domination by vendee by showing that they have conducted an independent, although coordinated, operation. Approved.—Old Colony Transp. Co.—Pur.—Holden, 109 M.C.C. 487 (492-3).

Vendor testified it had handled two household goods shipments in the past two years but did not have available any supporting documents evidencing such shipments. Commission concluded that evidence of two shipments during a two year period, even if properly supported by underlying documents, did not indicate active utilization of the involved rights. Accordingly, approval of the transaction was conditioned upon cancellation of vendor's household goods authority.—Dodds Truck Line, Inc.—Purchase—Handy, 109 M.C.C. 533 (534-5).

Finding of dormancy not warranted herein as vendor's operations under household goods authority had been commensurate with their ability and resources and had been continuous for 40 years until ill health forced owners' retirement and sale. Purchase approved.—Weathers Bros. Transfer Co., Inc.—Purchase, 109 M.C.C. 647 (651-2)*.

Commission held, with respect to vendor's retained rights recommended to be cancelled, that the issue was not whether movements over the routes could be moved "logically", but rather, whether the test of substantial operations, stated in *New Dixie*, 75 MCC 659, had been met. Commission found that evidence of vendor's past operations successfully met such test and it was unnecessary to pass upon the question of cancelling retained rights which did not create a duplicate rights situation. Approved.—Yellow Freight System—Pur.—Norwalk Truck Lines, 109 M.C.C. 672 (674-6).

Where a carrier has been conducting active and continuous operations throughout its authorized territory, it is not compelled to submit evidence of service to and from all authorized points in its service area to justify a conclusion that such operations have been of a substantial and continuous nature. See *O'Donnell's*, 104 MCC 161, record of applicant herein is sufficient to disprove a finding of dormancy. Purchase approved.—Mid-American Lines—Purchase—Five J Motor Service, 109 M.C.C. 753 (756).

Commission found rights sought to be purchased were dormant and vendee did not produce sufficient shipper testimony of a public need for the proposed service to warrant reinstitution of dormant operations which is, in effect, not unlike the institution of a new service.—Arkansas-Best—Purchase—Indianhead, 109 M.C.C. 885 (889).

See also Fogarty Bros. Transfer—Purchase—Transport Van Lines, n. 115, below. Refrigerated Transport Co., Inc.—Purchase—Kurtz, n. 115 below.

Dual operations: [Vols. 14, 16, 18, 19, 21].—Recently organized corporation's purchase of vendor's contract carrier rights cannot be approved when, immediately upon consummation of proposed transaction, management of vendee would be assumed by one stockholder who currently holds common carrier authority to transport the same commodities in the same general area. Although, in some cases where objectionable aspects of resulting dual operations could thereby be minimized or removed, restrictions have been placed on operating rights involved, common carrier's requested cancellation of part, and restriction of part, of his authority would not satisfy requirements of §210, would be inconsistent with his duty to serve the public to extent of his certificate, and, also, would complicate enforcement by the Commission.—Milton K. Morris, Inc.—Purchase—Morris, 97 M.C.C. 544 (545, 547-8).

Dual operations approved inasmuch as the named cement producer served as a contract carrier is not and could not be considered a potential consignee or customer for such limestone to be transported under common carrier authority as the said limestone is economically and chemically unacceptable to the cement producer. Because this commodity is different from those transported under Northern's permits, and operations will not be conducted for the same shippers, there appear to be no opportunities for discriminatory practices.—Northern Motor Carriers, Inc.—Purchase—Bonded, 109 M.C.C. 61 (64)*.

Interchange: [Vols. 19, 21].—Purchase application (MC-F-10077) embraced herein was denied inasmuch as vendee had not interlined with vendor in the past nor with any other authorized carrier operating over the routes between the points sought to be purchased, vendee Bruce Motor Freight's use, in connection with its authorized operations, of those routes, if acquired, would be so dissimilar to operations performed in the past by vendor as to amount to the institution of a new competitive service by vendee, without public support. East Tex. Motor Frt. Lines—Purchase—Lee, 109 M.C.C. 299 (311-2).

Intrastate operating rights: [Vols. 12, 14, 15, 17, 19, 21].—In approving interstate carrier's purchase of rights and property of Tennessee intrastate carrier that conducts interstate operations under certificate of registration and directly related §207 application for grant of certificate to vendee to continue vendor's operations and service the Commission held that close business relationships do not conclusively show that two carriers are managed in a common interest by their owners.—Mason & Dixon Lines, Inc.—Purchase—Volunteer Motor, 97 M.C.C. 780 (795).

In a §5 proceeding to acquire interstate operations performed by vendor under §206(a)(7), and to convert them to certificated operations, scope of the operations that can be performed under the underlying intrastate rights should not be changed if such authority and the interstate service being performed thereunder affords support for the issuance to vendee of a certificate of public convenience and necessity corresponding to the intrastate operations being purchased. On the other hand, scope of the operating authority to be reflected in such a certificate issued to the vendee should not exceed the scope of the operations authorized by vendor's intrastate authority. In addition, as in the case of operations under partial exemption of former second proviso of §206(a)(1), scope of the actual interstate operations performed by vendor must be examined to assure that the certificate issued to the vendee does not exceed the scope of the actual past lawful operations. Purchase approved.—Lake Shore Delivery, Inc.—Purchase—Durst Delivery, Inc., 97 M.C.C. 623 (627-628).

Applicants' contention that the Commission should be governed in its determination of this application by the Alabama Commission's approval of the transfer to vendee of vendor's underlying intrastate authority, which supports considered interstate authority, is without merit. Any action by the Alabama Commission respecting the transfer of intrastate rights is not controlling or determinative of any action before this Commission in proceedings of the nature here involved.—Eagle Motor Lines, Inc.—Purchase—Victory Frt. Lines, Inc., 101 M.C.C. 368 (372)*.

Separation of operating rights is no ground for denying the transaction if the parties responsible for the separation are not before the Commission; thus vendor's prior sale of its intrastate rights to Apex Fast Freight, Inc., is not grounds for denying the proposed purchase of vendor's interstate certificate because vendor is no longer controlled by the party who was in control at the time of the sale of its intrastate rights.—Interstate Motor Freight System—Purchase—Eaton Truck, 104 M.C.C. 248 (257-58)*.

Situation wherein sale by vendor of corresponding intrastate operating rights to another which had been registered under the second proviso of §206 (a) creating duplicate operations was eliminated by the repeal of the second proviso. Procedural safeguards now exist to prevent the registration of newly acquired intrastate operating rights by a one-State carrier until the State Commission finds that public convenience and necessity demands their use in interstate service also which decision is subject to review and countermand by this Commission.—Illinois-Calif. Express—Purchase—Ariz.-Utah Express, 104 M.C.C. 578 (585-7).

Reformation of operating rights into consolidated route description found justified to avoid the imposition of a confusing restriction, and the transfer of two separate segments of involved routes.—Schneider Transport & Storage, Inc.—Pur.—Lavery, 109 M.C.C. 479 (484).

Operating rights: [Vols. 14, 16, 18, 19, 21].—Commission authorized the transaction herein, finding that vendor's retention of irregular-route authority, similar to a portion of its regular-route authority to be sold, by virtue of its continuing control of its subsidiary would not be violative of the public interest inasmuch as the rights of the two carriers were not merged, and their operation was separate and distinct over the routes in question.—Fredrickson Motor Express Corp.—Purchase—Cope, 104 M.C.C. 670 (673-4).

Public Interest: [Vols. 14, 19].—In determining whether approval of purchase application would be consistent with the public interest, the interest of carrier employees is only one of matters to be considered. While protesting union alleges that the public interest would not be served by permitting non-union vendee to acquire operations and facilities of vendor, a unionized carrier, because vendee's possible past participation in anti-union activities makes it "unfit", such a finding would not be justified even if the alleged activities were proven. In any event, in view of vendor's declining traffic and revenues and its substantial deficits which, if continued, could only result in its demise as a carrier, the Commission cannot determine how denial of the application could be consistent with the overall public interest, including that of vendor's employees. Moreover, no weight may be given to union's offer to negotiate on lessening of labor costs in order to permit vendor to stay in business when record does not show how such reduction would be accomplished or how it would alleviate vendor's financial condition or restore its declining traffic and revenues. Approved.—Overnite Transp. Co.—Purchase—Rutherford Freight Lines, 97 M.C.C. 568 (575-7).

Proposed purchase of Alton & S. R. Co. (A&S), a terminal and switching carrier, by the Missouri Pac. R. Co., subject to the inclusion of three named carriers, was approved as such purchase would ensure continuation of vendor's interchange operation which is of critical necessity for shippers, railroads, and the general public in the maintenance of a sound transportation system. However, the sole ownership of the A&S by St. Louis SW Ry. Co. (SSW) as a separate corporation is not in the public interest as A&S would become an extension of the purchaser's line thereby according SSW a definite detrimental competitive advantage over other railroads using A&S's terminal line services; denied.—St. Louis SW Ry. Co.—Pur.—Alton & S. R., 331 I.C.C. 515 (533-35).

Dual ownership of terminal lines which act as agents for owner line-haul carriers is not uncommon *(Toledo,* 295 ICC 523). Such dual ownership resulting from approved purchase herein does not produce a conflict of interest as would derive from ownership by one railroad in two or more competitive line-haul carriers.—Id., p. 538-9.

Routes: [Vol. 19].—The exception to the hearing examiner's recommended report by the applicant was used to amend the request for authority, seeking to cancel that portion which resulted in duplications. Protestants were consulted prior to filing of the exceptions, and did not file replies. It was found that the proposed amendment cured the objections of the hearing examiner to the transaction. Approved.—Red Star Express Lines of Auburn—Purchase, 109 M.C.C. 51 (52-3).

On reconsideration, Commission approved transaction herein inasmuch as the realities of the situation and paramount public interest in continued efficient and economical operations permit vendor's retention of the segments not duplicated by service routes sold to vendee or acquired from a carrier controlled by vendor. Findings conditioned upon consummation of merger authorized in another proceeding.—Rumpf Truck Line, Inc.—Pur. (Portion)—Dundee Truck, 109 M.C.C. 893 (901)*.

Single-line service: [Vols. 12, 14, 16-19, 21].—On reconsideration of an appellate division's decision, the entire Commission found that "joinder" restriction, prohibiting with exceptions the tacking of vendor's operations to those of vendee, should be eliminated. The evidence clearly shows that, as a result of intensified competition evolving from the conversion of joint-line to single-line service, the compensatory benefits which the public will derive outweigh any possible detriment that might be incurred by the protestants. Furthermore, the Commission noted that restrictions against the joinder of operating authorities are cumbersome and lead to undesirable complications and to justify imposition of such a restriction opposing carriers must show that its nonimposition would have a material adverse effect upon their operations.—Eazor Exp., Inc.—Purchase—Fleet Highway Freight, 101 M.C.C. 719 (722, 25)*.

See also Lester C. Newton Trucking Co.—Purchase—Buglio Case, *Discontinued operations* above.

Speculation: [Vol. 21].—Vendor's sole stockholder, a certified public accountant, is not a regular or professional trafficker in operating rights despite admissions that he acquired vendor's stock for investment and resale. Such admissions suggest an unawareness of the Commission's attitude respecting trafficking or that buying or selling of motor carriers differs from purchase and sale of unregulated businesses. Further, his honest and bona fide attempt to operate vendor negates the charge of trafficking regardless of the slightly tainted interline arrangements entered into between vendor and protestant's predecessor.—Sharpe Motor Lines, Inc.—Purchase, 104 M.C.C. 127 (132).

Violation of Act: [Vols. 13-15, 19, 21].—Since the Commission's jurisdiction under §5 extends to all phases of the transaction, including sale of vendor's floating equipment and real estate holdings, and not merely to transfer of its water-carrier permit, consummation of sale of the physical properties without prior approval violated §5(4). However, as vendee apparently acted in good faith under a misinterpretation of §5 and has confined its operations with vendor's equipment to exempt towage and exempt charters, the violation does not justify denial.—Ingram Corp.—Purchase—Barrett Line, Inc., 320 I.C.C. 263 (266, 267, 268).

Past violations are not in all circumstances a bar to approval of §5 applications and the significance thereof depends on their quantity, duration, and nature. Record of frequent violations by vendee and its major stockholder, which spans many years and involves misrepresentations to the Commission, rate concessions, unauthorized operations, and leasing and inter-change infractions, clearly shows (1) that vendee's many violations of the Act and regulations were committed willfully and (2) that actions of its stockholder demonstrated flagrant disregard of the law and the Commission's authority. While there is some indication of recent improvement, corrections were apparently for purpose of facilitating pending applications and the record does not justify relying on the promises of future good faith conduct; under the circumstances, withholding approval of purchase applications is not punishment for past misdeeds, but rather to protect the public from the risks and dangers of expanded operations by vendee. Denied.—National Freight, Inc.—Purchase —Pittsburgh Wheeling Exp., 97 M.C.C. 642 (656-63).

The record clearly shows that purported interline operations between applicants were not, as contemplated by the leasing rules and regulations, for the purpose of augmenting vendor's equipment in order to transport traffic it developed, but rather a method by which vendee could transport traffic generated by it pursuant to an unlawful fictitious leasing of vendor's operating rights in violation of §5(4). These operations were preceded by negotiations between applicants; and they were performed under circumstances where vendee was contacted by shipper desiring service to vendor's territory, and, in certain instances, where shipper was referred to vendee by vendor. Furthermore, vendee furnished all tractors and trailers, furnished the drivers, paid their salaries, and bore the cost of equipment inspections. Denied.—Eagle Motor Lines, Inc.—Purchase—Victory Frt. Lines, Inc., 101 M.C.C. 368 (373-4)*.

50. Leases.—[Vols. 11-19, 21].—Due to insufficient information in pleadings as to whether or not lessee is a carrier within the Act, employee union's complaint, alleging that railroad's lease agreement for lessee's operation of its piers, without Commission authority under §5(2), constitutes an abandonment of a rail line in violation of §1(18), presents no issue shown to be within the Commission's jurisdiction. Normally, the Commission will not entertain an application under §5(2) where one of the parties is a noncarrier; and if it is assumed noncarrier lessee is controlled by lessor railroad, the lease transaction still would not be subject to commission's jurisdiction. Complaint dismissed.—Brotherhood of Ry. S. S. Clerks v. Reading Co., 328 I.C.C. 11 (12-13).

Commission found defendant dock company to be a common carrier and therefore found that certain leases between it and its affiliated rail carrier were unlawful due to absence of the required Commission approval under §5(2). Further, leased tracks in question were not switching tracks exempt from the requirement of Commission approval because services on said leased tracks are an essential movement. constituting a continuation of a through journey in interstate or foreign commerce and are thus not switching tracks within meaning of §1(18). Cease and desist order entered.—United Transp. Union v. B & LE and P & C, 342 I.C.C. 849 (857-58).

Following discussions in *Drum*, 368 US 370, and *Lovell*, 92 MCC 728, respondent carrier has not unlawfully leased its operating rights to transport steel; although the steel division is a separate corporate entity, it is not utilizing respondent's operating rights without Commission approval under arrangements which in effect amount to an unlawful lease of respondent's operating rights. In determining who in reality is performing the transportation service, the so-called test of "substance" is applied to the arrangements between the parties to ascertain whether the purported carrier assumes in significant measure the characteristic burdens of the transportation business; the overall test is one of "substance," involving an evaluation of all relevant factors and neither financial risk nor any other single factor is by itself conclusive.—Gateway Transp. Co. Inc., Investigation and Revocation, 106 M.C.C. 61 (64, 66-7).

Due to illness of the owner, operations of the carrier to be leased were conducted under temporary authority by the owner's husband who is also the owner of a separate motor carrier. Such temporary authority was justified by owner's illness, did not constitute unlawful control, and resulted in the continuance of a needed direct single-line service without adverse effect on protestants. Absent evidence of such adverse effect, Commission concluded that application herein should be approved.—Bilyeu—Lease—North Central Truck Lines, Inc., 109 M.C.C. 834 (838).

See also Manufacturers Hanover Trust Co. v. United States, n. 52, below. Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger Case, n. 52, below; Sharp Motor Lines, Inc.—Purchase, n. 48, above.

52. Mergers.—[Vols. 11-19, 21].—Supreme Court affirmed the judgment of the district court at 279 F. Supp. 316 sustaining the Commission's approval of the Penn Central merger and the inclusion of three "protected" railroads into the Norfolk & Western system. However, the order was modified to permit the Reading R. Co., based on actual experience, to petition for protection conditions.—Penn-Central Merger Cases, 389 US 486 (498-526)*.

Supreme Court reversed the Commission's findings in this proceeding as regards the valuation of the Harlem River and Oak Point, N. Y. rail yards; the cost of abandonment delay; discount for bulk sale; discount for present worth; and the plan requiring Penn Central to underwrite until 1978 the stocks it had given for the New Haven properties. Commission was sustained in its other valuation determinations.—New Haven Inclusion Cases, 399 US 392 (435-489)*.

District court held there was adequate evidentiary basis for Commission's finding that consummation of merger between first and third largest railroads in northeastern United States upon prescribed conditions which would include financial indemnity to certain weaker railroads would be in public interest and that there was no basis for an injunction of such merger—Erie-Lackawanna R. Co. v. United States, 279 F. Supp. 316 (352-6)*.

Plaintiff cannot be granted the relief requested in its action seeking an order requiring defendant railroad to engage in good faith negotiations with plaintiff on terms and conditions for its inclusion (that was approved by the Commission) in the Penn-Central merger and to cease alleged economic harassment of plaintiff and, also, requiring immediate physical consummation of the merger with financial terms to be agreed on later. The Commission's order contemplated that the parties would negotiate terms and conditions for plaintiff's inclusion in the merger and if they could not agree, apply to the Commission to fix such terms and conditions; it did not prescribe a pattern or procedure for negotiating, or even require that agreement be reached. Furthermore, on the facts of record, preliminary relief sought cannot be granted because sharp issues are presented by conflicting affidavits as to whether there has been disobedience to the Commission's order.—New York, S. & W. R. Co. v. Penn Central Co., 287 F. Supp. 704 (705-6).

Moreover, while there may be merit to plaintiff's contention that defendant, by the alleged refusal to negotiate in good faith and alleged harassment, is endeavoring to squeeze plaintiff into an unfavorable bargaining position, to order good faith negotiations and cessation of alleged harassment would probably be both ineffectual and futile, especially since defendant's affidavits claim good faith negotiations and that its conduct in other respects was reasonable, not an harassment, and not prompted by any intent to harass. Since The Commission's order provided a forum for plaintiff in the event terms and conditions of the merger were not agreed upon, plaintiff's remedy is to ask the Commission to fix terms and conditions of the acquisition. And grant of plaintiff's request for immediate physical merger with financial terms to be subsequently worked out would be inconsistent with interests of third party railroads not before the court, and might subject them to diversion of traffic if immediate consummation is ordered. Plaintiff's motion for preliminary relief, denied.—Id., p. 706.

Proposed merger of Pittsburgh & L.E.R. Co., a New York Central subsidiary, into a new Delaware corporation of the same name, and merger into latter of Pittsburgh, McK. & Y. R. Co., at present jointly controlled by Old P & LE and Central, approved. Among principal advantages of the transaction, in addition to corporate simplification, are applicability of the more modern and clearly defined General Corporation Law of Delaware instead of railroad corporation laws of Pennsylvania and Ohio which now govern Old P & LE's affairs, and accrual to New P & LE of a tax benefit approximating $135,500, representing one-half of P McK & E's depreciation charges for 1965.—Pittsburgh & L.E. R. Co. Merger, 320 I.C.C. 198 (203).

Where railroad system is or should be operated in competition with other carriers, its power to control or substantially influence the management of such other carriers through preferential routing of traffic or otherwise should be restricted. Thus, in view of substantial stock holdings, the widespread holdings of the remainder of stock of survivor in proposed merger transaction (the Norfolk & Western), and the historical posture of and close management relationships between the Pennsylvania and the N&W,

the former has the power to control the N&W and is in a position to extend its control over the proposed system. Moreover, the Pennsylvania now controls the Wabash, which seeks inclusion in the merger, and together with its power to control entire N&W system proposed, it is able to influence routing of substantial traffic over new N&W system to the detriment of other carriers; the Pennsylvania must be completely divorced from that system and have all its interests therein terminated.—Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 324 I.C.C. 1 (32-4).

Further, if Pennsylvania's influence over N & W is eliminated, the merger of the Nickel Plate into Norfolk & Western and other transactions proposed in connection therewith are in the public interest without the inclusion of any other railroad or without the consolidation of proceedings with any other unification proceeding pending. While the Transportation Act of 1940 relieved the Commission of its duty to initiate consolidations and left such function completely in the hands of the carriers, in considering railroad's petition for inclusion in merger and control transaction, the statute does not limit its participation to passing upon a proposal on a take-it or leave-it basis; however, the Commission is specifically enjoined to consider, among other things, the effect of considered transaction upon adequate service to the public and effect upon public interest of the inclusion or failure to include other railroads. To allow full exploitation of plans voluntarily developed by the parties and to afford the fullest protection to the public interest required by §5(2)(c), and (d), the Commission's jurisdiction is reserved for 5 years to permit interested railroads to petition for affiliation with new system.—Id., pp. 16, 26, 28, 32.

Furthermore, lease of Wabash by Norfolk & Western approved for period of 8 years rather than 50 years, and in connection therewith stock exchange agreement authorized, provided transaction is completed within 6 years. Approval of merger conditioned upon the Pennsylvania's divesting itself of any present or future stockholdings in N&W and the Wabash within 10 and 6 year periods respectively, the severing of any management relationships between the former and latter within 60 days and acceptance of these conditions by written notice from the Pennsylvania. Pending completion of divestiture, Pennsylvania is required to deliver all voting rights to N&W stock to three independent voting trusts. Merger approved provided all transactions with exception of stock control of Wabash are consummated within 90 days of effective date of order.—Id., pp. 9, 11-13, 33-4, 48-50.

Commission approved merger proposed herein as it is consistent with public interest, will enable Pennsylvania R. Co. to use motor vehicle service to public advantage in its operations, and will not unduly restrain competition.—Pennsylvania R. Co.—Merger—New York Central R. Co., 327 I.C.C. 475 (546-7).

Commission modified its prior finding in 327 ICC 475 by finding that the merger approved therein has not been shown to be detrimental to petitioners individually or to their ability to provide a general transportation service to the public.—Pennsylvania R. Co.—Merger—New York Central R. Co., 328 I.C.C. 304 (316-8)*.

Commission authorized inclusion (subject to certain conditions) of three petitioner railroads into Norfolk & Western Ry. Co. inasmuch as petitioners will strengthen this system, safeguard against diversion of traffic from petitioners and Norfolk & Western, and create a more balanced rail competition in East in face of present and anticipated competitive conditions.—Norfolk & W. Ry. Co. and New York, Chicago & St. Louis, 330 I.C.C. 780 (826-8)*.

Commission made inclusion of the New York, N. H. & H. R. Co. (NH), its affiliates and subsidiaries, a prerequisite for the merger authorized in 327 ICC 475 inasmuch as NH has deteriorated both in nature and scope of its operations and its financial position and this inclusion will aid in maintenance of NH's required services.—Pennsylvania R. Co.—Merger—New York Central R. Co., 331 I.C.C. 643 (651-654)*.

Upon remand, Commission made precise findings as to traffic losses of a competing non-applicant carrier in compliance with court's instructions. However, Commission reiterated the finding in 255 F. Supp. 19, that such specificity is not required if adequate protective conditions for such carriers are present. Stipulated traffic conditions between applicants and nonapplicant carrier approved as just, reasonable, and consistent with the public interest as they facilitate the urgently needed merger herein and are not so costly as to neutralize the merger benefits.—Chicago & N.W. Ry. Co.—Merger, 333 I.C.C. 236 (239, 253-54).

Complaint of Providence & W.R. Co., as intervening plaintiff, questioning the Commission's determination with respect to its petition for inclusion as a leased line under terms of current 99-year lease of all its property to the New Haven (presently undergoing reorganization) in the Penn Central system, fails to state a claim on which relief can be granted. Approval of the Penn Central merger having been conditioned on inclusion of the New Haven, the Commission could later require inclusion of P&W and, in report under review, it directed such inclusion as in the public interest and found that (with two exceptions) the lease provisions constituted equitable terms therefor. In view of the Commission's broad power under §5(2)(d), there is little force in plaintiff's objection to the imposition of a condition that, unless stock voting provisions in P&W's charter were eliminated in favor of a "one-share, one-vote" provision, Penn Central might terminate the lease on notice to P&W board of directors and the Commission and, thereafter, operate the road, without a lease, for P&W's account.—Manufacturers Hanover Trust Co. v. United States, 300 F. Supp. 185 (186-7)*.

Since plaintiff's request to merge with Providence & Worcester Co., a Delaware corporation, was recently granted, the charter voting restrictions can be altered through amendment by a majority vote of the stockholders without any need for legislative approval. A "one-share, one-vote" provision would not prejudice public stockholders even if Penn Central seeks authority to abandon the line; such abandonment cannot be obtained simply by securing consent of P&W as a corporation; and Penn Central would still be bound to operate P&W, despite termination of the lease, until granted Commission authority to abandon. Since either railroad can apply for authority to abandon, and the Commission can fix the fair rent for the interim, there is no apparent reason why Penn Central's operation of P&W for the lessor's account after termination of the lease would be inappropriate. Complaint dismissed.—Id., pp. 187-8.

Upon further hearing, and careful reconsideration of each substantive issue and every advantage and disadvantage that might result from proposed rail merger and related transactions, the Commission concludes that proposed unification, subject to appropriate conditions to protect competing railroads, affected employees and the general public, will be consistent with public interest. As modified by the conditions specified, most of which are the topic of agreements entered into by applicants and intervening railroads since time of prior decision denying the applications, proposed transactions present an entirely new perspective for intramodal competition in efficient, economical movement of transcontinental, western and Pacific Coast traffic; that perspective forecasts a stronger capability of the railroads to prosper and to effect many efficiencies and savings from which the public will benefit. Based on the entire record—including material adduced at the further hearing—proposed transactions, subject to the conditions imposed, are entirely consistent with the public interest; approved.—Great Northern Pac. & B. Lines, Merger—Great Northern, 331 I.C.C. 228 (244-5, 276-89)*.

Furthermore, as to the effect of unification on motor carrier rights and operations now controlled by the individual applicants, such authority held by the railroads or their motor carrier subsidiaries involve operations in unrelated and unconnected geographic areas, and are restricted mostly to services which are auxiliary to or supplemental of rail service. Following unification each motor subsidiary would continue to operate its own equipment, under its own authority, over its own routes; thus, proposed transaction would create no new motor carrier network; also, since the only change as to the railroads' motor rights would be in their ownership by the new company in lieu of individual applicants, there would be no adverse effect on competing motor carriers. However, in interest of corporate simplification, after consummation the new company should give early consideration to consolidation (subject to prior Commission approval) of the motor operations into a separate corporate entity and, also, to similar consolidation of the subsidiary motor carriers to be acquired.—Id., pp. 284-5.

Commission reinstated and affirmed its prior reports and orders (published at 331 ICC 643 and 331 ICC 754) in this merger proceeding as modified with respect to property valuation of the New York, N. H. & H. R. Co. (NH), a railroad included in this merger, inasmuch as the district court, in 289 F. Supp. 418 held that Commission erred in certain specifics in computing liquidation value of the NH. Inclusion of NH in this merger as of Jan. 1, 1969, approved and directed inasmuch as the continuance of NH service without interruption is a public interest matter of paramount importance and will insure that continuation. Inclusion of Providence & Worcester R. Co. and Norwich & Worcester R. Co. as leased lines of NH in this merger authorized and directed as such inclusion will benefit the merging parties and assure an adequate transportation service to shipping public that would be jeopardized by a failure to include these lines. —Pennsylvania R. Co.—Merger—New York Central R. Co., 334 I.C.C. 25 (30-74, 74-78, 86-93)*.

Commission approved merger proposed herein, subject to prescribed conditions, as such merger will improve rail service through elimination of interline delays, access to a large pool of specialized equipment, and other measures available to the larger rail system. However, inclusion of Southern R. Co. in the merger is rejected. Applicant may gain a slight competitive advantage over Southern through merger but not enough to significantly affect either carrier or the public interest. Southern's inclusion would dislocate shippers geared to present competitive structure, would not increase efficiency or safety, and would destroy healthy competition in some areas. The Seaboard-Piedmont transaction, although a voluntary merger, is an inclusion within the definition stated in 320 ICC 122 and the intent of §5(2)(d).—Seaboard Coast Line R. Co.—Merger—Piedmont, 334 I.C.C. 378 (390-92).

Commission found merger proposed herein, subject to stated employee-protective conditions, consistent with the public interest; approved.—Southern Pacific Transportation Co.—Merger, 334 I.C.C. 866 (872).

Proposed merger approved, subject to indicated conditions, as the record herein shows that shippers will be especially benefited by the merger through the introduction of increased piggyback of TOFC (trailer-on-flatcar) service as well as many other benefits.—Louisville & N. R. Co.—Merger—Monon Railroad, 338 I.C.C. 134 (140-1).

Where (after instant application was filed) the merger of acquiring-carrier applicant and another motor carrier was approved in another proceeding, and the principals of that merger were fully cognizant of pendency of embraced investigation proceeding, it must be presumed that they were aware that appropriate sanctions might well be imposed if any violations were disclosed by the investigation. It follows that, because of such awareness, consummation of the merger was at their peril insofar as outcome of instant proceeding is concerned; and no one can seriously argue that any such unlawful operations should be judged by the same criteria as those normally applied in §5 proceedings which involve lawfully conducted operations. Accordingly, approval of proposed control and merger should be limited to authorizing continuance of services where public benefits are such as to warrant conclusion that the public would be penalized if they were discontinued. Approved, for continuance by acquiring carrier of overhead regular-route, single-line, service in connection with rights it would acquire.—Buckingham Transp., Inc.—Control and Merger, 97 M.C.C. 700 (713-15).

Misrepresentation in a prior control application proceeding which, as part of the record, is relied upon by the Commission as the basis for authorization in instant merger proceeding does not render the provisions of §5 ineffective, and is ground for denial of proposed merger. Such misrepresentation is aggravated by the proposal to saddle surviving carrier, a financially weak company, with its owner's personal obligations to liquidating carrier's stockholders, which had been incurred in connection with consummation of the control transactions. Denied.—Kenneth Hudson, Inc.—Merger—The

Blue Line, Inc., 101 M.C.C. 384 (387).

Proposed merger into applicant of its six-carrier subsidiaries with assumption by applicant of all their liabilities, cancellation of their capital stock and dissolution of their individual corporate structures is consistent with the Commission's views on corporate simplification. And while applicant is overcapitalized and its long-term debt is approximately 12.5 times its shareholders' equity, proposed merger will eliminate the problem of overcapitalization and will reduce applicant's long-term debt to approximately 3.1 times its shareholders' equity; furthermore, fixed charges incurred would be no greater than those outstanding in the now separate companies and neither employees nor the shipping public would be adversely affected. However, approval is conditioned to prohibit the issuance of any securities or the assumption by applicant of any of its subsidiaries' obligations evidenced by securities, unless evidence is first submitted that the issuance or assumption is exempt or that approval therefor has been obtained under §214.—Schwerman Trucking Co.—Control and Merger, 101 M.C.C. 679 (681-3, 685)*.

See also Ind-O Transport, Inc.—Purchase—Niman Transfer & Storage, n. 48 above.

Conditions: Supreme Court concluded that Commission erred in withdrawing all protective conditions save the traffic ones and permitting immediate consummation of Penn-Central merger (327 ICC 475) as such withdrawal removes necessary protection from three smaller railroads. Case remanded to Commission for a decision as to future of these protected railroads and their inclusion in a major system.—B. & O. R. Co. v United States, 386 US 372 (388-392)*.

Commission approved inclusion of the New York, S. & W. R. Co. in merger approved herein as operations over the main lines of this carrier are vital in connecting applicants' lines and applicants are willing to accept such inclusion.—Pennsylvania R. Co.—Merger—New York Central R. Co., 327 I.C.C. 475 (521-22).

Commission ordered the New York, N.H. & H. R. Co. (New Haven) included in merger approved herein inasmuch as the public interest requires a complete restructuring of all New Haven operations in order to preserve its necessary operations.—Id., p. 522-27.

Commission modified its prior report in 327 ICC 475 as to inclusion of petitioners in the merger approved therein by removing the requirement for joinder of applicant Penn Central in a petition for inclusion and by binding applicant to accept inclusion if Commission so orders.—Pennsylvania R. Co.—Merger—New York Central R. Co., 328 I.C.C. 304 (320-22)*.

Protective conditions originally prescribed in appendix G of the prior report on this merger, 327 ICC 475, is modified herein to provide the protected railroads greater clarification and advantages which would improve their competitive positions whether or not the merger occurs. Modifications of traffic and indemnity conditions and protective provisions were prescribed but no need was shown for any capital loss indemnification condition.—Pennsylvania R. Co.—Merger—New York Central R. Co., 330 I.C.C. 328 (334-62)*.

Commission imposed conditions (appendix I herein) requiring parties to this merger, Penn-Central, to maintain gateways at Maybrook and New York Harbor as vital passages to the New England area, thus reducing the diversionary effect on intervening railroads' traffic to inclusion of New York, New Haven, and Hartford R. Co. in this merger.—Pennsylvania R. Co.—Merger—New York Central R. Co., 331 I.C.C. 643 (730-737)*.

Commission modified traffic protective conditions imposed in a prior report on this merger, 331 ICC 643 (appendix I), in the interests of clarification. Petitioners' requests for protective conditions are denied in light of the Supreme Court's statement in 389 US 486 that competition "is merely one consideration in a rail merger and that Commission's retention of jurisdiction in this proceeding provides an easily available means of recourse to the protected carriers".—Pennsylvania R. Co.—Merger—New York Central R. Co., 331 I.C.C. 754 (757-61)*.

To ensure that proposed merger will not cause a downgrading of the present Evansville, Ind.—Chicago, Ill. Line, Commission required applicant Louisville & N. R. Co. to provide at least the same level of service and maintenance over such line as is presently provided for a period of 10 years from the date of this report.—Louisville & N. R. Co.—Merger—Monon Railroad, 338 I.C.C. 134 (145-6).

See also Southern Pacific Transp. Co.—Merger, n. 52 above.

55. Operating agreements (contracts).—[Vols. 11-19, 21].—On reconsideration, review board's grant of authority to acquire trackage rights under 5(2)(a)(ii) is confirmed since the parties have met the public interest requirement of 5(2); however, the order is modified to authorize operation of the properties under 5(2)(a)(i) since the agreement between the parties envisions that the entire operation of the lessor company will be conducted by the lessee. The mere fact that the transaction may actually be one included in those referred to in subparagraph (i) instead of in subparagraph (ii) does not invalidate the board's authorizations since the Commission is not bound by the name which parties may apply to a transaction for which they seek approval. —Seaboard Air Line R. Co.—Trackage Rights, 331 I.C.C. 361 (364)*.

56. Operation under trackage rights.—[Vols. 11-19, 21].—Although plaintiff Union Pacific, in action to enjoin the Commission's orders, contends that Milwaukee railroad's application to acquire trackage rights between Longview Junction, Wash., and Portland, Oreg., should have been filed under §1(18)-(21) which requires hearings and a finding of public necessity, and not under §5(2), the Commission had authority to consider that application under §5(2)(b) in accordance with its long-established practice. Under §5(2), which permits acquisition of trackage rights, public hearings are discretionary with the Commission; and there was no abuse of its discretion in not granting a hearing, for Union Pac. to update the evidence it presented at hearings on the proposed Burlington Northern merger (approved on condition that Milwaukee be permitted to serve Portland), when the trackage rights involved were bound up with the merger proceedings and the Commission had heard practically all the evidence plaintiff seeks to present.—Oregon-Washington R. & Nav. Co. v. United States, 324 F. Supp. 124 (126-7)*.

Moreover, there is no merit in plaintiff's further contention that Milwaukee's trackage rights application under §5(2) constituted an admission that a hearing is necessary or that all parties contemplated further hearings on trackage rights. Therefore, since the Commission's orders authorizing the grant of trackage rights to Milwaukee without a hearing were not arbitrary, but were based on proper standards supported by ample evidence, they are sustained and the injunction suit is dismissed.—Id., p. 127.

The Commission has no power to compel a carrier to acquire trackage rights. —Industrial Corp. of S. Hackensack, N. J. v. N. J. & N.Y. R. Co., 324 I.C.C. 272 (273).

Commission herein prescribed terms and consitions for applicant's continued operations under trackage rights over rail line of Southern Pacific Co. In regard to the basis for payment for both bridge and local rights, the Commission need not be mathematically precise but must only find the limits of trackage rights charges within a range of reasonableness. The Commission has not adopted any particular formula for determining trackage rights charges but has employed various bases (see 307 ICC 329). Valuation of $17 million set as rental basis for bridge rights herein.—Atchison, T. & S.F. Ry. Co.—Operating Agreement, 331 I.C.C. 367 (372-73).

Further, the Commission found that it would be unfair to charge applicant as an operating expense a portion of the current value of an unreplaced facility retired for obsolesence or disuse. Commission also refused to set a time limit on trackage rights herein as its jurisdiction is continuous and terms and conditions may not be revised or such rights terminated with prior Commission approval, as was stated in 328 US 134. Finally, Commission's power to impose condition requiring arbitration to settle controversies as to the meaning of terms and conditions it imposes has been consistently recognized. Such a condition does not delegate authority to arbitrators to prescribe terms and conditions or to change conditions imposed by the Commission.—Id., pp. 381-84.

Commission clarified conditions prescribed in its prior report requiring indicated payment by applicant, as an operating expense, for a retired and unreplaced facility for which a Commission-approved reserve has not been created (see 309 ICC 289), and on which depreciation is not authorized by Commission's accounting rules.—Atchison, T. & S. F. Ry. Co.-Operating Agreement, 333 I.C.C. 342 (345-6)*.

Proposed operation by Louisville & N.R. Co. over certain line under trackage rights approved as such transaction will result in substantial benefits to Chicago area and points served by applicant by permitting more efficient transportation that will not adversely affect public or adequate transportation service.—Louisville & N. R. Co.—Trackage Rights, 334 I.C.C. 412 (417).

A trackage rights agreement, like a merger, is a transaction within the purview of §5(2) and an application under §5(2) must be filed for acquisition of trackage rights despite a condition granting such rights in prior merger agreement (appendix L, 331 ICC 352). Such a condition is not self-executing as asserted by respondents.—Great Northern Pac.-Merger-Great Northern, 338 I.C.C. 782 (784-6)*.

See also Calumet Western Ry. Abandonment case, § 1(18), n. 66. Louisville & N. R. Co. Abandonment case, §1(18), n. 60; Seaboard Air Line R. Co.—Trackage Rights, §5(2), n. 55.

58. Consolidation.—[Vols. 11-13, 16,17, 19].—As between rail applicants seeking to acquire control of another railroad, there exists less opportunity for end-to-end railroads to consolidate yards, facilities, and functions than exist for generally parallel railroads operating in direct competition with each other; and the minimal amount of duplicative trackage involved would result in less abandonment of line than would be the case where the affiliating carriers operate side-by-side. Moreover, the success of a plan for consolidating direct competitors depends, not so much on improving and maximising use of facilities and exploiting advantages of position, but, rather on shrinking of plant, consolidating functions and eliminating competition; thus, there would be little motive for parallel carrier to expend its energies in championing the cause of a competitor, in derogation of its own direct and permanent interests, even though competitor would be within its control.—Missouri Pac. R. Co.—Control—Chicago & E. I. R. Co., 327 I.C.C. 279 (285-7)*.

60. Affiliates, subsidiaries, holding companies.—[Vols. 11-17, 19, 21].—***In general:*** [Vols. 19].—Since protestants fail to establish an "affiliation" between applicants' controlling stockholders within the meaning of §5(6) of the Act, they are unable to show that as a result of such relationship liquidating carrier's controlling stockholder purchased stock in the carrier as an accommodation purchaser for surviving carrier. The record shows nothing more than the existence of a proper business relationship effected through interline arrangements between two carriers while the controlling stockholder of liquidating carrier had a minority interest in another carrier and prior to his purchase of controlling interest in liquidating carrier.—St. Johnsbury Trucking Co., Inc.—Control and Merger, 104 M.C.C. 137 (140).

See also Missouri Pac. R. Co.—Control—Chicago & E. I. R. Co. case, n. 100 below. Norfolk & W. Ry. Co.—Control—Lake Erie & F. W. R. Co. case, n. 45 above; St. Johnsbury Trucking Co., Inc.—Control and Merger, n. 45 above.

Holding companies: [Vol. 19].—Purchase by Signal, a contract carrier, of two other contract carriers and merger and control of another is conditioned upon continuing Commission jurisdiction to insure that the operating rights of Signal and its several carrier affiliates which are all under the common control of Leaseway, a holding company controlled by the O'Neill family, shall be consistent with the public interest.—Signal Delivery Service, Inc.—Purchase—Marc's Delivery Corp., 104 M.C.C. 280 (288).

Motor carriers: [Vol. 19].—Acquisition of New England Transp. Co., a motor carrier subsidiary of an included railroad, by parties to this merger is consistent with public interest inasmuch as motor carrier operations make a vital contribution to the included carrier's overall operations and there is no evidence that such an acquisition would adversely affect other motor carriers or unduly restrain competition.—Pennsylvania

R. Co.—Merger—New York Central R. Co., 331 I.C.C. 643 (725-28)*.

In the initial report on reconsideration, 97 MCC 587, the Commission found that as a result of a somewhat modified plan and newly submitted financial data, applicant-vendee Transport presented an improved financial picture; however, application denied on ground that the operating rights sought by Transport substantially duplicated those of Parkhill Truck Co., which was commonly controlled with Transport. On further consideration, however, a further modified plan, involving merger of Transport into Parkhill and the substitution of Parkhill as vendee, approval, since duplicate rights in vendee present no problem, as under the findings the duplication eliminated.—Ind-O Transport, Inc.—Purchase—Niman Transfer & Storage, 101 M.C.C. 593 (594-6)*.

Noncarriers: [Vols. 19, 21].—See McCloud River Trucking Co.—Purchase—Zamboni, n. 48 above.

Rail and motor carriers: [Vol. 19].—See McCloud River Trucking Co.—Purchase—Zamboni, n. 48 discontinued, above.

Railroads: [Vol. 21].—See Missouri Pac. R. Co.—Control—Chicago & E. I. R. Co. case, n. 45 *Violations*, above.

70. Employees.—[Vols. 11-14, 16-19, 21].—As held in 339 US 142, one intent of §5(2)(f) was to provide mandatory protection for employees affected by railroad consolidations; such protection can be accorded by terms provided by the Commission or (as is more likely) terms of a collective agreement which the Commission adopts or approves as adequate for required 4-year period, or longer if it so provides. Purpose of the statute is not to freeze jobs but to provide compensatory conditions and, in discharging its duty, the Commission often has adopted the labor conditions in collective agreements. When the Commission adopts or approves a pre-merger collective agreement, however, the last sentence of §5(2)(f)—"notwithstanding" provision—is not read out of the Act; such agreement becomes a "condition" of the "approval" and the Commission deems the provisions thereof to be "a fair and equitable arrangement to protect the interests of" affected employees. Hence, significance of the "notwithstanding" proviso is that it provides machinery for the terms of a pre-merger collective agreement and thus supplies the minimum measure of fairness required under first sentence of §5(2)(f).—Norfolk & W. Ry. Co. v. Nemitz, 404 US 37 (41-3)*. [But see dissent]

In railroad employees' suit to recover damages for alleged violation by defendant railroad (survivor in N&W-Nickel Plate merger) of employee-protection provisions of commission order in merger proceeding, the court has jurisdiction over the issue of whether plaintiffs received all the benefits to which they were entitled. However, the court's function being to delineate minimal requirements of the law and employee-protective orders, not to construe definitively the agreement between surviving railroad and employee unions which the Commission adopted as part of its order, interpretation of the agreement and order as to meaning consistent with the law, is a matter to be left to arbitration. Statutory protective agreement governing employees' rights following rail merger can alter, supplement, or vary the Commission's order, so long as it does not abridge the protection afforded; however, while agreement may lessen protection of certain classes of employees, without altering total protection level, such dimunition should be permitted to stand only if, in light of overall protection scheme as so modified, it is benign.—Nemitz v. Norfolk & W. Ry. Co., 309 F. Supp. 575 (580, 582-4)*.

Statutory protection afforded employees against being placed in a worse position with respect to employment as result of N&W-Nickel Plate merger requires, as minimum protective benefits, a wage freeze for four years after merger consummation. And, since purchase of employer "Sandusky Line" of Connecting Ry. Co. during course of the merger resulted in split of the Toledo seniority district, so that employees unable to find work on the line could no longer seek work at other points in the district, wage freeze to which they are entitled applies to earnings throughout seniority district and is not limited to wages earned on purchased line; plaintiffs are entitled to damages on that basis. However, the court must accept provisions of the Commission order as correct and, since time for seeking review thereof has expired, it has no jurisdiction to determine whether total wages may be reduced because of seasonal furlough or decline in revenues, exceptions embodied in the order. Question of whether plaintiffs' loss of wages is compensable because of inability to work throughout Toledo district, or not compensable because of exceptions in the order, is matter for arbitration, as provided in Commission protective order.—Id., pp. 582-3, 585.

As the lower court properly held, appellees (railroad employees) are entitled to damages to the extent that their compensation was diminished by their inability to perform work throughout the Toledo Division seniority district; but they are not entitled to damages to the extent that their compensation may have been diminished by furloughs due to seasonal requirements, or by any decline in traffic or revenues. However, contrary to its conclusion that the question of damages was a matter for arbitration, since the trial court has jurisdiction of appellees' claims, it must adjudicate those claims in their entirety—the basic dispute between the parties as well as the relief to be accorded to each appellee. Therefore, the district court's judgment is modified, in accord with the court's opinion, and the action remanded to that court for further proceedings. —Id., 436 F. 2d 841 (850)*.

On petition of labor union, the Commission properly modified its findings in 320 ICC 52 (that employees of Chesapeake & Ohio at its Richmond, Va., Main Street Station, if affected by approval of Seaboard Air Line's withdrawal from joint use thereof and use of another station, were entitled to benefits of §5(2)(f) and the same protection as that prescribed for Seaboard employees who might be affected, with cost to be borne by Seaboard) to show that the prescribed protection included not only C&O employees who had worked at Main Street but, also, junior employees who worked in the same seniority district and had been "bumped" by employees from Main Street who had seniority, if they were adversely affected. While the junior employees were not expressly mentioned in the court's prior decision (261 F. Supp. 101), they were implicitly included; neither the court nor the Commission had authority to, and neither undertook to, exclude such employees who might be affected by the transaction. Considered order expressly stated what had been implicit; the Commission simply clarified its prior order, which it had authority to do, and the result it reached was proper.—Seaboard Coast Line R. Co. v. United States, 283 F. Supp. 866 (867-9)*.

And since the question of whether and to what extent, if any, the junior employees may be adversely affected was properly found to be a matter for settlement by the parties under the arbitration provisions of the prescribed employee-protective conditions, or by the courts, the Commission was not required to determine which junior employees had been adversely affected by the transaction; generally, the Commission does not determine the actual effect, if any, on individual employees. Accordingly, the absence of a finding pertaining to any effect on individual junior employees does not destroy validity of the Commission's order; complaint dismissed.—Id., p. 870.

District court has subject-matter jurisdiction in suit by members of railroad union seeking damages claimed to result from defendant railroad's alleged violation of employee-protective conditions imposed on the parties and incorporated in Commission order approving defendant's purchase of "Sandusky Line" from Connecting Ry. Co., and to enjoin further violation of that Commission order; the court is given jurisdiction to enforce Commission orders by provisions of §9, §16(12), and 28 USC §§ 1336, 1337, and the rights of plaintiffs, if any, are founded on such an order. Though defendant argues that the Railway Labor Act, not I.C.C. Act, governs, §5(11) gives the Commission exclusive and plenary jurisdiction to approve §5 transactions and does not exclude Railway Labor Act from operation thereof. Also, defendant's argument that plaintiffs' cause of action is based on alleged violation of a collective bargaining agreement, not a Commission order, must be rejected; plaintiffs are suing on the order itself, and employee-protection terms originally included therein, and not upon any agreements between the union and railroad made after—and altering—an order of the Commission.—Nemitz v. Norfolk & W. Ry. Co., 287 F. Supp. 221 (224-9)*.

And since union members have attempted in vain to invoke arbitration clause of an agreement between the union and railroad which was incorporated in the Commission order as part of the employee-protective conditions, plaintiffs are not required to exhaust any other remedies before presenting their claims to the court; the doctrine of exhaustion of administrative remedies presupposes existence of adequate and efficient remedies. Moreover, plaintiffs are attempting to pursue a remedy specifically created by Congress in §§ 9 and 16(12) and those statutes make no reference to administrative exhaustion as a mandatory prerequisite. However, defendant's claim of accord and satisfaction and plaintiffs' allegation that union members never intended to accept amounts already received as settlement of their claims, or as anything except partial payment of what was owed them under the Commission order, raise a material question of fact; accordingly, neither of the cross motions for summary judgment on that matter may be granted. Ruling upon plaintiffs' rights under actual terms in the Commission order is reserved pending determination of factual questions.—Id., pp. 229-31.

Though §5(2)(f) provides certain safeguards for railroad employees affected by a rail merger, it does not prevent the discharge of employees as the result of such a merger but, rather, it relates only to questions of employee compensation. The section authorizes a railroad and an employee union to enter into an agreement protecting the interests of workers affected by a merger; and, in connection with merger of Delaware, L. & W. R. into defendant railroad, an Implementing Agreement was entered into between the railroad and defendant unions representing its employees. To extent that plaintiffs (employees of DI&W who were furloughed by defendant railroad two years after the merger, but never recalled) may have been wronged, it appears to have been due to misapplication of the Implementing Agreement and not to a violation of law. Therefore, lower court properly dismissed that portion of complaint alleging that defendant railroad violated the statute by wrongfully "discharging" plaintiffs.—O'Marra v. Erie Lackawanna R. Co., 407 F. 2d 674 (677-8)*.

Although a substantial part of managerial and clerical work to be eliminated as result of approved mergers is performed by machine, and none of such work is assigned to particular employees whose services could be dispensed with, in accordance with the statutory requirements the conditions prescribed in 317 ICC 557, as supplemented in 317 ICC 729 and 320 ICC 377, including §§ 4, 5, and 9 of the Washington Job Agreement of 1936, are imposed.—Pittsburgh & L.E. R. Co. Merger, 320 I.C.C. 198 (204).

In merger proceeding, conditions prescribed in Southern Ry. Co.—Control—Central of Georgia Ry. Co., 317 ICC 557, as supplemented and clarified in 317 ICC 729 and 320 ICC 377, imposed for protection of railway employees not covered by agreements and adversely affected by the transactions.—Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 324 I.C.C. 1 (50).

Except for modification respecting arbitration, conditions imposed in the *Southern-Central* case, as supplemented and clarified, conform substantially to the *New Orleans* conditions (a combination of the *Oklahoma* conditions and the provisions of the Washington Agreement); thus, imposition of the *Southern* employee protective conditions, including sections 4, 5 and 9 of the Washington Agreement, substantially incorporate the terms sought by employees. Further, fringe benefits, including vacation rights and privileges, are regularly the subject of collective bargaining and not likely to be altered summarily by unilateral action of carriers. Under the *Southern-Central* fringe benefits provision the dismissed or displaced employee is entitled to the same benefits which would have accrued to him had he been retained in the employ of his home road; but he is not guaranteed better fringe benefits than would have been his had he not been dismissed or displaced as a result of the §5 transaction approved.—Missouri Pac. R. Co.—Control—Chicago & E.I. R. Co., 327 I.C.C. 279 (311-3)*.

Inasmuch as §5(2)(f) provides that employee protection may be established by agreement between a railroad and employees' unions, the Commission finds the agreement herein consistent with public interest and can make no requirement as to protection of employees covered by the agreement but Commission will require, as a condition for approval of considered merger, that this agreement also apply to employees not represented by signatory unions.—Pennsylvania R. Co.-Merger-New York Central R. Co., 327 I.C.C. 475 (543-46).

Since acquiring carrier applicant and Railway Labor Executives' Association consented to imposition of the New Orleans conditions for protection of adversely affected employees and since carrier required to be included as joint owner in the transaction has voiced no opposition thereto, authorization of acquisition of joint and equal control through stock purchase of a small switching and terminal line is subject to imposition of considered employee-protective conditions.—Norfolk & W. Ry. Co.—Control—EP&E Co.—Purchase, 330 I.C.C. 672 (682).

On further hearing upon remand by Supreme Court, Commission clarified its order of Dec. 3, 1962 to specifically provide for the inclusion, in employee-protective conditions imposed therein, of the New Orleans conditions (282 ICC 271) and §§4, 5, and 9 of the Washington Agreement (cited herein), except as §5 is modified by Commission's order of Nov. 7, 1962.——Southern Ry. Co.—Control—Central of Georgia Ry. Co., 331 I.C.C. 151 (185-7)*.

On reconsideration and further hearing of proposed railroad merger and related transactions, the situation as to protection of employees has been considerably changed since time of the prior decision which denied the applications. Applicants have reached an agreement with some employee representatives that provides "attrition-type" protection (within concept expressed in 328 ICC 684) for railroad employees, plus various monetary benefits, retirement allowances, and protection against loss from sale of homes and lease cancellations; also, they are negotiating with other unions and indicate willingness to enter into similar agreements with all affected employees. Pursuant to §5(2)(f), the Commission makes no requirements for protection of employees who have entered into such an agreement; but it does find the agreement not to render proposed transaction inconsistent with the public interest.—Great Northern Pac. & B. Lines, Merger—Great Northern, 331 I.C.C. 228 (231, 276-8)*.

However, the interest of all carrier employees affected by proposed unification—both those represented by a union and those not so represented—must be weighed, and Commission approval must be conditioned on fair and equitable arrangements for their protection. All the employees then are free to enter into separate protective agreements. Analysis of the agreements already reached is convincing that interests of employees covered thereby will be adequately and fairly protected by the terms thereof; therefore, in the interest of uniformity and in view of applicants' willingness to extend attrition conditions to all employees, approval of proposed transactions is conditioned on requirement that attrition conditions, the same as those in agreements already reached, be applied to all affected employees who have not entered into separate agreements.—Id., pp. 276, 278-9.

Agreements signed by merger applicants with employee representatives of the included New York, N.H., & H. R. Co. do not render the inclusion inconsistent with public interest. Commission therefore made no requirements for protection of employees covered by these agreements but non-signatory employees are required to enter a written commitment indicating their agreement to the plan.——Pennsylvania R. Co.-Merger-New York Central R. Co., 331 I.C.C. 643 (729)*.

Upon remand, Commission found that traffic conditions stipulated herein by the involved parties so offset traffic diversion from an involved, nonapplicant railroad as to protect such carrier's employees from job loss. Such stipulated conditions meet the court's requirement for employee protective conditions and accordingly Commission will impose no further such conditions.—Chicago & N. W. Ry. Co.—Merger, 333 I.C.C. 236 (252-3).

In view of limited number of employees the record indicates will be affected by the proposed merger, Commission provided a

90-day period following consummation of merger within which interested parties are to negotiate employee protective agreements, failing which the Commission will prescribe employee protective conditions.—Louisville & N. R. Co.—Merger—Monon Railroad, 338 I.C.C. 134 (193-7).

Employees of a railroad subsidiary to a railroad which is a party to a merger found to be "affected employees" due to a trackage rights condition of such merger which reduced jobs through elimination of an interchange. Such employees are entitled to "fair and equitable" arrangements. Oklahoma conditions imposed.——Great Northern Pac.—Merger—Great Northern, 338 I.C.C. 782 (787-9)*.

Commission denied petition by a dismissed carrier employee seeking a lump sum severance payment because said employee had not used arbitration machinery in pressing his claim and such machinery is the proper forum for settlement of individual labor disputes, not this Commission.—Cooper v. Penn Central Transportation Co., 342 I.C.C. 459 (463-4).

Petition of intervener, a former general traffic manager and vice-president of acquired carrier, alleging that, notwithstanding assurances contained in application and given otherwise by acquiring carrier's management that no drastic changes affecting acquired carrier's employees were contemplated during temporary control, employment of general-office employees was terminated, is vague regarding the number of employees allegedly represented by petitioner, or whether they have consented to such representation. Only 5 of 20 employees dismissed are still unemployed; petition does not disclose whether petitioner's position (he being now employed by another carrier) has worsened or improved, and information contained therein does not warrant finding that effect of the transaction on acquired carrier's employees warrants imposition of conditions for their protection. However, jurisdiction of the matter is retained for 1 year from date of consummation of control.—Arkansas-Best Freight System, Inc.—Control—Delta, 93 M.C.C. 474 (476).

Unlike mandatory provisions of §5(2)(f) concerning protection of employees in cases involving unifications of rail carriers, the protection which must be afforded motor carrier employees, if any pursuant to §5(2)(c) is not subject to any fixed formula and must be based on circumstances existing in the particular case. Taken as a whole, the Act makes clear the congressional intent that public policy demands fair and equitable treatment of motor carrier employees, but the law does not require imposition of conditions for their protection; had Congress intended that rail and motor carrier employees be afforded the same protection, it would not have made §5(2)(f) mandatory and §5(2)(c) discretionary with the Commission. Therefore, considering both employee and carrier interests, approval of proposed purchase is subject to the condition that any employee of vendor or vendee separated from his employment as result of consummation thereof must receive, for not more than 3 months, severance pay at the rate specified, paid by vendee. — Overnite Transp. Co. — Purchase — Rutherford Freight Lines 97 M.C.C. 568 (577-80).

In approving §5 purchase application the Commission held that the Interstate Commerce Act, taken as a whole, makes clear the Congressional intent that public policy demands fair and equitable treatment of employees of motor carriers involved in 5 proceedings and that §5(2)(c)(4) of the Act provides that in passing upon any proposed transaction under the provisions of §5(2) weight shall be given to the interest of the carrier employees affected.—Braswell Freight Lines, Inc.—Purchase—Shayler, 101 M.C.C. 1(10).

Although Refiners' intervening employees fear that Leaseway's (a noncarrier corporation controlling approximately 125 other corporations including seven motor carriers) proposed purchase of Refiners Transport & Terminal Corp. and Refiners subsequent purchase of part of Mitchell Transport Inc.'s operating rights will have an adverse effect on them and that protective conditions are necessary and proper, their petition fails to indicate manner in which they will be affected or what conditions might be necessary. Moreover, Leaseway states that none of the employees of either Refiners or Mitchell would be affected adversely by this transaction and that all personnel of Refiners will be retained except those who may voluntarily resign or do not wish to continue their employment. Thus, the Commission finds that, since no adverse effect on employees would result from consummation of proposed transaction, no protective conditions are necessary.—Refiners Transport & Term. Corp.—Purchase—Mitchell, 101 M.C.C. 611 (617).

Determination by local of union that this transaction was a purchase, requiring vendor's employees to be placed at bottom of seniority list, was based upon inadequate and incorrect information. While recourse to NLRB may be open to employees to correct situation, this is not necessary where the action affects employees as a result of §5 transaction. Condition imposed requiring that Chemical Leaman dovetail Ryder's drivers and mechanics with its own as required in its master labor agreement on the occurrence of a merger.——Chemical Leaman Tank Lines, Inc.—Purchase—Ryder, 104 M.C.C. 686 (708-9).

See also National Freight, Inc.—Purchase—Pittsburgh Wheeling Exp. case, n. 5 above; Reardon v. Pennsylvania-New York Cent. Transp. Co. 28 USC §2201, n. 2.

Applications; Proceedings

100. Parties.—[Vols. 12-19, 21].—Noncarrier corporate parent is a necessary party to control proceeding only by virtue of its stock interest in carrier applicant; and both applications are interdependent, for if either were found to be contrary to the public interest and denied, then there would be no grounds for granting application of the other. Record shows that principal market for noncarrier's natural gas is the St. Louis area; whereas, most of coal handled by carrier to be controlled is shipped south to Joppa, Ill., or north to the Chicago area; thus, there is no basis for denying parent's application on conflict of interest ground, nor for denial of carrier's application because of any disability of its corporate parent; and in finding that control of another carrier by applicant will be in the public interest, Commission must also find that indirect control of other carrier by corporate parent will likewise be in the public interest.—Missouri Pac. R. Co.—Control—Chicago & E. I. R. Co., 327 I.C.C. 279 (313-5)*.

Motion that noncarrier holding-company be dismissed as a party applicant in proceeding on new corporation's application for authority to acquire stock control of bus line, denied. Noncarrier would own 40 percent of stock of new corporation (organized pursuant to agreement between it and individual 60-percent stockholder) and, under the articles of incorporation, would have power to elect 2 of its 5-member board of directors, could control the increase in or sales of its corporate stock and the disposition of its operating rights and properties, and would have the power to control the traffic flowing over its lines and those of another bus line sought to be controlled through purchase of its stock from the holding company (assuming approval and consummation of holding company's and new corporation's proposed transactions). While each of those facts and circumstances, standing alone, may not warrant finding that noncarrier would jointly control newly formed carrier within meaning of §1(3)(b), collectively, they permit of no other finding; thus, holding company is a necessary party applicant.—Greyhound Corp.—Control—Tex., N. Mex. & Okla. Coaches, 97 M.C.C. 733 (740)*; Id., 101 M.C.C. 655 (666-7)*.

In addition to vendee, its subsidiary and its noncarrier affiliates were all joined in the §5 application as applicants inasmuch as their purchase collectively of the physical properties of vendor herein considered is an integral and inseparable part of the entire transaction in which vendee proposed to acquire all of the operating rights and certain other properties of vendee.—East Tex. Motor Frt. Lines—Purchase—Lee, 109 M.C.C. 299 (318).

Intervention: [Vols. 16, 21].—Commission permitted one petitioner to intervene herein for limited purpose of seeking inclusion in a merger approved in 327 ICC 475 and other two petitioners for the limited purpose of participating in any subsequent proceedings.—Pennsylvania R. Co.—Merger—New York Central R. Co., 328 I.C.C. 304 (306-07)*.

Petition of acquired carrier's former vice-president for permission to intervene on behalf of himself and other of the carrier's employees whose services were terminated during temporary control, granted, since it will not unduly broaden the issues and petitioner conditionally favors approval of the transaction and does not seek oral hearing.—Arkansas-Best Freight System, Inc.—Control—Delta, 93 M.C.C. 474 (475).

105. Applications.—[Vols. 14-17, 19, 21].—The Commission need not impose restrictions stipulated between applicants and protestants in §5 transactions even when they are offered as amendments to the applications.—Ingram Corp.—Purchase—Barrett Line, Inc., 324 I.C.C. 263 (269).

There is no basis for protestant's contention that in §5 proceedings the application is not necessarily part of the record unless made such as the hearing, since rule 1.19 of Rules of Practice provides that, to the extent protestants do not deny recitals of material and relevant facts in pleadings filed by applicants before the oral hearing, such facts constitute evidence and are part of the record.—Continental Dispatch, Inc., 95 M.C.C. 483 (492).

See also East Carolina Ry. Abandonment case, §1(19), n. 1.

110. Scope of issues.—[Vols. 12-19, 21].—***Antitrust Act violations:*** [Vols. 12, 14, 17, 21].—When, in remanding supplemental report and order in control proceeding, the court held that there was but one general issue before the Commission for determination (indicating that condition (e) in 1923 order approving Southern Pac.'s control of Central Pac. Ry., 76 ICC 508, and the 1924 agreement between Southern Pac. and Union Pacific which recites all conditions of the order, are but two separate aspects of one general issue) and did not expressly affirm the "just and reasonable" determination in that report, the Commission cannot equate the court's silence to affirmance of its finding as to justness and reasonableness of condition (e); and the "just and reasonable" issues under §5(2) are not res judicata. In view of nature of the remand, therefore, all evidence and issues are considered as within the scope of the reopened proceeding, including those pertaining to condition (e) and §5(2) and those concerning validity of the 1924 agreement and actions of the parties thereunder.—Central Pac. Ry. Co. Control, 328 I.C.C. 345 (346-7)*.

See also Missouri Pac. R. Co.—Control—Chicago & E. I. R. Co. case, n. 100 above. Southern Pac. Co.—Control—Western Pac. R. Co. case, n. 111 below.

Certificate under §207: [Vols. 12-19, 21].—Interpretation of certificates is normally a matter for consideration under other sections of the Act, and the Commission is reluctant to make a finding in that respect in a §5 proceeding, especially where the application is determinable on other grounds and an interpretation might have a widespread effect on an entire field of the transportation industry, with no opportunity for carriers concerned to be heard. While the record does not establish the prevalence in other certificates of the operating description employed in vendor's certificate or the extent to which an interpretation thereof would affect the motor passenger industry, such interpretation is not necessary to a decision on the merits of purchase application. Therefore, in view of conflicts in opinions of counsel and the parties, as well as in informal views expressed by a former and a present official of the Bureau of Motor Carriers, instant proceeding is not the proper forum for the interpretation requested and none will be made.—Eagle Charter Bus Service, Inc.—Purchase—Eagle Bus Lines, 93 M.C.C. 705 (710-1).

Evidence of past unlawful operations conducted by vendor pursuant to a certificate of registration, in good faith under color of right, is entitled to appropriate consideration in connection with whether a continuance thereof by vendee would meet a public need. See *Helphrey*, 97 MCC 549, as affirmed in *Best Way*, 253 F. Supp. 314, and cases cited therein.——Wilson Trucking Corp.—Purchase—Compton Lines, Inc., 104 M.C.C. 806 (811).

Commission found that the rule established in 106 MCC 100 with regard to certification of shipper support applies to §207 applications related to a §5 application. However, in a related §207 application it is sufficient that applicants show past continued operations performed under the certificate of registration. Where such past operations are sufficient to grant the related §207 application, shipper testimony is not required. Approved.——Pittsburgh & N. E. Trucking Co.—Control & Merger, 109 M.C.C. 56 (58-9).

Commission can deny a §5 application, or an application filed under §207 directly related to a specified §5 proceeding, without independently considering the public convenience and necessity. See *Hart*, 226 F. Supp. 635. Herein, since vendor is not entitled to a certificate of registration, there are no interstate and foreign commerce rights to be transferred. Commission noted that it would give favorable consideration to a request by the purchaser to incorporate the evidence presented in the directly related application into the separate application.—All-American Transport, Inc.—Control and Merger, 109 M.C.C. 243 (250-51)*.

Where conversions of certificates of registration to certificates of public convenience and necessity are involved as a matter directly related to a §5 application, the objective is to preserve existing motor carrier operation. New operations instituted under temporary authority cannot alone be considered as evidence of past lawful operations supporting such a public need and are not the best evidence of a public need for its continuance.——Transport Serv.—Control—Gould, Inc., & Colo. Frt., 109 M.C.C. 359 (378-9).

In accordance with Commission's findings in previous registration conversion applications involving California intrastate certificates, in which there was no evidence that the applicant had ever transported commodities requiring specialized service, the Commission has expected such commodities, even though the California certificate had authorized their transportation. Authority granted to transport general commodities with the exceptions of commodities of unusual value, commodities in bulk, and commodities requiring special equipment as there was no record of vendor ever transporting such commodities.——Western Gillette, Inc.—Control—Desert, 109 M.C.C. 514 (521)*.

Inasmuch as California route descriptions differ considerably from the manner in which routes are described in Commission certificates it has been necessary to interpret and restate the operating rights of vendor as set forth in its certificate of registration in the terms and manner normally used in certificates of public convenience and necessity. See *Howard's*, 97 MCC 341, 349.——Id., p. 521.

Although vendor has shown that it has engaged in some transportation of explosives, it has not shown that it has done so extensively nor has it demonstrated that it possessess the higher than usual degree of fitness required for such authority. Authority granted will exclude classes A and B explosives——Id., p. 521-2*.

Interpretation of Texas state certificate authorizing transport of two lists of special commodities, entitled the "Wales Record" and the "Union City Record", concludes that such commodities fall within the heavy-hauler, self-propelled articles, or *Mercer* (74 MCC 459) description categories as used in Commission certificates.—Home Transp. Co., Inc.—Purchase—Fuchshuber, 109 M.C.C. 779 (788-9)*.

Contracts: [Vols. 12, 14-19, 21].—Provision in stock-purchase agreement between the parties whereby, should the Commission deny the application, acquiring carrier reserved the right to assign its right to purchase the stock to a third party of its choice and who in its judgment would be acceptable to the Commission, is no more than a standard provision customarily appearing in comparable agreements. And, contrary to the examiner's finding, the assignment provision does not reveal any attempt by acquiring carrier to obtain the proposed control through assignment of the agreement to another in the event of denial of the transaction.—General Movers Corp.—Control—Martin Van Lines, Inc., 101 M.C.C. 748 (753-4, 759-60)*.

Control within §5: [Vols. 12-18, 19, 21].—In approving §5 purchase application, the Commission found on the issue of control or management in a common interest, that close business relationships do not conclusively show that two carriers are managed in a common interest by their owners, nor do close working arrangements in advertising, accounting, leasing, interchange, etc., necessarily indicate management in a common interest.—Mason & Dixon Lines, Inc.—Purchase—Volunteer Motor, 97 M.C.C. 780 (795).

Upon institution of interstate operations by applicant pursuant to issuance of a certificate as authorized in the report, jurisdiction within the scope of §5(2) under the principle stated in 39 MCC 620 for continuance of its control within its environmental corporate complex extended to all corporate entities within the complex. Both noncarrier holding companies in the chain of continuance in control of applicant are considered motor carriers under part II of the Act.—Greyhound Lines, Inc., Ext.—Grand Canyon, 109 M.C.C. 96 (115-6).

See also Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, Case, n. 52, above; Southern Pac. Co.—Control-Western Pac. R. Co. case, n. 111 below.

Convenience & necessity: [Vol. 15].—See Aetna Freight Lines, Inc.—Control—Ray Carter, at §5(2), n. 45.

Divisions: [Vol. 15].—The division of interline revenues between the merging carriers made when liquidating carrier was under surviving carrier's control is not supported by the evidence and has operated to injure the interests of protestants. Such provision, providing that liquidating carrier received 10 percent less than the divisions otherwise set forth in the uniform transcontinental division sheets, while surviving carrier received 10 percent more is not shown to be justified particularly in view of the fact that a similar arrangement between surviving carrier and a wholly independent carrier provided that the independent carrier received 10 percent more of the interline revenue and surviving carrier 10 percent less. Accordingly, in computing income data for the proposed merger transaction, the 10 percent shift of interline revenues is restored insofar as possible.—Yellow Transit, Inc.—Merger—Wilson, Inc., 104 M.C.C. 737 (758-59).

In determining the price of liquidating carrier's stock, the appropriate factors for consideration are (1) invested capital, which is tangible net worth, adjusted, plus deferred income taxes and long-term debt; (2) earnings as related to market price; and (3) earnings paid out as related to market price. These factors are compared with those of 20 publicly held motor carriers, a procedure made necessary because liquidating carrier's stock was not widely traded and its market value was unrealistic because of the relationship to surviving carrier existing just prior to the decision to merge the two companies.—Id., p. 762.

Dual operation: [Vol. 12-14, 17-19, 21].—Commission authorized applicant to control a contract carrier of automobiles, although already in control of a common carrier of automobiles with some duplicate authority with the restriction that contract carrier's rights to services under contract with one shipper, General Motors, and conditioned common carrier's rights against services for that shipper. Restrictions are not favored but operations of the carriers resembled each other sufficiently to warrant imposition of said restriction.——Ryder System, Inc.—Control—Complete Auto Transit, 109 M.C.C. 275 (286-8).

Fitness of applicants: [Vols. 17-19, 21].—The significance of past violations depends on their quantity, duration, and nature. However, record in purchase proceeding shows that vendee has a history of frequent violations spanning many years and involving willful misrepresentations to the Commission; also, while actions taken by vendee's major stockholder in effectuating and continuing unlawful control of vendor's operations afford ample grounds for a finding of unfitness, his fraudulent efforts to revitalize vendor's dormant rights (including, among other things, false freight bills and false equipment leases) and his admissions thereof to the Commission's representative remove any doubt with respect thereto. Although there is some indication of recent improvement, corrective measures were taken only after Commission investigation disclosed the wrongdoing and then only to facilitate the pending applications; considering the flagrant disregard for regulation shown, reliance on any promises or representations of future good faith conduct is not justified. Denied.—National Freight, Inc.—Purchase—Pittsburgh Wheeling Exp., 97 M.C.C. 642 (654-6, 660-3).

Since acquired carrier's controlling individuals have been superseded, and the violations of §5(4) which had been effectuated have been terminated, the Commission is relieved of the necessity of considering the fitness of the persons formerly in control, as an element in determining whether proposed control and merger transaction merits approval; however the law violation found to have been effectuated under such former control remains of importance to the extent that it is necessary to determine whether an overriding public interest exists to permit continuance of the operations conducted under unlawful control and management.—Buckingham Transp., Inc.—Control and Merger, 97 M.C.C. 700 (713).

Since additional information submitted at a further hearing solely on question of vendee's financial fitness shows that vendee is now financially fit to consummate proposed, the application is granted in part. Vendee's overcapitalization does not constitute a bar to approval since 50 percent of its total capitalization would be evidenced by stock, and its total investment in its wholly owned subsidiaries is included in capitalizable assets on a cost basis as compared with their net worth. Approval is conditioned however, on elimination of overcapitalization through non-payment of dividends by vendee to its stockholders or affiliated companies, and submission of evidence verifying amendment of its charter to reflect authority to issue necessary additional stock and the additional capital investment made by its new majority stockholder.—Refrigerated Transport Co., Inc.—Purchase—Kurtz, 104 M.C.C. 114 (117, 118).

Applicants are fit to consummate the proposed transaction since the record is insufficient to warrant a finding that vendor fraudulently obtained his certificate in order to permit vendee to combine its authority with that of vendor. The evidence indicates that vendor was inexperienced in the transportation industry and in obtaining his certificate he relied heavily on vendee's sole stockholder who was related to him by marriage; that he made sincere attempts to raise cash to go into the trucking business, and while he failed to inform the Commission that due to changed circumstances he would be unable to operate if a certificate was issued to him, such failure does not constitute fraud.—Sawyer Transport, Inc.—Purchase—R. C. Wilson, 104 M.C.C. 233 (242-44).

Applicant's financial fitness to consummate the proposed control and merger is a prime factor in determining whether the transaction is consistent with the public interest. No such finding is warranted herein since applicant would have a negative working capital position and its debt-equity ratio will probably be unsatisfactory since its income is running substantially below prediction. Further, applicant's overcapitalization should not be ignored in determining its financial fitness despite prior authorization to recapitalize since it might also be overcapitalized if only the control transaction were consummated. Additionally, the findings prerequisite to statutory authorization cannot be made in the absence of more information concerning applicant's non-carrier corporate parent's ability to curtail $3,350,000 in acquired obligations since the impact on applicant's operations which would result from its parent's possible inability to meet its obligations could be severe in view of applicant's financial condition and because it depends upon the parent's ownership of tangible property utilized by applicant in its operations.—Consolidated Freightways Corp. of Delaware—Control. 104 M.C.C. 379 (384-85).

Working capital (current assets less current liabilities) equal to one month's expenses exclusive of depreciation is not a minimum requirement for financial fitness as was stated in prior reports in this proceeding. Consequently, applicants' capital needs were overstated and source of capital underestimated. Such prior findings withdrawn.—Consolidated Freightways Corp. of Del.—Control, 104 M.C.C. 658 (661-2)*.

Department of Transportation, an intervener herein, withdrew its opposition upon applicants' stipulation of compliance with the Department's safety regulations. However, consummation of purchase transaction would result in applicants' loss of identity as motor carriers making said stipulation impossible to enforce. Commission, therefore, approved application but required this proceeding to remain open for one year to permit the Department to petition for supplemental action if safety compliance is not accomplished and maintained.—Interstate Truck Service—Purchase—Safeway, 109 M.C.C. 195 (201-2).

In addition to vendee, its subsidiary and its noncarrier affiliates were all necessary parties to properly joined as applicants in this §5 application. Accordingly, consideration must be given to the ability of each party to meet their commitment to pay their proportionate share of the total purchase price.—East Tex, Motor Frt. Lines—Purchase—Lee, 109 M.C.C. 299 (318).

Despite significant overcapitalization, vendee's overall financial picture is favorable as shown by conversion of its working capital deficit into a surplus, reduction of its capital deficit by nearly half, its proven ability to sell vendor's equipment, and its increasing profitability. Transaction approved.—Universal Transport, Inc.—Purchase—Muck, 109 M.C.C. 871 (879)*.

See also Greyhound Corp.—Control—Tex., N. Mex. & Okla. Coaches, n. 9 above; Refrigerated Transport Co., Inc.—Purchase—Kurtz, n. 8b above; Schwerman Trucking Co.—Control and Merger case, n. 8b above.

Intrastate operating rights: [Vols. 12-15, 17-19, 21].—Question of the validity of the Commission's order stating that permit issued to liquidating carrier (in proposed merger proceeding) by the Washington Public Service Commission constituted a certificate of public convenience and necessity within meaning of the second proviso of §206(a)(1) and authorizing carrier to engage in operations in interstate or foreign commerce corresponding to operations authorized by the said permit, is not a question for determination in the merger proceeding. Therefore, protestants' motion for continuance of §5 proceedings pending determination of liquidating carrier's single-State status, and their motion to strike certain data presented by that carrier, are both denied.—Helphrey Motor Freight, Inc. —Purchase—Manning Freight, 97 M.C.C. 549 (556-7, 561-2)*.

In approving §5 purchase application the Commission held that it was necessary for multiple-state vendee seeking to continue the operations performed by vendor within a single State by virtue of claimed "grandfather" rights under §206(a)(7), or a certificate of registration, to obtain a certificate of public convenience and necessity under §207.—Lake Shore Delivery, Inc.—Purchase—Durst Delivery, Inc., 97 M.C.C. 623 (627).

Where operating rights of a multiple-state carrier are limited to nonradial irregular routes which are territorially confined to points in Arizona, and holder of certificate of registration is authorized to operate over regular routes wholly within California, there can be no common point between the two carriers for lawful interline. Use of points within commercial zone bordering the state line to extent that extend beyond confines of Calif. into Arizona are unlawful because such points are beyond underlying California authorization of the certificate of registration.—Reliance Truck Co.—Control and Merger, 109 M.C.C. 495 (501)*.

See also Arrow Motor Transit, Inc.—Control, n. 126, below.

Key points: [Vol. 14].—Service of motor carrier not subjected to key point restrictions in view of special circumstances whereby only one United States point located on the U. S.—Canada boundary line may be served, and service by the motor carrier is restricted to that to be conducted in foreign commerce between points in the United States, on the one hand, and points in Canadan on the other hand.—Canadian Ntl. Transp.—Investigation of Control, 109 M.C.C. 392 (404-405).

Purchase and sale: [Vol. 15].—In proposed sale of operating rights, the Commission noted that there is no fixed formula for determining whether the purchase price is reasonable and that a carrier's earning record is not the sole criterion by which to determine the reasonableness of the proposed sale.—Brasewell Freight Lines, Inc.—Purchase—Shayler, 101 M.C.C. 1(12).

Regular, irregular routes: [Vols. 12, 14, 17, 19, 21].—In considering protestants' objections to the unification of applicants' operating rights, on the ground that the irregular-route operations of vendor will be converted to a regular-route operation, the Commission stated that operations under the unified rights will determine the type of service vendee will provide, and considering that vendee has been conducting operations under the considered rights for over two years, pursuant to temporary authority, without complaint, it must be presumed that the irregular-route operation of vendor has not been unlawfully converted to a regular-route operation.—Braswell Freight Lines, Inc.—Purchase—Shayler, 101 M.C.C. 1 (12-13).

When operations over irregular route authority tend to become regular in character, a carrier has an obligation of either checking the tendency and thereby preserving irregular route status, or of obtaining appropriate authority for conversion. Operations over irregular route authority which have become regular and which have been performed in good faith are entitled to consideration in determining whether there is a need for the regular route service. If such rights are dormant, shipper need for reactivation provides an alternate basis for approval.—Ryder Truck Lines—Pur.—Guignard Freight Lines, 109 M.C.C. 682 (685)

As applied to regular route operations evidenced by certificates of registration, it was found that regular routes should not be pulverized by requiring a showing of operations to and from each and every point on those routes. Evidence of substantial past operations is sufficient, despite the fact that it was shown by protestants that some of the points had never been served. In these circumstances, a public need by supporting shippers is cumulative, and therefore, unnecessary.—Wilson Trucking Corp.—Purchase—Compton Lines, Inc., 104 M.C.C. 806 (811-12).

Restrictions upon operating rights and services: [Vols. 12, 14-19, 21].—The Commission need not impose restrictions stipulated between applicants and protestants in §5 proceedings even when they are offered as amendments to the applications; and examiner was entitled to due deliberation on imposition of proposed restriction on contract-carrier chartering rights authorized to be transferred to chartering of vessels owned by vendee, and was under no duty to indicate his decision thereon at the hearing. However, such restriction, precluding vendee's acting as a conduit of chartering, is not barred by prohibition in §309(g) of any limitation on a water contract carrier's right to add to its equipment or services within scope of its permit, since §5 specifies that approval of transactions shall be on such terms and conditions as the Commission finds reasonable. As transfer of ownership of the permit is akin to issuance of a new permit to a different carrier, proposed restriction is unlike one imposed on authority which will continue to be held by the carrier to which initially granted; the limitation found necessary is not so much a restriction on the permit itself as a condition on approval of the transaction which could not otherwise be found consistent with public interest.—Ingram Corp.—Purchase—Barrett Line, Inc., 324 I.C.C. 263 (269, 270).

Inasmuch as vendee, under temporary authority, provided service between points in Pennsylvania, by tacking its own interstate authority to considered interstate purchase rights, in approving proposed purchase transaction, the previously unrestricted purchase rights are restricted against service between points in Pennsylvania. Such restriction is acceptable to applicants and imposition thereof would preclude future use of interstate authority as a device to avoid state regulation of intrastate commerce.—Long Transp. Co.—Purchase—La Grou, 97 M.C.C. 631 (639).

In view of finding that unrestricted approval of proposed motor carrier control and merger would not have a substantial adverse effect on protestant's operations, no restrictions against tacking will be imposed. Restrictions against tacking generally are looked upon with disfavor, although they may lawfully be imposed where it appears that their nonimposition would have an adverse effect on the operations of protestants. Moreover, no such restriction is proper where applicants have each handled traffic, as here evidenced, from or to the territory of the other by interline; i.e., where no new competitive service is likely.—Eazor Express, Inc.—Control and Merger, 101 M.C.C. 707 (716).

The proposed control through stock purchase will be conditioned against transportation of certain commodities in bulk, in tank vehicles, pursuant to voluntary stipulations entered into by the parties although the Commission is not bound by such stipulations; additionally, approval of the transaction is conditioned upon modification of vendor's certificate authorizing the transportation of general commodities, without exceptions, to exclude these commodities usually excluded from rights to transport general commodities.—Hall's Motor Transit—Control—Pony Express, 104 M.C.C. 353 (365).

Removal of the no-tacking restriction is not justified by the evidence presented at both hearings. There is no evidence that vendor or its predecessor ever participated in interline movements beyond the territorial scope of its considered authority to include the four states in question; neither is there evidence of vendee's ever serving these states. To the extent that vendee's operations under the unified rights includes such interline movements it constitutes a new service, without the requisite showing of public need.—Fogarty Bros. Transfer—Purchase—Grenon & Son, 104 M.C.C. 444 (447).

Restrictions against tacking are undesirable and will not be imposed except where clearly shown in the public interest. Certificates of applicants speak for themselves, and it is not incumbent upon applicants to point out all tacking possibilities that would result from a unification. In general, acquired rights may be tacked freely with those of acquiring carrier unless protestant introduces specific evidence to justify a restriction. Burden of proof should remain upon protestants.—Chemical Leaman Tank Lines, Inc.—Pur.—Ryder, 104 M.C.C. 686 (704-5).

In general, the scope of interstate operations are governed by the interpretation or construction placed upon such certificates by the issuing State agency. However, where the limitation upon the scope of the underlying intrastate authority is clearly directed against local traffic within the State, it is inapplicable to operations in interstate or foreign commerce. See *Miller-Purchase-Newman*, 57 MCC 395.—Wilson Trucking Corp.—Purchase—Compton Lines, Inc., 104 M.C.C. 806 (810-11).

The test of substantiality is flexible, taking into consideration such factors as nature of industry and population served; carrier's size; resources, and financial viability; nature of rights involved; frequency of service; and variety of commodities transported. Commission will not pulverize an applicant's authority product by product, or part by part, so as to restrict scope of its operations where there is evidence of substantial operations in addition to bona fide operation as general commodities carrier inasmuch as a motor carrier, particularly a proviso operator, holding out to carry general commodities should not be restricted to specified commodities because its carrying space was most often occupied by a particular kind of goods. Considered in this light, applicant's overall operations warrant approval of authority as a general commodity carrier.—Ohio Fast Freight, Inc.—Control—Trumbull, 109 M.C.C. 88 (92-94).

Commission concluded that a restriction against "refrigerated" transportation by vendee seeking a certificate of public convenience and necessity to replace a State certificate of registration was not warranted. In order to achieve uniformity with the present policy of the Commission, stated in 106 MCC 1, no class of commodities not of the types usually excluded by this Commission from general commodities would be excluded merely because the intrastate authority supporting a certificate of registration sought to be acquired excludes such commodities. —St. Johnsbury Trucking Co., Inc.—Control and Merger, 109 M.C.C. 166 (169)*.

Commission has attempted in recent years to discourage or remove restrictions as unnecessary burdens upon operating rights unless shown clearly to be required in the public interest, see *Fox-Smythe*, 106 MCC 1. Restrictions in vendor's State certificate are for protection of intrastate carriers and are unnecessary for interstate traffic.—Home Transp. Co., Inc.—Purchase—Fuchshuber, 109 M.C.C. 779 (789-90)*.

Restrictions in vendor's certificate of registration are partially contained in certificate description insofar as vendee is authorized to transport commodities requiring special equipment since such commodities meet the restriction's terms. To extent they do not, a restriction is unnecessary and none will be imposed.—Id., p. 790*.

Where transferor has been conducting active overall operations of substantial proportions, our established policy against atomizing or fragmentizing certain segments of a carrier's authorized regular routes is of prime significance in considering what, if any, cancellations or restrictions should be placed upon particular segments of transferor's extensive system of regular routes.—Branch Motor Exp. Co.—Control—Middle Atl. Transp., 109 M.C.C. 807 (814-5).

Restriction imposed limiting operating rights to be sold to traffic originating at and destined to points involved in said certificate inasmuch as this authority permits operations in conjunction with authorities now held by vendor and subject of a pending purchase application by a vendee other than that herein. Restriction contingent upon consummation of said pending application. —Caravan Refrigerated—Pur.—Bilyeu Refrigerated, 109 M.C.C. 843 (853).

See also Buckingham Transp., Inc. —Control and Merger, n. 3, above. Michigan Express, Inc.—Control and Merger—Cushman at §5(2), n. 7, single-line; Ryder System, Inc.—Control—Complete Auto Transit at §5(2), n. 110 dual operations.

Revocation, suspension, abandonment: [Vols. 12-14, 17-19, 21].—Commission, citing 65 MCC 56, held that avoidance of a transaction within the scope of §5 through forfeiture, with our approval, of motor carrier status prior to consummation, is not equivalent to approval under §5; and that if a requested revocation is for that purpose, withholding termination of such motor carrier status is warranted until we have determined whether the transaction may be properly found consistent with the public interest.—Greyhound Lines, Inc., Ext.—Grand Canyon, 109 M.C.C. 96 (113-4).

Routing practices: [Vols. 15, 18, 19, 21].—See Central Pac. Ry. Co. Control case, §3(4), n. 41.

Securities: [Vols. 12, 14, 16-19, 21].—Although record does not disclose whether the long-term obligations to be assumed by survivor in proposed merger are securities within §214, on basis of the evidence presented action on the merits under §5 need not be deferred, but the transaction is approved with express understanding that, if the provisions of §214 apply, it will not be consumated until the Commission's approval under that section has been obtained through appropriate application; however, this does not preclude payment of those obligations in cash concurrently with consummation.—Arkansas-Best Freight System, Inc.—Control—Delta, 93 M.C.C. 474 (485).

Although payment of proposed purchase price will not adversely affect vendee's financial structure and it will incur no fixed charges, it has been negotiating with a bank for a revolving credit fund, and approval of purchase should not be construed as authorizing issuance of any security within meaning of the Act in connection with such fund.—Carolina Freight Carriers Corp. —Purchase—Kilgo, 93 M.C.C. 543 (555)*.

Securities issuable by the subsidiary or any of the noncarrier affiliates of vendee, a motor common carrier, are not subject to the provisions of §214 inasmuch as said noncarrier affiliates are not shown to control vendee and therefore are not subject to Commission's jurisdiction as determined by §5(3) of the Act.—East Tex. Motor Frt. Lines—Purchase—Lee, 109 M.C.C. 299 (320).

Separate agreements: [Vols. 19, 21].—Credit agreement between survivor, liquidating carrier (a wholly owned subsidiary of survivor), and a bank, containing certain limitations on declaration or payment of dividends, distribution of assets, or redemption or retirement of stock by either carrier, does not preclude their merger.—Arkansas-Best Freight System, Inc.—Control—Delta, 93 M.C.C. 474 (484).

See also Central Pac. Ry. Co. Control case, §3(4), n. 41.

Splitting routes: [Vols. 12, 13, 19].—Prior decisions in §5 acquisition proceedings limit "splitting" of operating rights to situations consistent with public interest. Evidence shows that transaction herein would create substantial duplications of operating rights upon consummation of other proceedings cited herein. Since such duplication is a contingency, restriction against vendor's authority to serve four named States will become effective only upon our approval and consummation of these other proceedings. —Caravan Refrigerated—Pur.—Bilyeu Refrigerated, 109 M.C.C. 843 (851-3).

Stock transactions:— Vols. 14, 17-19, 21].—Proposed issuance by Louisville & N. R. Co. of not exceeding 772,467 shares of $35 par-value preferred stock and 257,489 shares of $50 par-value common stock to effect a merger with Monon R. Co. approved. Request for additional issuance of stock denied as it is unnecessary to effect said merger and no other reason for issuance having been shown.——Louisville & N. R. Co.—Merger—Monon Railroad, 338 I.C.C. 134 (193, 203-4).

See also Great Northern Pac. & B. Lines, Merger—Great Northern, n. 8, above; Norfolk & W. Ry. Co.—Control—FP&E Co.—Purchase case, n. 45 above.

Temporary authority: [Vols. 12, 14-17, 19, 21].—Evidence showed that vendee's temporary control had not only stifled its prior competitive operations with those of vendor when they had been separately controlled before approval under §210a herein, but that vendee had completely captured all of vendor's traffic during its 10 months of temporary control. Thus, its subordinate sale of those routes to Bruce Motor Frt. was an attempt to barter off nothing more than "bare" operating rights for which it had no further use.——East Tex. Motor Frt. Lines—Purchase—Lee, 109 M.C.C. 299 (309-12).

In cases involving conversions of certificates of registration to certificates of PC&N under §207 when they are directly related to a §5 application, the Commission's objective in approving temporary authority under §210a(b) pending disposition of the §5 application is to preserve existing motor carrier operations, if failure to grant such temporary approval may result in their destruction or interfere substantially with future performance of continuance service to the public. New operations instituted under such temporary authority which deviates substantially from operations conducted to such authority cannot alone be considered evidence of past lawful operations supporting a public need for their continuance. Thus, applicant's operation under temporary authority is not best evidence of public need for the proposed service.——Transport Serv.—Control—Gould, Inc., & Colo. Frt., 109 M.C.C. 359 (378-9).

See also Bilyeu—Lease—North Central Truck Lines, Inc., §5(2), n. 50, supra.

Violation of Act: [Vols. 12-19, 21].—Defendant's unilateral revision of train schedules and standards of service adversely affecting interchange with complainant at Maybrook, N. Y., through increase in transit time violates conditions imposed for complainant's protection in *Pennsylvania R. Co.*, 334 ICC 25. Defendant ordered to cease and desist and to inform public of the restoration of service. However, complainant's demonstrated lack of diligence in bringing its claim before this Commission is "something akin to laches" and, accordingly, complainant's request for an award of damages, which is discretionary with the Commission, is denied.—Erie Lackawanna Ry. Co. v. Penn Central Co., 338 I.C.C. 513 (542-5).

See also Southern Pac. Co.—Control, Western Pac. R. Co., §5(2), n. 111.

111. Procedure, generally.—[Vol. 21].—Earlier determinations of Commission that benefits of inclusion should be divided between parties to consensual arrangements in railroad merger cases did not bind Commission to follow similar practice when fixing equitable terms for involuntary acquisition of railroads under §5(2)—Erie-Lackawanna R. Co. v. United States, 279 F. Supp. 316 (320)*.

Record affords no basis for finding the Commission abused its discretion in denying Denver & R.G. W.'s petition, filed after further hearing on reconsideration of Northern Lines' merger applications, requesting (1) an opportunity to present evidence on over-all effects of the merger and pending *Rock Island* and *Milwaukee* merger applications, and (2) that decisions in the three proceedings be withheld pending determination of effects of the proposals. The Commission, in denying further hearing, recognized importance of the effect of its decision on the general railroad structure in the west and decided to handle the problem by exercising its broad power to relate the pending applications to other proposals, while at the same time going forward with instant proceeding in a manner deemed best to protect the public and competing railroads; further, it also decided that consolidation of the cases was unworkable and that final decision in each case should not be withheld until all were ready for decision.—United States v. United States, 296 F. Supp. 853 (874)*.

In addition, the Commission retained jurisdiction for 5 years (or such other period as it might, for good cause, prescribe) in order to impose just and reasonable conditions found to be required by any cumulative or cross-over problems arising from approval of the merger or any other §5 transactions with respect to the territory involved and, also, to enable it to consider among other things petitions by any railroad in the territory for inclusion in the merger authorized; moreover, it held that consummation of the merger would constitute irrefutable assent by applicants to the reservation of authority to impose, after hearing, any just and reasonable conditions found necessary and appropriate. Manner in which the Commission proceeded while, at the same time, providing for readjustments in light of the over-all situation in the territory—as it might develop—seems to be reasonable in effecting the public interest as expressed in the national transportation policy. Complaints dismissed.—Id., pp. 874-5, 877-8.

While the Commission has the necessary power under appropriate circumstances to consolidate proceedings in which the issues are closely related, delay in deciding proposed merger transaction until such time as the Penn-Central merger is ready for final determination might endanger or defeat entirely a unification shown beyond question to be in the public interest. In view of the applicants' developing and relying on record sufficient to establish public interest, the adverse effect which could result from delayed determination of issues, and the adequate safeguards to the public through imposed conditions, consolidation of considered proceedings for decision with Penn-Central merger case is not required by public interest; nor is reopening of proceeding for further hearing necessary, since record is sufficiently well developed to permit separate determinations.—Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 324 I.C.C. 1 (18-19).

Sections 5(2), 5(4) and 5(7) of the Act do not require summary dismissal of control applications even if applicants and railroad interveners violated the Act by unauthorized purchases of stock of railroad sought to be acquired. Although an element to be considered in determining the public interest aspects of proposed consolidations is illegal stock purchases, it is not necessarily a bar to granting such authority as would be consistent with the public interest. If motion to dismiss were granted merely upon grounds of possible illegality in stock purchases, or lack of stockholder assent to proposed transactions, the possibility of finding these proposals to be in the public interest would be precluded; motion denied.—Southern Pac. Co.—Control—Western Pac. R. Co., 327 I.C.C. 387 (393-4).

Further, although decision as to merits of control applications is warranted, the embraced investigation, and complaint proceeding alleging control applicant's violation of the Act, is continued and broadened to include three other carriers not parties therein. The alleged control or power to control is not alone rail applicant's holding of 10 percent of outstanding stock of the carrier to be controlled, but the ownership by and among potentially hostile carriers of 50 percent of such outstanding stock. Therefore, no ruling is made at this time regarding applicant's alleged violation.—Id., p. 396.

Applicants' motion that two related §5 applications in consolidated proceeding, one involving purchase of operating rights and property of one bus line and the other involving acquisition of stock control of another passenger carrier, be considered as separate and distinct transactions and that separate reports and orders be issued therein, denied. Since the examiner was able to consider each transaction separately with respect to the question of consistency with the public interest, there was nothing improper in his handling them in a single report. Moreover, operational features under one transaction and the results flowing therefrom are the same as in the other and, in addition, later filed application is contingent on prior approval of the one filed earlier. Also, in accordance with §17(3), to handle the two matters in a single report will best conduce to the proper dispatch of business and to the ends of justice.—Greyhound Corp.—Control—Tex., N. Mex. & Okla. Coaches, 97 M.C.C. 733 (739-40)*.

Failure of persons in control to join the application herein makes it impossible to determine on this record whether control by them would be consistent with the public interest. Application denied without prejudice to an amended application.—Illinois—Calif. Express—Purchase—Ariz.—Utah Express, 104 M.C.C. 578 (589-90).

Change of form rather than substance in the nature of transaction was not material insofar as notice to public in Federal Register was concerned, particularly as such notice did not even purport to give all details of proposed transaction. Moreover, even if notice were to be considered defective, it was cured by subsequent republication giving notice of amendment after which ample time remained for interested persons to file for intervention. Technical objection held to be de minimus and not warranting further delay or postponement of proceedings.—Chemical Leaman Tank Lines, Inc.—Pur.—Ryder, 104 M.C.C. 686 (697-8).

Tilting of an action is purely administrative and is not determinative of the nature of a transaction which may ultimately be approved. Although this application was docketed as a purchase (portion) based on the opening statement, no difference has been shown between this transaction and a true statutory merger, which is what it has been found to be, notwithstanding its title.—Id., p. 708-9.

Upon amendment, in which all parties in control of vendee joined application and submitted satisfactory financial and other data as required by exhibit A to the application, the defect which required denial in the initial report, 104 MCC 578, has been corrected. Application approved.—Illinois—Calif. Express—Purchase—Ariz.—Utah, 104 M.C.C. 815 (816-7)*.

All parties, other than noncarrier individuals, controlling a carrier-applicant are required to submit financial and other data required by the Commission. The noncarrier holding corporation in control of vendee joined the application herein by affixing its representative signature but its failure to submit the required data and the failure of those persons in control of said noncarrier to join the application makes the application fatally defective unless appropriately amended. Denial of application on other grounds renders such failures moot but these requirements will be present in all future §5 proceedings.—Arkansas—Best—Purchase—Indianhead, 109 M.C.C. 885 (889-90).

Commission held that a hearing examiner may take official notice of a finding in another matter already determined by the Commission, although not yet administratively final, where the parties to each proceeding were the same, and where each party had the opportunity to present evidence and to crossexamine adversary witnesses on the particular issue involved.—C. O. D. E., Inc.—Control—Nolte Bros. Truck Lines, 109 M.C.C. 552 (557).

See also Pennsylvania R. Co.—Merger—New York Central R. Co., at §17(6), n. 15., Pittsburgh & N. E. Trucking Co.—Control & Merger at §5(2), n. 110, Certificate under §207.

112. Hearing; notice.—[Vols. 14-19, 21].—In suit to enjoin Commission orders authorizing grant of trackage rights between Longview, Wash., and Portland, Oreg., to Milwaukee railroad without a hearing, Union Pac. R. basically contends that the application should have been filed under §1(18)-(21) which requires hearings and a finding of public necessity, instead of §5(2) under which public hearings are within the Commission's discretion. However, §5(2) permits a railroad, with Commission approval, to acquire trackage rights over another line; and the Commission was authorized to consider the application under §5(2)(b) in accordance with its long-established practice. While it is also claimed that the Commission abused its discretion in not granting a hearing, practically all evidence UP seeks to present was heard at hearings on the Burlington Northern merger which the Commission approved on condition that the Milwaukee have access to Portland. And there is no merit in UP's contention that the §5(2) application constituted an admission that a hearing was necessary or that all parties expected further hearings on trackage rights. Commission orders sustained.—Oregon-Washington R. & Nav. Co. v. United States, 324 F. Supp. 124 (126-7)*.

Petition for hearing denied as hearing is not necessary when the Commission's approval of a trackage rights agreements and consummation of the proposed transaction will not adversely affect existing transportation service to the public (see *Operation*, 282 ICC 297) as is case herein where even petitioner for hearing favors applicant's access to the Chicago area.—Louisville & N.R. Co.—Trackage Rights, 334 I.C.C. 412 (416-7).

Applicants' contention that the examiner did not consider the whole record, but rendered his decision on the "realities of the situation" not sustained. On review of the examiner's report in light of the testimony and briefs, it is concluded that his reference to "realities of the situation" was a prosaic statement and did not suggest that extra-record matters were controlling; that the examiner considered all of the evidence of record; and that applicants have been accorded a full and fair hearing. Furthermore, the Commission's consideration of the record was *de novo* and any errors as to minor facts in the report did not affect the Commission's decision or ultimate conclusions.—Greyhound Corp.—Control—Tex., N. Mex. & Okla. Coaches, 97 M.C.C. 733 (741).

See also Pennsylvania R. Co.—Merger—New York Central R. Co., at §17(6), n. 15.

115. Evidence.—[Vols. 12-19, 21].—In action to set aside and enjoin Commission order approving bus lines' control application, plaintiff (protestant) claims the order was obtained by fraud upon the Commission on the part of applicant, and that disclosure of certain facts would have shown a §5(4) violation which would have led to a different Commission decision. But giving false or misleading testimony during a judicial proceeding does not constitute a fraud upon the court unless it appears that the court was so misled by such testimony as to render a decision based on a mistaken view of material facts; this is equally true in an administrative proceeding. There is no showing that the Commission was misled in any material way by the testimony plaintiff relied on or that any part of its decision was based on a mistaken view of the facts. Also, plaintiff's reliance on §5(4) is misplaced; the Commission concluded, on facts before it, that no prior unlawful control of the carriers had been acquired and its conclusion is amply supported by the record. Plaintiff clearly has not shown that order under review was obtained by fraud; its motion for relief based on fraud, denied.—Interstate Investors, Inc. v. United States, 287 F. Supp. 374 (378, 381-4)*.

In discussing merits of proposed merger transaction, the Commission takes official notice of facts obtained from annual reports filed with the Commission by carriers involved, a report of the Securities and Exchange Commission, and data obtained from recognized finance and industry publications; however, pursuant to the Administrative Procedure Act, parties challenging them are afforded opportunity to show to the contrary upon timely filed petition setting forth objections.—Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 324 I.C.C. 1 (10).

Through evidence of service by a prospective purchaser under temporary authority is not conclusive, it may be considered with other evidence in determining whether the transaction and resulting unified operation would be consistent with public interest.—Carolina Freight Carriers Corp.—Purchase—Kilgo, 93 M.C.C. 543 (551)*.

Also, when record shows that vendor has provided the shipping public with substantial service under its general-commodity authority between many points on its regular routes and in its irregular-route territory, it is not required to submit evidence of operations from and to every authorized point, or in connection with all combinations of its routes, in order to show that its operations have been continuous and substantial. However, many of its off-route points in Maryland and Pennsylvania, which have populations over 20,000 and surrounding trade territories, are not reasonably near the appurtenant regular route but, in some instances, are hundreds of miles off-route in areas not generally served by vendor; in this highly unusual situation, such points take on the characteristics of principal or terminal points, and vendor is not relieved from necessity to establish with certainty either that its authority to serve such distant and densely populated points has remained active through rendition of service, or, in the event it is dormant, that need exists for service from and to those points.—Id., pp. 553-3.

While traffic handled by a vendor subsequent to beginning negotiations for sale of its rights is entitled to little weight in determining scope of operations conducted under such rights, a seller has the right to augment his traffic even though he anticipates such a sale, if the augmentation is free from the "control, influence, or dominion" of proposed purchaser. Evidence does not show that any serious negotiations commenced prior to increase in interstate traffic handled by single-State acquired carrier, although a possible merger had been previously discussed; and record is not sufficient to show any control or management of applicant carriers in a common interest; therefore, acquired carrier's operations are entitled to consideration as evidence of need for continuance thereof by acquiring carrier. —Helphrey Motor Freight, Inc.—Purchase —Manning Freight, 97 M.C.C. 549 (562-3)*.

Although evidence of movements conducted after the parties have commenced negotiations for sale of the underlying rights can be accorded little weight in determining whether a transaction is consistent with public interest, the vendor has a right to build up operations after commencement of negotiations and evidence of such operations may be considered if it is clear that such build-up was free from prospective purchaser.s control, influence, and dominantion. —Miami Transp. Co., Inc., Of Ind.—Pur.— Strothman, 97 M.C.C. 600 (604).

In proposed sale of operating rights, in an attempt to show that protestants will not be adversely affected by the transaction, applicants requested the Commission to consider certain data relating to the operations of protestants since the completion of the hearing. This data is not of record and the Commission held that it would not be considered in disposing of the issues here present.—Braswell Freight Lines, Inc.— Purchase—Shayler, 101 M.C.C. 1(16).

In purchase proceeding evidence as to interline operations between applicants at Birmingham, Ala., which does not reflect vendor's continuation of a lawful prenegotiation service, is entitled to no consideration. The record shows that these operations were preceded by negotiations between applicants; that they were performed under circumstances where vendee was contacted by shipper desiring service to vendor's territory, and, in certain instances, where shipper was referred to vendee by vendor; that vendee furnished all tractors and trailers. and that vendee furnished the drivers, paid their salaries, and bore the cost of equipment inspections. Thus, these operations were not, as contemplated by the leasing rules and regulations, for the purpose of augmenting vendor's equipment in order to transport the traffic it developed, but rather a method by which vendee could transport traffic generated by it pursuant to an unlawful fictitious leasing of vendor's operating rights in violation of §5(4); therefore, evidence as to these operations is entitled to no consideration.—Eagle Motor Lines, Inc.—Purchase—Victory Frt. Lines, 101 M.C.C. 368 (373-4)*.

In attempting to determine the adverse effect of joining vendor's operations to those of vendee, the entire Commission on reconsideration of an appellate division's decision took official notice of protestants' financial data as reflected in their annual or quarterly reports, in order to have a broader base upon which to appraise the competitive effect of those operations on the overall operations of protestants. Such financial data shows that protestants' operations suffered no perceptible adverse effect from vendee's management of vendor's operations under temporary authority and any resulting through operations. Approved without restriction.—Eazor Exp., Inc.— Purchase—Fleet Highway Freight, 101 M.C.C. 719 (722-4)*.

Evidence of shipments of frozen waffles by vendor, an irregular-route special commodity carrier, from Philadelphia, Pa., to Waterford, Conn., and to Binghamton, N.Y., is admissible and proper. In transporting these shipments vendor operated from Philadelphia to

New York, N.Y., thence back to Mercer County, N.J., and thence to Waterford and Binghamton. The movement from Philadelphia to New York to Mercer County was provided under separate paragraphs of vendor's grocery store merchandise authority, and thence under its processed foods authority. Although these rights are contained in one certificate, there is no indication that they were not intended to be considered as separate, distinct, and unrestricted. Under these circumstances, the questioned service was lawfully performed by a combination of the several authorizations and is entitled to consideration.—Lester C. Newton Trucking Co.—Purchase—Buglio, 101 M.C.C. 480 (484-5).

Applicant attempted to discredit protestants' witness (a former employee of applicant) by testimony of another witness regarding the former employee's animosity toward applicant, which testimony was marred by contradiction, and by questions relating to certain matters in the witness' past; however, it is most significant that applicant failed to produce witnesses, who could have been made available, to contradict facts testified to by that witness. In the absence of evidence to rebut testimony of protestants' witness, examiner properly accorded his testimony the weight to which it was rightfully entitled. Furthermore, the examiner could judge veracity from actually seeing and hearing the witnesses.—General Movers Corp.—Control—Martin Van Lines, Inc., 101 M.C.C. 748 (761-2)*.

Acquired carrier's abstract of shipments made subsequent to its contract with surviving carrier is entitled to little weight but may be considered for the purpose of showing little or no change in the pattern of operations at acquired carrier's irregular route points.—Thurston Motor Lines, Inc.—Control and Merger, 104 M.C.C. 1 (6).

Evidence not submitted at the hearing and not subjected to protestants' cross-examination is dehors the record and not entitled to consideration under rule 1.86 of the Commission's General Rules of Practice. Applicants sought to include in their reply copies of correspondence with and references to an informal staff opinion of a state Public Utilities Commission concurring in their interpretation of a state supporting certificate.—St. Johnsbury Trucking Co., Inc.—Control and Merger, 104 M.C.C. 137 (141).

Protestants' objection to admission of applicants' exhibits on the basis that they do not show "representative" past operations are insufficient to preclude consideration of the exhibits, and go to the weight to be accorded them rather than to their admissibility. Protestants based their objection on the grounds that both exhibits fail to indicate the particular routes traversed, and do not, in fact, reflect representative operations in view of the admission by the sponsoring witnesses that the shipments reflected on the first exhibit were selected at random, while those shown on the second exhibit did not include certain traffic.—Id. (142).

Protestants' objection to applicants' exhibits relates to the qualifications of the sponsoring witness rather than to the authenticity of the evidence, and as such, goes to the weight to be accorded to the exhibit rather than its admissibility. The exhibits were prepared by surviving carrier's general manager or by others under his direction and supervision, from liquidating carrier's delivery receipts. While the sponsoring witness was not employed by applicants during the period covered by the exhibits and had no personal knowledge of the operations in question, the underlying data supporting the exhibit constitutes records made in the regular course of business, and as such, it and the exhibit which it supports are admissible under rule 1.79 of the Commission's General Rules of Practice.—Id. (142-43).

Denial of the proposed purchase transaction is supported by reason of the dormancy of vendor's operating rights. Exhibit 7, which was sought to be introduced in evidence to show past operations, was properly rejected since 31 of the 40 shipments shown in the exhibit were supported by "tear copies" of the underlying bills of lading rather than originals. These "tear copies" did not withstand the test of credibility when challenged under cross-examination by protestants. They did not establish observation of a gateway, failed to show whose vehicles were used in the movements, and otherwise lacked adequate supporting data to establish the validity of information thereon. Moreover, vendor's witness appeared insufficiently acquainted with vendor's movements shown on exhibit 7. On cross-examination, he, therefore, could not qualify the abstract through his oral testimony.—Fogarty Bros. Transfer, Inc.—Purchase—Transport Van Lines, 104 M.C.C. 665 (667).

Evidence of leasing arrangements between applicants established unlawful control but was not sufficient of itself to dictate rejection of past operations submitted in support of the related §207 application as such operations were conducted under color of right—Pittsburgh & N.E. Trucking Co.—Control & Merger, 109 M.C.C. 56 (59-60).

In a §207 application related to a §5 transaction, evidence of past lawful operations under a certificate of registration satisfactorily supports approval of both applications except where such evidence was at a time when applicants were under common control in violation of §5(4), and was, therefore demonstrative of unlawful operations, such evidence was rejected as a basis for supporting the applications. Shippers' support being inadequate and the services of protestants having been found adequate to serve the involved area, applications were denied.—Reliance Truck Co.—Control and Merger, 109 M.C.C. 495 (503)*.

The quantum of shipper evidence needed to support reactivation of dormant authority is a factor which changes from case to case and there are no hard and fast standards delineating the degree of proof necessary for applicant to prevail. Commission, following its decision in *Ohio-Vermilion*, 101 MCC 444, found that a strong need has not been shown by shipper evidence herein.—Fischbach Trucking Co.—Control and Merger—Peck, 109 M.C.C. 739 (750).

Commission held that its hearing examiner erred in limiting supporting shipper testimony to the specific locales mentioned in certifications submitted by applicant in the related §207 application. The *Schaeffer* criteria, 106 MCC 100, regarding shipper testimony were met when shippers' affidavits were filed and notice given to protestants. However, applicant was not adversely affected as its past operations warrant issuance of a certificate.—Mid-American Lines.—Purchase—Five J Motor Service, 109 MCC 753 (755-6).

Commission policy requires protestants to produce specific evidence in support on a general apprehension of feared traffic diversion or any adverse effect from a proposed transaction.—Branch Motor Exp. Co.—Control—Middle Atl. Transp., 109 M.C.C. 807 (821).

See also Arrow Motor Transit, Inc.—Control, n. 126, below; Continental Dispatch, Inc., case, §5(2), n. 105; Eastern Massachusetts Street Ry. Co.—Lease—Trailways case, n. 7 passenger service, above; Eazor Express, Inc.—Control and Merger case, §5(2), n. 110 restrictions; Leonard Bros. Transfer, Inc.—Purchase—Ace-R. B. Van Lines, n. 48 discontinued, above; Pennsylvania R. Co.—Merger—New York Central R. Co., at §17(6), n. 15.

116. Official notice; res adjudicate; stare decisis.—Commission considers it advisable, before discussing merits of proposed merger, to describe events occurring after the hearings, but, nevertheless, having a bearing on the decision. Official notice is taken of these post-hearing events; and, any party challenging facts set forth in connection therewith may proceed pursuant to §7(d) of the Administrative Procedure Act.—Pennsylvania R. Co.—Merger—New York Central R. Co., 327 I.C.C. 475 (487).

Commission held that a hearing examiner may take official notice of a finding in another case already determined by the Commission, although not yet administratively final, where the parties to each proceeding were the same, and where each party had the opportunity to present evidence and to cross-examine adversary witnesses on the particular issue involved.—C.O.D.E. Inc.—Control—Nolte Bros. Truck Lines, 109 M.C.C. 552 (557).

See also n. 115 above.

126. Burden of Proof.—[Vols. 15-19, 21].—Applicants in purchase proceeding (plaintiffs) have the burden of proving that the proposed transaction is consistent with the public interest. And, being faced with the obstacle of dormancy, they have the duty to make an affirmative showing as to the extent of past service provided under the purchase rights so that the Commission may be properly advised in order for it to determine whether and to what extent approval of the proposal would permit institution of a new service that might adversely affect existing adequate service, i.e., to consider the impact of the proposal in the interests of competing carriers, shippers, and consignees. The Commission's conclusion that applicants failed to sustain their burden of proof is supported by substantial evidence of record; order under review is sustained.—Cooper Motor Lines, Inc. v. United States, 284 F. Supp. 754 (756-8)*.

Burden is on applicant in a §5 purchase proceeding to show that a new service will not be created; and, to sustain its burden of proof, applicant must show both (1) that prior operations under the purchase rights are not dormant and (2) use to which the rights would be put would not radically differ from their prior use. And if the Commission finds that rights to be purchased are dormant or a new competitive service would be created or that vendor proposes to sell more rights than he has, then applicant must present proof under separate §207 application that public convenience and necessity require granting the application. Record shows that the Commission's denial of two §5 purchase, and related §207 extension, applications because vendees' proposed services were so different from prior lawful service as to constitute new competitive services, and because neither carrier had met its burden of proof in showing need for the new services, is based on substantial evidence and in accordance with applicable law; sustained.—Consolidated Copperstate Lines v. United States, 293 F. Supp. 858 (861, 862)*.

In §5 application proceeding the burden is on applicant to show that a new service will not be created and, to do so, it must show that substantial operations have been conducted under its authority, and that the operating rights involved would not be put to a different use in the future. Also, if the Commission finds that proposed transaction would result in a new service, either because of reactivation of dormant rights or because of a different use, applicant then must prove that public convenience and necessity require grant of the authority sought. Evidence in motor carrier merger proceeding fully justified the Commission's findings that liquidating carrier's rights in three States were dormant and that public need for reactivation thereof had not been established. There is warrant in the law and the facts for the Commission's conclusions; sustained.—Tose, Inc. v. United States, 304 F. Supp. 894 (898-900)*.

The burden was upon plaintiffs, applicants in motor carrier purchase proceeding before the Commission, to show that the rights involved were not dormant and that a new competitive service would not in fact be created by the purchaser. Ultimate effect of the Commission's order, which approved purchase of those rights that had not become dormant, was to deny authority to purchase those claimed "rights" of vendor which were dormant and thus legally non-existent; however, the Commission's findings with respect to dormancy and the absence of a public need for a new competitive service are supported by substantial evidence of record, and are neither arbitrary nor capricious. Complaint dismissed.—Beaufort Transfer Co. v. United States, 324 F. Supp. 649 (654)*.

Provisions of §5(2) do not require a showing of penury or danger of imminent bankruptcy before proposed merger transaction can be approved. Transcendent requirement, which is indispensable under criteria set out in the statute, is that carrier show the transaction is consistent with the public interest.—Pennsylvania R. Co.—Merger—New York Central R. Co., 327 I.C.C. 475 (494).

As an irregular-route carrier, vendor is required to show only that it has rendered substantial service to a representative number of points within its authorized area in order to support the conclusion that its operations have been substantial and continuous.—H. C. Gabler, Inc.—Purchase—H. Earl Pitzer, Inc., 97 M.C.C. 535 (540).

The burden is on applicants to show that proposed purchase is in the public interest. That burden is not met when abstracts of representative shipments fail to show that continuance by interstate vendee of vendor's past operations would be in the public interest: first abstract shows a method by which vendee transported traffic generated by it pursuant to an unlawful fictitious leasing of vendor's operating rights; the second fails to show what shipments, if any, were interlined with vendor; and the third does not involve pertinent operating rights. Furthermore, applicants' contention that the Commission should be governed in its determination of a §5 application by the prior finding of the Alabama Public Service Commission approving the transfer to vendee of the underlying intrastate authority is without merit.—Eagle Motor Lines, Inc.—Purchase—Victory Frt. Lines, Inc., 101 M.C.C. 368 (372-4)*.

In §5 proceeding applicants have burden of proving that proposed purchase of vendor's operating rights between Boston, Mass., and Rochester, N.H., via Lawrence, Mass., will be consistent with the public interest. And, although the public interest encompasses the interests of competing carriers and their ability to perform and to continue to perform an adequate transportation service for the public, in the absence of a showing as to the quantum of traffic and revenues that protestants would lose by virtue of approval, mere apprehension that their operations will be harmed is entitled to little weight.—Eastern Massachusetts Street Ry. Co.—Lease—Trailways, 101 M.C.C. 410 (411, 13).

On reconsideration of an appellate division's decision the entire Commission noted that since restrictions against the joinder of operating authorities are cumbersome and lead to undesirable complications, opposing carriers must show, to justify imposition of such a restriction, that its nonimposition would have a material adverse effect upon their operations. And evidence showing a substantial increase in applicants' traffic since vendee assumed temporary control of vendor and commenced tacking their respective authorities and showing some of the protestants as handling substantial traffic between the same areas, in and of itself does not show that an adverse effect upon protestants' operations would result from the operations of vendee under vendor's rights, but merely that vendee's operations would be more competitive than those of vendor.—Eazor Exp., Inc.—Purchase—Fleet Highway Freight, 101 M.C.C. 719 (722)*.

When applicants sustained their burden of justifying continuation of operations under combined rights of vendor and vendee, protestants failure to show with greater particularity the manner and extent to which its operations might be impaired, taken together with unnecessary operating problems arising from imposition of the requested restriction, and the unanimous shipper testimony that protestant would not suffer any diversion of traffic as a result of unconditional approval of the application demonstrates that imposition of the restriction is not consistent with the public interest.

Protestant, who is of substantial size, fears a loss of traffic if the applicants are not restricted from serving points under their combined rights which protestant is authorized to serve. However, protestant concedes that loss of traffic and revenue to it subsequent to vendee's exercise of temporary authority is chiefly the result of lower rates.—Refrigerated Transport Co., Inc. —Purchase—Kurtz, 104 M.C.C. 114 (124).

Standards of proof applicable to transfer of certificated rights are equally applicable to the acquisition of regular-route registered rights. Evidence presented clearly demonstrates liquidating carrier's comparatively substantial operations over its regular-route rights and testimony of shipper witnesses evinces additional need for service to many of the same points and a number of other points where operations were limited. Applicants are not required to establish further that a need exists for service to and from every terminus or intermediate and off-route point involved. The evidence is sufficient to show that the shipping public is actively supporting the applications.—St. Johnsbury Trucking Co. Inc.—Control and Merger, 104 M.C.C. 137 (146).

Evidence of past single-State operations conducted by applicant in related §207 conversion proceeding under its "grandfather" certificate of registration, supported by an Illinois irregular-route certificate, shows a sufficiently representative service (except as to Joliet and Freeport) to meet its burden of proof under the "test of substantiality" which the Commission adopted, in 101 MCC 151, as applying to a vendor operating under a certificate of registration. That test permits a more lenient approach than the former test applied in similar cases, i.e., that proof be "convincing and more comprehensive than that involving a transfer of control with respect to a certificate where the issue of public convenience and necessity previously had been determined"; also, an irregular-route carrier's operations will vary as to points served and frequency of service and, to prove that its operations have been substantial and continuous, it is only required to show "substantial" service to a "representative" number of points within its authorized territory.—Arrow Motor Transit, Inc.—Control, 104 M.C.C. 436 (438-9).

With respect to Freeport and Joliet, applicant claims its past service was authorized because commercial zones thereof touch its 50-mile radial State authority; however, although the Freeport commercial zone possibly does touch the 50-mile radius, that constituted no authority to serve parts of that zone outside the radius; and Joliet and its commercial zone are well beyond the radius. In any event, record shows that applicant served Freeport under color of right, but it is void of any similar evidence with respect to Joliet. It is well established that evidence of past operations will support a finding of convenience and necessity and will warrant a grant of authority substantially identical thereto; furthermore, past operations conducted illegally, but under color of right, have also been found to support a finding of public convenience and necessity. As a matter directly related to approved control transaction, therefore, and applying the "test of substantiality," grant of authority to serve Freeport, but denial as to Joliet, will be consistent with evidence of applicant's past Illinois intrastate operations.—Id., pp. 439-40.

Applicants successfully sustained their burden of proving vendor's operations free from domination by vendee by showing that an independent, although coordinated, operation has been conducted. Application approved.—Old Colony Transp. Co.—Pur.—Holden, 109 M.C.C. 487 (491-2).

See also Eazor Express, Inc.—Control and Merger Case, §5(2), n. 45.; St. Johnsbury Trucking Co., Inc.—Control and Merger, n. 115 above; Republic Van & Storage Co.—Purchase—Consolidated Van, n. 48 above.

Regulations of the Commission

34 FR 18122, Nov. 11, 1969, Part 1134: Control or Consolidation of Motor Carriers or Their Properties, §1134.1 Application for authority to merge properties or franchises. (a), "B.M.C. 44" changed to OP-F-44"; §1134.50 Application for authority to acquire control, "B.M.C. 45" changed to "OP-F-45" both effective on publication in the Federal Register.

35 FR 7559, May 15, 1970, Part 1134: Control or Consolidation of Motor Carriers and Their Properties, new regulation, §1134.51 Control of duplicate operating rights, added, effective 35 days from date of service.

37 FR 9672, May 16, 1972, Part 1111: Railroad and Water Carrier Consolidation Procedures, heading of part revised to read as set forth; and §1111.2(b)(13) and §1111.4(b) and (d) revised, effective on date of publication in Federal Register.

Section 5. (3) Noncarrier deemed carrier upon acquiring control.—[Unchanged. See vol. 11, p. 9212.]

Amendments, see footnotes, vol. 6, p. 5169, vol. 11, p. 9212; historical note, vol. 6, p. 5169

Notes of Decisions

Volume 11—p. 9213; Volume 12—p. 10272; Volume 13—p. 10980; Volume 14—p. 11477; Volume 15—p. 12052; Volume 16—p. 12686; Volume 17—p. 13355; Volume 18—p. 14121; Volume 19—p. 15267; Volume 21—p. 16761.

10. Controlling person subject to reports, accounts, securities provisions.—[Vols. 11-19, 21].—Noncarrier corporation already controlling certificated water carriers and authorized to purchase chartering and towage rights and physical properties of a water contract carrier is subject to the accounting, recording, and reporting requirements of §313, since its interests and investments will be in water transportation or in business related thereto.—Ingram Corp.—Purchase—Barrett Line, Inc., 324 I.C.C. 263 (270).

Securities issues of noncarrier parent of carrier applicant are regulated by Securities and Exchange Commission and Federal Power Commission; thus, subjecting these issues to Commission regulation could disrupt the established patterns of such issues and lead to jurisdictional conflicts; moreover, it is neither necessary nor advisable to subject it to common carrier regulation in view of fact that its common carrier subsidiaries are under and will remain under Commission regulation whatever action is taken regarding noncarrier parent. Therefore, noncarrier corporate parent is subjected to the provisions of §5(3) only to extent of making such periodic and special reports as may be required pursuant to §§20(1) and (2); however, Commission jurisdiction retained should further regulation be required.—Missouri Pac. R. Co.—Control—Chicago & E.I.R. Co., 327 I.C.C. 279 (315-6)*.

Commission ordered noncarrier Northwest Industries, which is acquiring control of a rail carrier through merger approved herein, to file periodic and special reports as the Commission may require pursuant to §§20(1) and (2) of the Act. Since said noncarrier derives most of its income from nontransportation activities it should not be subject to other sections of the Act at the present time.—Chicago & N.W. Ry. Co.—Merger, 333 I.C.C. 236 (240-1).

Because Leaseway, a noncarrier corporation, controls approximately 125 other corporations including seven motor carriers, it is ordered subject to provisions of the Interstate Commerce Act only to the extent that it is required to make such periodic and special reports as the Commission may require pursuant to §220. Leaseway is presently subject to provisions of the Securities and Exchange Act and further requirement that it secure Commission authorization for issuance of securities, which apparently would be predominantly unrelated to its motor carrier activities, could hamper those operations. Therefore, at this time, public interest does not require that Leaseway be subjected to the security provisions of the Act. In addition, it is also unnecessary that Leaseway file annual reports with the Commission since each of the carriers under its control is subject to the Commission's jurisdiction and presently submits such reports. Requiring additional reports would serve little purpose.—Refiners Transport & Term. Corp.—Purchase—Mitchell, 101 M.C.C. 611 (619-20).

The two corporations which constituted intermediate control between vendee and the individuals ultimately in control found to be principally engaged in activities related to transportation. On this basis they are both found to be carriers pursuant to §5(3) of the Act and subject to the reporting requirements therein.—Illinois-Calif. Express—Purchase—Ariz.-Utah, 104 M.C.C. 815 (818)*.

The subsidiary and noncarrier affiliates of vendee herein, a motor common carrier, are not found to exercise control over vendee and are therefore not subject to the provisions of §5(3) of the Act.—East Tex. Motor Frt. Lines—Purchase—Lee, 109 M.C.C. 299 (320).

Commission did not subject a noncarrier seeking control to provisions of §214 inasmuch as adequate protection is afforded by our reservation of jurisdiction and by restricting carriers to be controlled (directly or indirectly) from declaring or paying dividends, making advances to affiliated companies, encumbering its assets for noncarrier purposes, and engaging in any other intercompany property transactions. This restriction is not intended to restrict normal business dealings between controlling carrier and its carrier subsidiaries but rather to require Commission approval for transactions between such carriers and their affiliates.—Matlack, Inc.—Control—Southern & T. I. McCormack, 109 M.C.C. 861 (868-9).

Section 5(3) requires that a party seeking control in an application under §5, herein a noncarrier holding corporation owning all the outstanding stock of vendee, be henceforth considered a carrier subject to the requirements of the Commission. However, denial of this application on other grounds made such subjection a moot point.—Arkansas-Best—Purchase—Indianhead, 109 M.C.C. 885 (890).

Section 5(4). Unauthorized control; unlawful.—[Unchanged. See vol. 11, p. 9213]

1. Construction and interpretation.—Although both carriers involved herein are controlled by the United States Steel Corp., the Commission found that such control is not in violation of §5(4) inasmuch as the effectuation of this common control occurred prior to enactment of the present statute. However, operations over tracks leased by one carrier to its affiliate are in violation of §5(4) because such leases were entered into without Commission approval. Cease and desist order entered without prejudice to a filing under §5(2) to cure this deficiency.—United Transp. Union v. B & LE and P & C, 342 I.C.C. 849 (856-58).

A lawful lease of properties and operations of a carrier precludes a finding herein of unlawful control of the lessor by the lessee during the lease. There is no evidence that lessor would attempt to retain its control under by assignment of its right to purchase the stock to a third party in the event of denial of the transaction.—Consolidated Freightways Corp. of Del.—Control, 104 M.C.C. 658 (659)*.

Respondents found to have effected unlawful control or management in a common interest following prior denial of application for control by purchase of a minority stock interest, election of common directors, and various other indicia of common control. It is no defense to plead their belief that such action did not contravene Commission's jurisdiction in view of clear language of the statute and the recent denial of authority on grounds which relied on a strict interpretation of the statute.—Canadian Ntl. Transp.—Investigation of Control, 109 M.C.C. 392 (401-2).

Although discussions by defendants of their problems with the Commission personnel do not warrant condonation of the law violation, they do evidence a concern for and a desire to conform to the provisions of the Act. Commission, therefore, found that the §5(4) violation had not been shown to have been willful, flagrant, or in disrespect for the applicable law.—Reliance Truck Co.—Control and Merger, 109 M.C.C. 495 (502)*.

A marital relationship created no presumption of unlawful common control. Evidence proves that applicant's wife purchased the carrier to be leased with her own finances, both carriers were operated independently of each other, all records were maintained separately, and there were no common employees. Such evidence effectively refutes any contention of unlawful common control.—Bilyeu—Lease—North Central Truck Lines, Inc., 109 M.C.C. 834 (837-8).

Although members of applicants' families held a significant interest in other carriers, such a relationship does not per se prove control, management, or operation in a common interest. However, close family interests are presumptive of control and all applicants are charged to disclose any interest, including family interests. Failure to make such disclosures is in violation of §5(4).—L & M Express Co., Ext.—North Carolina, 110 M.C.C. 845 (850).

Section 5 (5-8). Control effected by other than prescribed methods; Affiliation; Investigation; Injunctions.—[Unchanged. See Vol. 11, p. 9213-9215.]

Amendments, see footnotes, vol. 6, pp. 5170-5176, vol. 11, pp. 9213-9215; historical notes, pp. 5170-5176; cross references, vol. 9, p. 7461.

Section 5. (9).—[Unchanged. See vol. 11, p. 9215, vol. 15, p. 12054.]

Amendments see footnotes, vol. 6, p. 5177, vol. 11, p. 9215; historical note, vol. 6, p. 5177.

Notes of Decisions

§5(9): Volume 2—p. 1387; Volume 6—p. 5177; Volume 9—p. 7464; Volume 12—p. 10272; Vol. 13—p. 10981; Volume 14—p. 11478; Volume 15—p. 12053; Volume 16—p. 12687; Volume 18—p. 14122; Volume 19—p. 15270; Volume 21—p. 16763.

10. Supplemental orders.—[Vols. 12-16, 18, 19, 21].—See also Seaboard Coast Line R. Co. v. United States, §5(2), n. 45 *Conditions*.

Language of §5(9) and the few cases ruling on scope of that law are persuasive, contrary to plaintiff's argument, that it gives the Commission requisite power to enter considered order requiring Greyhound to cease and desist from practices found to violate the representations (amounting to assurances of public benefit and interest and no harm to existing carriers or service) which it made in earlier acquisition proceedings. The Commission was acting in response to carrier's failure to abide by its representations; it was supplementing orders made in the earlier proceedings, for good cause shown, and the supplemental order entered did not change the literal scope of Greyhound's certificates. That supplemental order simply attached conditions to the original orders which could have been attached in the first place, and which only incidentally (and in one respect) affect scope of the certificates acquired; also, other requirements relating to destructive practices, not to actual carrier operations, do not even remotely affect the certificates. Thus, in no way can the Commission's action be described as a partial revocation or suspension of carrier's certificates requiring §212(a) procedure.—Greyhound Lines, Inc. v. United States, 308 F. Supp. 1033 (1037-8)*.

Similar reasoning applies to plaintiffs' argument, relative to the required through bus service, that §216(a) and (e) is the exclusive statutory power by which the Commission may order maintenance of a through bus. The Commission could have required through bus service as a condition of the acquisition under its §5(2) power; thus, if carrier's representations induced it not to so condition the original order, subsequent breaches of those representations may be dealt with under §5(9), especially under the full procedural due process afforded in the case. Since it is not disputed that commitments were made in the acquisition cases, nor that the Commission has a duty to consider public interest and the competitive effects in each acquisition proceeding, it cannot be said that the Commission did not rely on representations honorably made in the earlier proceedings. Commission findings, both as to nature of statements that were made and as to practices held inconsistent with them, are amply supported by the evidence of record; plaintiffs' motion to set aside the supplemental order at issue, denied.—Id., pp. 1038-9.

Further, the court has jurisdiction over Commission counterclaim, filed in suit to set aside order, seeking specific enforcement of the supplemental order which would require Greyhound to restore practices and traffic patterns in existence, or contemplation, on date of commission approval of the fifth earlier acquisition, in the ten particulars counterclaimed. The order, in addition to proscribing three principal practices, proscribed all practices found to be unreasonable or inconsistent with carrier's prior representations and ordered it to restore the earlier practices and traffic patterns. It is not essential to enforcement of such order that each practice sought to be enjoined be specified therein, for the court may refer to the record, examiner's report, and Commission opinion to determine what the order was meant to include; thus, in effect, destructive practices reflected in record and opinions under review are part of the order and, contrary to carrier's argument, the court has power to specifically enjoin them. Since examiner's report and the Commission's opinion, taken together, encompass all the practices sought to be enjoined, the counterclaim for enforcement is granted in full.—Id., pp. 1039-40.

The Commission has plenary authority under §5(9) to reopen and modify a prior order issued under §5(2) if, in light of changed conditions, requirements imposed thereby are no longer just and reasonable within meaning of that section; and holding of Supreme Court in 340 US 419 that a §5(2) order lacks the finality of an unconditional certificate of convenience and necessity, and may be reopened and modified to insert restrictive conditions, suggests that the Commission has such authority independent of §5(9). It would be illogical to assume that, once a §5(2) order is entered, the Commission is forever barred from changing, modifying, or correcting it to supply deficiencies, regardless of what material changes in conditions and circumstances may occur.—Central Pac. Ry. Co. Control, 317 I.C.C. 469 (482)*.

Therefore, pursuant to §5(9) and the authority contained in condition (i) in the 1923 order approving Southern Pac.'s control of Central Pac. Ry., and in view of the changed circumstances and developments since that time, including current existence of several central transcontinental rail routes, condition (e) in the 1923 order is modified by striking therefrom the name of Union Pacific as the only connection of Southern Pacific on traffic moving via Ogden, Utah, between considered territories. In addition, the 1924 agreement between those connecting lines (and any agreements or memoranda of understanding pursuant thereto) is required to be cancelled or amended to accord with condition (e), as modified.—Id., 328 I.C.C. 345 (356-8)*.

Under the provisions of §5(9) the Commission is specifically authorized, upon a showing of good cause therefor, to issue, from time to time, such orders, supplemental to any order made under paragraphs (1), (2), or (7) of §5, as it may deem necessary or appropriate.—Southern Ry. Co.—Control—Central of Georgia Ry. Co., 331 I.C.C. 151 (184)*.

Section 5. (10) Unifications, consolidations, etc., of motor carriers only.—[Unchanged. See vol. 21, p. 16764.]

Section 5. (11) Plenary nature of authority under section.—[Unchanged. See vol. 11, p. 9216.]

Amendments, see footnotes, vol. 6, p. 5178, vol. 11, p. 9216; historical note, vol. 6, p. 5178.

Notes of Decisions

Volume 2—p. 396; Volume 6—p. 5178; Volume 9—p. 7464; Volume 14—p. 11478; Volume 15—p. 12054; Volume 16—p. 12687; Volume 17—p. 13357; Volume 18—p. 14123; Volume 19—p. 15270, Volume 21—p. 16764.

1. Relief from antitrust laws, in general. —[Vols. 14-16, 18, 19, 21].—See also East Tex. Motor Frt. Lines—Purchase—Lee, at §5(2), n. 100.

In suit to set aside Commission order approving applicant's control of local bus lines, there is no merit in claim of plaintiff (protestant) that, by dismissal of antitrust complaint which it filed during pendency of the control proceedings, the Commission abdicated its responsibility under the Clayton Act. The Commission's duties under that act cannot be viewed apart from provisions of §5; and on considering §20a application to issue stock necessary to effect agreed exchange, it could examine the entire transaction and at that time discharge its duty under the Clayton Act. Moreover, principles of National Transportation Policy are the dominant yardstick for measuring carrier consolidations; also, under §5, the Commission is empowered to approve a transaction even though it might otherwise by contrary to Clayton Act goals. Giving proper effect to necessary interaction between the two statutes, the Commission acted well within its discretion in dismissing the antitrust complaint since matters raised were fully under correct legal standards in the §5 proceedings; an agency is not required to cover the same ground twice. Order under review is amply supported on the record; sustained. —Interstate Investors, Inc. v. United States, 287 F. Supp. 374 (389-91, 393)*.

In approving merger of Northern Lines into a new company which would control and operate a 27,000-mile network of rail lines in northern tier of States, the Commission acted within the framework of statutes dealing specifically with transportation, and in harmony with the antitrust policies without being bound to the relevant-market standards of the antitrust laws. Since proposed transactions come within §5, the over-all guide is the national policy to further the public interest in efficient transportation; and, contrary to contentions of the Justice Department, the Commission did not construe the national policy as embodying a presumption in favor of rail mergers. In considered report, the Commission recognized competition as an indispensable factor in the public interest equation, though not the only one to be weighed; it was not required to further determine areas of effective competition through analysis of the relevant geographic and product markets, as those terms are used in antitrust cases. The Commission was guided by applicable laws and made findings, supported by substantial evidence, requisite to the validity of its action; sustained.—United States v. United States, 296 F. Supp. 853 (862-9, 877-8)*.

Section 5(11) is a more recent and more specific expression of congressional policy than §1 of the Sherman Act and §7 of the Clayton Act, and in terms relieves an acquiring carrier, upon the Commission's approval of the acquisition, from operation of the antitrust laws; and, though §5(11) does not authorize the agency to "ignore" those laws, there can be little doubt that the Commission is not to measure such proposals by the standards of the antitrust laws. The problem is one of accomodation of §5(2) with the antitrust legislation; the Commission remains obligated to estimate the scope and appraise the effects of curtailment of competition resulting from an acquisition, and consider them along with advantages of improved service and other matters of public interest to determine whether the acquisition will assist in effectuating the over-all transportation policy.—United States v. Navajo Freight Lines, Inc., 339 F. Supp. 554 (557)*.

In addition to the §5 provisions, statutory scheme of the Act encompasses almost every aspect of the motor carrier business; and the doctrine of primary jurisdiction—a workable allocation of business between courts and an agency possessed of expertise in its field and charged with enforcement of a statutory scheme—has generally been recognized in antitrust suits where there is a real possibility that an agency might subsequently approve the conduct in question, and that such approval would immunize it from the antitrust laws. In view of policies behind the primary jurisdiction doctrine and the cases which have applied it in the antitrust field, therefore, primary jurisdiction of any case alleging violations of the Clayton Act, because of one motor carrier's acquisition of stock of another, should rest with the Commission. Defendants' motion to dismiss civil antitrust complaint for lack of jurisdiction, on ground that the Commission has primary jurisdiction with respect to all questions involved, granted.—Id., pp. 557-8, 561, 565-6.

The commission has no authority under §20a to grant immunity from the antitrust laws; however, when it approved securities issued in conjunction with carrier activity which has been approved under §5, and specifically finds such issuance necessary to carry out the approved activity, the issuance of securities will share the activity's immunization. Thus, antitrust exemption for REA's 1959 notes was granted by the Commission's order which approved issuance thereof to named creditor railroads without competitive bidding and, also, held that issuance of the notes as evidence of REA's non-negotiable debt to owning railroads was necessary and appropriate for performance of carrier's services pursuant to joint venture to conduct railway express service, initially approved in 1929. Therefore, insofar as it challenges transactions involving the 1959 notes, REA's antitrust suit constitutes an attack on validity of the Commission's order which, under the Urgent Deficiencies Act, must be before a three-judge court; and to that extent, the complaint is dismissed for lack of subject matter jurisdiction.—REA Express, Inc. v. Alabama G.S.R. Co., 343 F. Supp. 851 (856, 858-9).

But challenge of transactions involving the non-negotiable debt to shareholding railroads does not attack a Commission order when the Commission at no time, directly or indirectly, approved that debt as necessary to railroads' joint venture. In its opinion approving initial operating agreement, the Commission emphasized that approval of the debt would be beyond its limited authority under §5(1); the opinion which approved REA's 1938 notes cannot be read as approving the method for financing repayment thereof when, apart from describing the non-negotiable debt, the Commission nowhere indicated its views as to legality of the debt; also, absent clear language to that effect, order approving the 1959 notes cannot be taken as granting a broad retroactive antitrust exemption to that debt. Thus, as no

Commission order specifically approved the non-negotiable debt, REA's antitrust claim based on alleged necessity of the debt to the joint venture is not an attack on the Commission's orders. Insofar as the complaint alleges invalidity of the 1959 notes, due to premature termination of amended operating agreement, defendants' motion to dismiss is denied.—Id., pp. 857-8, 859-60.

Appraisal of the competitive effects of a §5 transaction is not determined by the terms of any criteria laid down by the antitrust laws even though the proposal may, in fact, reduce competition, but must be balanced against other public interest factors of record which may outweigh and override the reduction, if any, of competition. While transactions approved under §5 are, by virtue of §5(11), exempted from the applicability of the antitrust laws, the Commission is not unmindful of the possibility of potential competitive restraints or monopoly powers as factors to be considered in relation to the adequacy of transportation service resulting from and following our approval of a given transaction under §5.—Jefferson Lines—Purchase—Jefferson Trans., 104 M.C.C. 497(509).

Section II of the Clayton Act clothes the Commission with authority to investigate and administer §7 of that act as related to carriers under its jurisdiction. A subsequent paragraph of that section exempts from the application of the section purchases by carriers of stock in other carriers "solely for investment", such stock not being used to bring about, or in attempting to bring about, the substantial lessening of competition. The subject transaction whereby Greyhound acquired 45 percent of Oklahoma Transportation Company has not been exempted from application of the antitrust laws by regulatory agency approval since no application for authority to obtain the stock was sought under §5(2) of the Interstate Commerce Act, nor was relief from the operations of the antitrust laws sought under §5(11) of that Act. This record shows that the subject transaction in and of itself, as an integral part of Greyhound's plan to capture the feeder and bridge traffic in the area, has the effect of substantially lessening competition and clearly violates §7 of the Clayton Act.—Transcontinental Bus System v. The Greyhound Corp., 104 M.C.C. 524 (554-559).

2.—State laws.—[Vols. 14-19, 21].—Provision of constitution of the State of Washington prohibiting consolidation of the stock, property, or franchises of competing railroads operating within the State must give way to the federal power to regulate commerce among the States, which is the basis for the statute giving the Commission authority to pass on railroad merger applications; furthermore, the statute provides that carriers which merge with the Commission's approval are relieved from the operation not only of federal antitrust laws but of all prohibitions of State law.—United States v. United States, 296 F. Supp. 853 (875-6)*.

Section 5(11) of the Interstate Commerce Act grants the Commission exclusive and plenary jurisdiction so that no state law either applies or needs to be interpreted. Thus, applicant's contention that Nebraska law regarding dissenting stockholders should be applied to establish protestants' rights is properly rejected.—Yellow Transit, Inc.—Merger—Wilson, Inc., 104 M.C.C. 737(742).

3.—Other acts.—[Vols. 18, 19, 21].—The plain language of §5(11), conferring exclusive and plenary jurisdiction on the Commission to approve §5 transactions and relieving the carriers from all other restraints of federal law, indicates that Congress intended the Commission to have jurisdiction to prescribe the method for resolving labor problems arising directly from approved transactions; and omission of any proviso excepting the Railway Labor Act from the operative provisions of §5(11) indicates a congressional intent to include that Act as a "federal restraint" from which the parties to a §5(2) proceeding are relieved. Therefore, defendant's contention that suit against it by members of railroad union (seeking damages claimed to result from defendant's alleged violation of employee-protective conditions which were included in the Commission's order approving defendant's purchase of certain rail lines and equipment) should be dismissed because plaintiffs have not exhausted their administrative remedies under the Railway Labor Act is clearly untenable.—Nemitz v. Norfolk & W. Ry. Co., 287 F. Supp. 221 (224, 227-8)*.

No collective bargaining agreements are superseded by operation §5(11) whenever conditions are imposed under §5(2)(f), and, in the absence of lawful reasons requiring modification of outright nullification, private contracts between the parties remain in full force and effect and coexist alongside the conditions imposed under §5(2)(f).—Southern Ry. Co.—Control—Central of Georgia Ry. Co., 331 I.C.C. 151 (168-71)*.

Section 5. (12), (13), (14).—[Unchanged].

Notes of Decisions

§5(13): Volume 15—p. 12055; Volume 19—p. 15272; Volume 21—p. 16766. §5(14): Volume 2—p. 1405; Volume 6—p. 5186; Volume 9—p. 7466; Volume 11—p. 9218; Volume 12—p. 10273; Volume 13—p. 10981; Volume 14—p. 11480; Volume 15—p. 12056; Volume 16—p. 12688; Volume 18—p. 14124; Volume 19—p. 15272; Volume 21—p. 16766.

Section 5. (15), (16).—[Unchanged.]

Notes of Decisions

§5(15): Volume 2—p. 1409; Volume 6—p. 5188; Volume 9—p. 7468; Volume 11—p. 9220; Volume 19—p. 15272.

§5(16): Volume 2—p. 1410; Volume 6—p. 5190; Volume 9—p. 7469; Volume 11—p. 9221; Volume 14—p. 11481; Volume 21—p. 16767.

Section 5a. Agreements between carriers.—[Unchanged, except for the amendment, as set forth below, by the act of Feb. 5, 1976, Pub. L. 94-210, §208, 90 Stat. 42. See vol. 14, p. 11481.]

In paragraph (1)(A), "part I, II, or III" is struck out and "part I (other than a common carrier by railroad), part II, or part III" is inserted in lieu thereof.

Historical Note

The amendment by Pub. L. 94-210, 90 Stat. 42, is effective 270 days after the date of enactment of the act. [See also vol. 14, p. 11483]

Notes of Decisions

Volume 15—p. 12056; Volume 16—p. 12688; Volume 17—p. 13358; Volume 18—p. 14124; Volume 19—p. 15273; Volume 21—p. 16769.

2. Construction and interpretation.—[Vols. 15, 17-19, 21].—That applicant for membership in a carrier association is already a member of another group is not a basis for denying it admission. Decision in 301 ICC 781, relied on by the association for denying carrier's application, was not intended to establish a test for membership in two bureaus; rather, it meant that if a carrier determined that its operations required dual membership, there was nothing in §5a to prevent it. Any motor common carrier seeking membership in a motor common carrier agreement must be admitted to membership, as a right, upon the same terms as existing members.—Movers' & Warehousemen's Assn.—Agreement, 323 I.C.C. 61 (63-4)*.

Upon complaint regarding improper conduct of respondents' collective ratemaking activities the Commission reviewed the agreement presently in force. As this review discloses numerous deficiencies and inconsistencies with §5a standards the Commission, upon its own initiative, may and did broaden the scope of the investigation beyond that of the complaint.—Midwest Motor Carriers Bureau, Inc.—Agreement, 335 I.C.C. 647 (648-9)*.

4. Carriers of one class; agreements not within §5a provisions.—[Vols. 15-19, 21].—Although proposed motor carrier ratemaking agreement provides for listing carriers of other classes in tariffs published by the association, carriers by rail or water subject to parts I or III of the Act, respectively, may be listed in such tariffs solely as participants in joint rates with the new motor carriers therein with whom they have through routes upon execution of required separate rate and tariff agreement and payment of established fees or assessments; approved.—National Assn. of Specialized Carriers, Inc.—Agreement, 323 I.C.C. 714 (715, 716, 720).

5. Independent action; ratemaking procedure.—[Vols. 15-19, 21].—There is no basis for concluding that a large household goods carrier would dominate the smaller members of the association, if admitted as a member, or establish rates which are unlawful; carriers have the right of independent action, guaranteed by §5a, and, the lawfulness of rates established pursuant to the agreement is always subject to review by the Commission. These two safeguards, therefore, obviate such fears.—Movers' and Warehousemen's Assn.—Agreement, 323 I.C.C. 61 (62)*.

The Commission found the emergency docket procedure inconsistent with established §5a standards as it is neither definite nor specifies circumstances requiring deviation from regular procedure. Regular procedure found not in compliance with prior report requiring elimination of all references to proxy voting and clarification of manner of selection of carrier nominees to fill interim vacancies on rate committees as conditions for approval.—Midwest Motor Carriers Bureau, Inc.—Agreement, 335 I.C.C. 647 (652-3)*.

Proposed amendment to eliminate quorum requirements in favor of a majority of the members present and voting for action on proposals considered by the tariff committee not approved as the Commission has consistently required quorum requirements to prevent dominance of collective activity by a minority of the members.—Steel Carriers' Tariff Assn., Inc.—Agreement, 335 I.C.C. 655 (659-60).

6. Furtherance of the national transportation policy.—[Vols. 15-18].—Proposed amendment to §5a agreement of a motor carrier association, which would exclude new members if their annual gross revenue exceeds $30 million, is not in furtherance of the national transportation policy. It is well settled, see 278 ICC 147, that any motor common carriers seeking membership in a motor carrier agreement must be admitted to membership, as a right, upon the same terms as existing members. Proposed amendment would impinge upon the right of motor common carriers operating within the involved territory to be admitted to membership upon the same terms as existing members; disapproved.—Movers' & Warehousemen's Assn., 323 I.C.C. 61 (62)*; and the matter of an applicant for membership in the association (a household goods carrier) not being a carrier of the same class as present members has no bearing on issue presented in application for approval of that amendment.—Id., p. 63.

Upon reconsideration, the Commission finds lack of exclusive control over ratemaking activities by signatory carriers vests excessive authority in an independent agent and permits domination of signatory carriers by the agent. Such domination is not in furtherance of the national transportation policy. Order terminating approval entered, withheld 3 months to allow filing of a revised agreement.—Midwest Motor Carriers Bureau, Inc.—Agreement, 335 I.C.C. 647 (651)*.

Proposed amendment to extend the territorial scope of the agreement to areas now covered by operating authority of none, one, or only a few of the signatory motor common carrier members not approved as not in furtherance of the national transportation policy since collective ratemaking cannot exist where there is no authority to perform transportation service and since applicant has shown no need for antitrust exemption where only one or a few carriers have authority.—Steel Carriers' Tariff Assn., Inc.—Agreement, 335 I.C.C. 655 (658-9).

8. Notice.—[Vols. 15-19, 21].—Proposed new article in applicant rate bureau's bylaws relating to establishment of an interrelated committee to meet with similar interrelated committees of other motor carrier rate bureaus, for sole purpose of discussing rate matters under consideration by organizations constituting the committees jointly meeting and reporting recommendations thereon to the standing rate committee, should be amended to provide for giving notice of meetings and matters to be considered by the interrelated committee in the same manner accorded proposals covered by the agreement, including a provision which would afford any interested person (including shippers) an opportunity to appear and present views on the subject being considered. Such changes are warranted and are necessary to meet the standards for approval of §5a agreements.—National Assn. of Specialized Carriers, Inc.—Agreement, 323 I.C.C. 714 (719).

Since §5a agreements are required to contain provisions that notice of final actions taken by rate bureaus be given in the same manner and to the same extent as proposals, even in unopposed proceedings, the Commission reversed the examiner's conclusion that respondents need not give notice of disposition of proposals to parties who did not file representations thereon. The principle that adequate notice be given to all interested parties is firmly established in §5a proceedings. However, so far as appeared on the record in the instant proceeding a nominal subscription charge would not constitute a restraint on the notice requirements of §5a.—Household Goods Carriers' Bureau—Agreement, 329 I.C.C. 258 (259-61).

Commission hereby orders all agencies operating pursuant to agreements approved under §5a to amend such agreements so as to give shipping public notice of independent action by member carriers in the same manner and same extent that notices of collective action are given and no other collective procedures under the agreement are thereby invoked. All future agreements submitted to Commission must contain such an appropriate rule.—Notice of Independent Action, 332 I.C.C. 22 (32).

Provisions of agreement giving notice of regular docket ratemaking proposals are inadequate as the specified 10-day period should exclude the date of notification, Saturdays, Sundays, and holidays. Similar notification provisions for emergency docket proposals are inadequate for the same reason and also as they are illusory and misleading to shippers.—Midwest Motor Carriers Bureau, Inc.—Agreement, 335 I.C.C. 647 (652-3)*.

Proposed amendments of the ratemaking agreement providing that notice of collective or independent actions be given to interested parties or nonmembers on a "subscription basis" in lieu of present policy of publication in a transportation journal of national distribution or public notice not approved as phrase "subscription basis," standing alone, is indefinite.—Steel Carriers' Tariff Assn., Inc.—Agreement, 335 I.C.C. 655 (660).

10. Parties.—[Vols. 15, 18, 19].—Fair administration of §5a requires that all interested parties be afforded an adequate opportunity to express their views regarding proposals prior to a final determination, and the agreements approved by the Commission in other §5a proceedings have afforded interested parties an opportunity to make representations on proposals in writing or orally. The right to determine whether the nature of proposals warrants an oral hearing may appropriately be reposed in a rates and tariffs committee composed of carrier members, and so long as the right to make representations to proposals is preserved, no need appears for a requirement that oral hearings be granted on every proposal at the option of an interested party.—Household Goods Carriers' Bureau—Agreement, 329 I.C.C. 258 (262).

12. Evidence.—[Vols. 15-18].—Evidence presented for the first time in exceptions, relating to ineligibility of an applicant for membership in motor carrier association because it is not a carrier of the same class as present members, is not properly before the Commission. And association's motion for oral hearing to determine (1) the status of membership applicant as a carrier, (2) the relationship between it and its agents in ratemaking, (3) anticompetitive effect of its participation in association's activities, and (4) the reach and ambit of decisions such as 276 ICC 183, 208, and 215 is denied; none of those matters bears upon the propriety of the proposed amendment itself, and must, in the context of the limited issue herein be considered irrelevant.—Movers' & Warehousemen's Assn.—Agreement, 323 I.C.C. 61 (63)*.

18. Approval of agreements by Commission.—[Vols. 15-19, 21].—Protestant's petition that the Commission rescind its approval of association agreement, at least until such time as it is admitted into full membership, is too drastic an action to be taken at this time, in view of the ultimate disapproval of proposed amendment which would exclude it from membership.—Movers' & Warehousemen's Assn.—Agreement, 323 I.C.C. 61 (64)*.

Proposed motor carrier ratemaking agreement covering organization and procedure of applicant association; incorporating applicant's bylaws and rules of tariff publication procedure which accord to each party thereto the free and unrestrained right to take independent action either before, after, or during any determination made through procedures established by the agreement; and limiting participation therein by carriers of different classes to matters relating to transportation under joint rates or over through routes; approved. However, since provision is made for amending applicant's bylaws, approval is subject to condition that, to extent that any change in bylaws might result in revision of the rate procedures and to safeguard any carrier's right of independent action, the amended agreement be approved by the Commission; approval is also conditioned on adoption of suggested amendment to article of the bylaws relating to establishment of interrelated committee.—National Assn. of Specialized Carriers, Inc.—Agreement, 323 I.C.C. 714 (716, 718-20).

Carrier groups are not required to seek approval from this Commission of their concealed loss and damage claim rules unless they desire the protection from antitrust laws which §5a would afford for agreements within its scope.—Loss and Damage Claims, 340 I.C.C. 515 (535).

Proposed amendment of previously approved ratemaking agreement providing procedures for expulsion of members who fail to furnish Conference with requested information and data in support of collectively adopted changes in rates and related matters was not approved. Explosion from membership is too drastic a penalty to exact for refusal, or perhaps, inability to supply data and information but it is hereby recommended that the Commission give further consideration to the problem encountered when data necessary to comply with established procedures are not voluntarily supplied by members to the bureaus upon request therefor.—Middle Atlantic Conference—Agreement, 341 I.C.C. 164 (168).

Regulations of the Commission

34 FR 3568, Feb. 27, 1969: Record Retention Guide, XXIV Interstate Commerce Commission [Revised] 1.8 Rate-making organizations, 49 CFR Part 1253.

35 FR 3620, Feb. 21, 1970: Record Retention Guide, XXIV Interstate Commerce Commission; 1.8 Rate-making organizations, 49 CFR Part 1253.

36 FR 3772, Feb. 26, 1971: Record Retention Guide, XXIV Interstate Commerce Commission; 1.8 Rate-making organizations, 49 CFR Part 1253.

37 FR 4671, March 3, 1972: Record Retention Guide, XXX Interstate Commerce Commission; 1.8 Rate-making organizations, 49 CFR Part 1253.

38 FR 1870, Jan. 18, 1973: Record Retention Guide, XXX Interstate Commerce Commission; 1.8 Rate-making organizations, 49 CFR Part 1253.

Section 5b. Agreements between carriers subject to part I.—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §208, 90 Stat. 42.]

(1) As used in this section, the term—

(a) 'affiliate' means any person directly or indirectly controlling, controlled by, or under common control or ownership with, any other person, and as used in this subdivision, the term (i) 'control' has the same meaning as in section 1(3)(b) of this part; and (ii) 'ownership' refers to equity holdings of 5 per centum or more in any business entity;

(b) 'antitrust laws' means the Act of July 2, 1890, as amended (15 U.S.C. 1, et seq.), the Act of October 15, 1914, as amended (15 U.S.C. 12, et seq.), the Federal Trade Commission Act (15 U.S.C. 41, et seq.), sections 73 and 74 of the Act of August 27, 1894, as amended (15 U.S.C. 8 and 9), and chapter 592 of the Act of June 19, 1936, as amended (15 U.S.C. 13, 13a, 13b, 21a); and

(c) 'carrier' means any common carrier by railroad subject to part I of this Act.

(2) Any carrier which is a party to an agreement, between or among two or more carriers, relating to rates, fares, classification, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation, or establishment thereof, shall, under such rules and regulations as the Commission shall prescribe, apply to the Commission for approval of such agreement. The Commission shall, by order, approve any such agreement if approval thereof is not prohibited by paragraph (4) or (5) and if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (8) should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied. No such approval shall be granted or continued (a) if any of the terms and conditions which are prescribed under the last sentence of this paragraph are violated or not complied with, or (b) unless the Commission receives a verified written statement (and any written supplement or addendum thereto requested by the Commission) setting forth, with respect to each carrier which is a party to such agreement (i) its name, (ii) the mailing address and telephone number of its headquarter's office, (iii) the names of each of its affiliates, (iv) the names, addresses, and affiliations of each of its officers and directors and of each person who, together with any affiliate, owns or controls any debt, equity, or security interest in it having a value of $1,000,000 or more, and (v) such other information as the Commission directs to be included. The approval of the Commission shall be granted only upon such terms and conditions as the Commission determines are necessary to enable its approval to be granted in accordance with the standards set forth in this paragraph.

(3) Each conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under the provisions of this section shall maintain such accounts, records, files, and memoranda and shall submit to the Commission such reports, as may be prescribed by the Commission. All such accounts, records, files, and memoranda shall be subject to inspection by the Commission or its duly authorized representatives. The Commission may conduct investigations, make reports, issue subpoenas, conduct hearings, require the production of relevant documents, records, and property, copy and verify the correctness of information subject to inspection, and take depositions (a) to determine whether any such conference, bureau, committee, or other organization, or any carrier which is a party to any such agreement, has acted or is acting in compliance with the provisions of this section, regulations issued under this section, and the public interest, (b) to determine whether any such organization or carrier is inhibiting an efficient utilization of transportation resources or has established practices which are inconsistent with efficient, flexible, and economic operation, and (c) for such other purposes as the Commission considers appropriate.

(4) The Commission shall not approve under this section any agreement which it finds is an agreement with respect to a pooling, division, or other matter or transaction to which section 5 of this part is applicable.

(5)(a) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration, unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action, without fear of any sanction or retaliatory action, at any time before or after any determination arrived at through such procedure. In no event shall any conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under the provisions of this section—

(i) permit participation in agreements with respect to, or any voting on, single-line rates, allowances, or charges established by any carrier;

(ii) permit any carrier to participate in agreements with respect to, or to vote on, rates, allowances, or charges relating to any particular interline movement, unless such carrier can practicably participate in such movement; or

(iii) permit, provide for, or establish any procedure for joint consideration or any joint action to protest or otherwise seek the suspension of any rate or classification filed by a carrier of the same mode pursuant to section 15(7) of this part where such rate or classification is established by independent action.

As used in clause (i) of this subdivision, a single-line rate, allowance, or charge is one that is proposed by a single carrier applicable only over its own line and as to which the service (exclusive of terminal services provided by switching, drayage, or other terminal carriers or agencies) can be performed by such carrier.

(b) The limitations set forth in subdivision (a) shall not be applicable to—

(i) general rate increases or decreases, if the agreements accord the shipping public, under specified procedures, adequate notice of at least 15 days of such proposals and an opportunity to present comments thereon, in writing or otherwise, prior to the filing with the Commission of the tariffs containing such increases or decreases, or

(ii) broad tariff changes if such changes are of general application or substantially general application throughout a territory or territories within which such changes are to be applicable.

In any proceeding in which it is alleged that a carrier voted or agreed upon a rate, allowance, or charge, in violation of the provisions of this section, the party alleging such violation shall have the burden of showing that such vote or agreement occurred. A showing of parallel behavior is not, by itself, sufficient to satisfy such burden.

(6)(a) The Commission is authorized, upon complaint or upon its own initiative without complaint, to investigate and determine whether any agreement previously approved by it under this section, or terms and conditions upon which such approval was granted, is not or are not in conformity with the standards set forth in paragraph (2) and with the public interest, and whether any such terms and conditions are not necessary or whether any additional or modified terms and conditions are necessary for purposes of conformity with such standard. After any such investigation the Commission shall, by order, terminate or modify its approval of such an agreement if it finds such action necessary to insure conformity with such standard, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standard or to the extent to which it finds such terms and conditions not necessary to insure such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, shall be postponed for such period as the Commission determines to be reasonably necessary to avoid undue hardship.

(b) The Commission shall periodically, but not less than once every 3 years, review each agreement which the Commission has by order approved under this section to determine whether such agreement, or any conference, bureau, committee, or other organization established or continued pursuant to such agreement, still conforms with the standard set forth in paragraph (2) and the public interest, and to evaluate the success and effect upon the consuming public and the national rail freight transportation system of such agreement and organization. The Commission shall report to the President and to the Congress on the results of such reviews, as part of its annual report pursuant to section 21. If the Commission makes a determination that any such agreement or organization is no longer in conformity with such standard, the Commission shall by order terminate or suspend its approval thereof.

(7) No order shall be entered under this section except after interested parties have been afforded a reasonable opportunity for a hearing.

(8) Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4) or (5), hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

(9) Any action of the Commission under this section (a) in approving an agreement, (b) in denying an application for such approval, (c) in terminating or modifying such approval, (d) in prescribing the terms and conditions upon which such approval is to be granted, or (e) in modifying such terms and conditions, shall be construed as having effect solely with reference to the applicability of the relief provisions of paragraph (8).

(10) The Federal Trade Commission, in consultation with the Antitrust Division of the Department of Justice, shall periodically prepare an assessment of, and shall report to the Commission on (a) any possible anticompetitive features of (i) any agreements approved or submitted for approval under this section, and (ii) any conferences, bureaus, committees, or other organizations operating under such agreements, and (b) possible ways to eliminate or alleviate any such anticompetitive features, effects, or aspects in a manner that will further the goals of the national transportation policy and this Act. The Commission shall make such reports available to the public.

(11) Any conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under this section shall make a final disposition with respect to any rule, rate, or charge docketed with such organization within 120 days after such proposal is docketed.

Historical Note

STUDY OF CONGLOMERATES

SEC. 903. The Commission shall undertake a study of conglomerates and of such other corporate structures as are presently found within the rail transportation industry. The Commission shall determine what effects, if any, such diverse structures have on effective transportation, on intermodal competition, on revenue levels, and on such other aspects of national transportation as the Commission considers to be legitimate subjects of study. The Commission shall prepare a report with appropriate recommendations and shall submit its report to the Congress within 1 year after the date of enactment of this Act. (Pub. L. 94-210, 90 Stat. 148)

Section 6. Schedules and statements of rates, etc., joint rail and water transportation—(1) Schedule of rates, fares, and charges; filing and posting.—[Unchanged. See vol. 9, p. 7472.]

Amendments, see footnotes, vol. 2, p. 1413; historical notes, p. 1414, vol. 12, p. 10273, vol. 13, p. 10982.

Notes of Decisions

Volume 2—p. 1416; Volume 6—p. 5192; Volume 9—p. 7472; Volume 11—p. 9221; Volume 12—p. 10274; Volume 13—p. 10982; Volume 14—p. 11483; Volume 15—p. 12060; Volume 16—p. 12692; Volume 17—p. 13362; Volume 18—p. 14128; Volume 19—p. 15277; Volume 21—p. 16775.

Constitutionality and Construction

2. Construction.—[Vols. 2, 6, 12, 19, 21].—In action seeking a court decree holding considered "rent-a-train" grain tariff to be illegal, *per se*, and requiring the Commission to strike that tariff from its files, plaintiffs must concede that the Commission has primary jurisdiction, under §6 and §15, to determine whether any tariff complies with provisions of the law; also, they must concede that, in areas which Congress placed within the competence of Commission jurisdiction, a controversy must first be submitted to the agency for decision, subject to review by a three-judge district court. The logical effect of such concessions is to refute the court's jurisdiction over the complaint. Question of the validity of the "rent-a-train" tariff is being investigated by the Commission and determination thereof will depend on consideration of many factors and, therefore, must await conclusion of the investigation. Accordingly, the court should not take jurisdiction of instant action; to do so would by-pass administrative plan created by Congress, which gives the Commission first consideration of rate-making matters, subject thereafter to judicial review. Complaints dismissed.—Rardin Grain Co. v. Illinois Central R. Co., 288 F. Supp. 813 (815-7)*.

Commission found assailed schedules not just and reasonable due to vagueness and ambiguity of certain provisions regarding minimum charges and weights, time periods, empty movements and other provisions as stated. A finding that ambiguous provisions are not shown just and reasonable is proper. See 332 ICC 408. Protestants' reliance on 315 ICC 311 is ill-founded. That case was instituted by regulated carriers asserting that they were subject to injury due to a destructive competitive practice. Protestants herein are not regulated carriers nor has the issue of destructive competition been established. —Grain by Rent-a-Train, IFA Territory to Gulf Ports, 335 I.C.C. 111 (117, 124-25).

Contention that assailed tariff does not state rates as required by §6(1) and is unlawful *per se* is not valid. Although weight has historically been the most common pricing unit, Rule 4(i) of our Tariff Circular No. 20 specifically provides for publishing rates per "other unit" as alternative to the specifically enumerated units of "per 100 pounds, per ton, per car." Once proposed tariff is amended to include a guaranteed minimum number of trips, it will contain certain rates and charges clearly stated in form of specific amounts for definitely described units, augmented by per ton and per train-mile charges involved.—Grain bv Rent-A-Train, IFA Territory to Gulf Ports, 339 I.C.C. 579 (588-90)*.

Rates, Fares, and Charges

35. Export and import rates.—[Vols. 2, 6, 12, 15, 16].—See also International Joint Rates and Through Routes, at §1(1), n. 52.

Commission reaffirmed its conclusion in 337 ICC 625 that we may accept for filing a tariff which establishes joint rates on import-export traffic between carriers subject to our jurisdiction and water carriers subject to the jurisdiction of the Federal Maritime

Commission but that a general rule governing such filings is not necessary at this time.—International Joint Rates and Through Routes, 341 I.C.C. 246 (247-8)*.

Charges (Other than Rates and Fares)

55. All services offered and performed.—[Vols. 2, 6, 9, 11, 16, 17, 19, 21].—To expedite or delay a shipment constitutes a special service; and §6(1) requires that rail service offered and the charge therefor be published in tariff form and be available to all, in order to vary the standard norm of service which requires handling with "reasonable dispatch." Railroad's practice of holding shipments of potatoes from California to Kansas City, Mo., (routed over circuitous routes by shippers to secure greater transit time pending development of a more favorable market) at points on its direct routes for period of time equal to the time necessary to accomplish the circuitous movement, constitutes a service of delay which results in free warehousing to shippers and undue detention of refrigerator cars. Therefore, since carrier's tariff does not provide for either holding such shipments in transit, or charges therefor, considered service of delayed delivery violates §6(7) and §1 of the Elkins Act; carrier ordered to cease and desist from unlawful practices shown to exist.—Routing Exceptions, A., T. & S.F. and Connecting Carriers, 325 I.C.C. 228 (235-7, 238)*.

58. Demurrage.—[Vols. 2, 6, 9, 11, 17].—See Chicago & N. W. Ry. Co. v. Union Packing Co. at §6(7), n. 215, and Southern Ry. Co. v. Champion Papers, Inc., at §6(7), n. 217.

66. Protective service.—[Vols. 2, 6, 11-14, 16, 21].—From the discussion at 281 ICC 604-606, and the Commission's holding in 276 ICC 9, it became apparent that increases in protective service charges would not be permitted in the absence of an elaborate cost presentation. Such a presentation is not susceptible to use in general increase cases which are primarily revenue need cases. —Mechanical Protective Serv. of Perishables—Nationwide, 340 I.C.C. 470 (499).

The lack of underlying papers to the study submitted by respondents and the insufficiency of the testimony precluded a finding that the study had been properly conducted or that the results thereof were representative of mechanical protective service traffic. And despite the fact that respondents averred that the proceeding was not a revenue-need proposal, the failure to introduce any revenue-expense comparison prevented a determination of whether mechanical protective service was currently a deficit operation. Proposed increases denied. See also, §15(7), n. 50. Id., p. 499.

Rules and Regulations

81. In general.—[Vols. 2, 6, 9, 12, 21].—Schedules filed by respondent railroads on canned goods from the Pacific coast to eastern destinations not approved as they fail to contain provisions to protect minimum weight applicable to car ordered by shipper and a limited two-for-one rule during season specified by shippers. Ordered cancelled without prejudice to filing of new schedules.—Canned Goods, Between Pacific Coast and the East, 332 I.C.C. 55(63-6).

Commission prescribed new rules and regulations for filing and publishing both joint and combination rates over international-domestic through routes. These rules permit such filing and publishing in connection with any carrier subject to parts I, II, and III of the Act by amendment of 49 CFR §§1300.67 and 1307.22.—International Joint Rates and Through Routes, 337 I.C.C. 625 (632-36).

84. Limitations upon liability.—[Vols. 2, 21].—Carriers' rules and practices governing the handling of loss and damage claims do affect the value of service rendered by carriers and should, therefore, be published in their tariffs.—Loss and Damage Claims, 340 I.C.C. 515 (536).

Form and Effect of Publication

136. Plain and definite statement required.—[Vols, 2, 6, 9, 11-19, 21].—Rules providing that line haul rates include the loading and unloading of the carrier's vehicle "when this service can be performed by one man" found to be vague and indefinite, since no provision was made as to who is to decide when a shipment can be loaded or unloaded by one man. Thus, it was not clear under what circumstances the line haul rates include this service. The indefiniteness of the phrase is even more pronounced when considered in light of the fact that respondents' rules also provided that shipments which, because of weight, dimensions, or physical characteristics, cannot be handled by one man are not entitled to loading and unloading service. The considered phrase is unnecessary and confusing, and this type of rule violates rule 10(a) of the Commission's Tariff Circular 20 and §6 of the Act; ordered cancelled.—Detention of Vehicles & Loading & Unloading Provisions, 329 I.C.C. 220 (227).

The Commission found a rule providing that line-haul rates include loading and unloading to service "performed by one man" to be vague and indefinite, and that provisions for loading and unloading without restrictions are not lawful. Also, since proposed alternate rules would permit the use of two men at any time in loading and unloading service, but not necessarily in all instances, a shipper or consignee would be unable to determine when and under what circumstances this service would be furnished. Such rules are uncertain and indefinite, and are therefore in violation of Tariff Circular 20 and §6 of the Act and are ordered cancelled.—Id., pp. 227-9.

Proposed unit of charges involving express rates on phonograph records from Richmond, Ind. to all express stations in the United States is novel in that it is a combination of two traditional units of transportation charges, cubic displacement and piece, but since both consignee and competitor are able to determine the charges by reference to the packaging of the articles, charges found to be just and reasonable.—Phonograph Records—REA—Richmond, Ind., to U.S. Points, 329 I.C.C. 391 (396-98).

Protestants' contention that proposed cancellation of wharfage absorption at indicated Gulf and South Atlantic ports by respondent railroads is in violation of §6 requiring plain and definite statement of rates found not proven. Respondents' tariffs are filed with the Commission and show the extent to which waterborne rates include port terminal services and charges.—Cancellation of Wharfage Absorption, 335 I.C.C. 477 (528).

Regulations of the Commission

34 FR 12343, July 26, 1969, Part 1300: Freight Schedules; Railroads, §1300.67 Export and import traffic—ocean carriers, revised, effective upon publication in the Federal Register.

34 FR 12593, Aug. 1, 1969, Part 1300: Freight Schedules; Railroads, §1300.67 Export and import traffic—ocean carriers, effectiveness of order of July 15, 1969 (34 FR 12343) stayed pending further order of the Commission.

35 FR 15444, Oct. 3, 1970, Part 1300: Freight Schedules; Railroads, §1300.67 Export and import traffic—ocean carriers, revised (Ex Parte No. 261; Special Permission No. 70-275), effective Oct. 26, 1970.

36 FR 11781, June 18, 1971, Special Permission No. 71-5600 Returned Shipments; Waive Rule. Relief from Rule 4(i) of Tariff Circular 20, to publish rules governing applicable rates on rejected or returned shipments, granted; expiration date June 4, 1976.

36 FR 16228, Aug. 20, 1971: Special Permission No. 72-810, Fares, Charges, Etc.; Postponement of Effectiveness of Increases, Reestablishment of Lower Rates. Effective Aug. 16, 1971, rules of various Commission tariff circulars are waived to extent necessary to permit carriers to publish and file tariff supplements mandated by the Executive Order of Aug. 15, 1971 entitled Providing for Stabilization of Prices, Rents, Wages, and Salaries.

36 FR 16228, Aug. 20, 1971: Suspension Docket No. 8664, Stabilization of Rates and Charges, August 1971. Operation of schedules of new increased rates, fares and charges, etc., filed to become effective Aug. 17, 1971, and later, which would be in violation of the Executive Order of Aug. 15, 1971 entitled Providing for Stabilization of Prices, Rents, Wages, and Salaries, is suspended, effective Aug. 16, 1971.

36 FR 16975, Aug. 26, 1971: Suspension Docket No. 8664, Sub. No. 1, Stabilization of Rates and Charges, August 1971. Operation of schedules of new increased rates, fares and charges, etc., filed to become effective Aug. 24, 1971, and later, is suspended, effective Aug. 23, 1971.

36 FR 21857, Nov. 16, 1971: Suspension Docket No. 8688, Stabilization of Rates and Charges, Operation of schedules publishing new increased rates, fares and charges, etc., which, if permitted to become effective, would result in rates and charges that would violate Executive Order No. 11627, dated Oct. 15, 1971 (except those currently under suspension and investigation), ordered suspended, and use thereof deferred, for indefinite period pending further Commission order.

36 FR 22300, Nov. 24, 1971, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program, §1311.0 - §1311.5, new Part 1311 added, effective day after date of publication in Federal Register.

36 FR 22341, Nov. 24, 1971: Suspension Docket No. 8688, Sub-No. 2, vacates indefinite suspension of operation of certain schedules, subject to conditions set forth, effective on date of order.

36 FR 23108, Dec. 3, 1971: Suspension Doc. No. 8688 (Sub No. 1) Stabilization of Rates and Charges, certain schedules of increased rqtes suspended by order of Nov. 19, 1971.

36 FR 23108, Dec. 3, 1971: Suspension Doc. No. 8688 (Sub. No. 3) Stabilization of Rates and Charges, certain schedules of increased rates suspended by order of Nov. 24, 1971.

37 FR 335, Jan. 11, 1972, Part 1300: Freight Schedules; Railroads, §1300.62 Notice for changes of rates within Alaska and the Hawaiian Islands (Rule 62 of Tariff Circular No. 20), revoked, effective Jan. 1, 1972.

37 FR 1107, Jan. 26, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program, special procedures prescribed by order of Nov. 19, 1971 (36 FR 22300) revised in order to conform to, and implement, §300.16 of the regulations of the Price Commission (37 FR 652), effective on date of order.

37 FR 3354, Feb. 15, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program; Price Commission having deferred until March 10, 1972 public utility rate increases proposed to become effective on or after Feb. 10, 1972, carriers are directed to defer indefinitely the effective dates of all increased rates, fares, charges, etc., proposed to become effective during the Price Commission deferral period, effective on date of order.

37 FR 6149, March 24, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program. Carriers authorized to cancel indefinite postponement of effective dates of proposed increased rates, fares, charges, etc., required by the order of Feb. 11, 1972, effective on date of order.

37 FR 9398, May 10, 1972, Part 1300: Freight Schedules—Railroads, §1300.30 Transmission of publications to subscribers, added, effective June 21, 1972.

37 FR 9398, May 10, 1972, Part 1303: Passenger Service Schedules—Rail and Water Carriers, §1303.36 Transmission of publications to subscribers, added, effective June 21, 1972.

37 FR 9398, May 10, 1972, Part 1304: Express Companies Schedules and Classifications, §1304.42 Transmission of publications to subscribers, added, effective June 21, 1972.

37 FR 12239, June 21, 1972, Parts 1300, 1303 and 1304: Order of May 1, 1972 (37 FR 9398) requiring transmission of tariffs and schedules to subscribers and other interested parties, stayed pending disposition of timely filed petitions for reconsideration, effective on date of order.

37 FR 14308, July 19, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program, entire Part 1311 revised, effective on day following publication in the Federal Register.

37 FR 18550, Sept. 13, 1972, Part 1300: Freight Schedules—Railroads, §1300.30 Transmission of publications to subscribers, amended, effective 60 days after publication in Federal Register.

37 FR 18550, Sept. 13, 1972, Part 1303: Passenger Service Schedules—Rail and Water Carriers, §1303.36 Transmission of publications to subscribers, amended, effective 60 days after publication in Federal Register.

37 FR 18551, Sept. 13, 1972, Part 1304: Express Companies Schedules and Classifications, §1304.42 Transmission of publications to subscribers, amended, effective 60 days after publication in Federal Register.

37 FR 25399, Nov. 30, 1972, Parts 1300, 1303, and 1304: Order of Aug. 28, 1972 establishing regulations for the transmission of tariff and schedule publications to subscribers and other interested parties, which had been stayed, made effective 30 days after publication of order in Federal Register (11/30/72).

38 FR 2177, Jan. 22, 1973, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program, Pursuant to end of Phase II and beginning of Phase III, mandatory application of regulations is suspended, effective Jan. 11, 1973, until further notice; but such regulations shall be construed as voluntary guidelines.

38 FR 3389, Feb. 6, 1973, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program, §1311.5 Standards applicable during Phase III of the wage and price stabilization program, adopted Jan. 30, 1973.

38 FR 16231, June 21, 1973, Part 1300: Freight Tariffs: Railroads, Water Carriers, and Freight Forwarders subject to Interstate Commerce Act, amended to more easily indicate kinds of carriers subject to Part 1300.

Section 6. (2) Schedule of rates through foreign country.—[Unchanged. See vol. 9, p. 7483.]

Amendments, see footnotes, vol. 2, p. 1455; historical notes, p. 1455.

Notes of Decisions

Volume 2—p. 1455.

Section 6. (3) Change in rates; fares, etc.; notice required, simplification of schedules.—[Unchanged. See vol. 9, p. 7484.]

Amendments, see footnotes; vol. 2, p. 1456; historical notes, p. 1456.

Notes of Decisions

Volume 2—p. 1457; Volume 6—p. 5210; Volume 9—p. 7484; Volume 12—p. 10276; Volume 16—p. 12694; Volume 17—p. 13366; Volume 18—p. 14130; Volume 19—p. 15280; Volume 21—p. 16779.

Changes in Schedules

1. In general.—[Vols. 2, 6, 9, 12, 16].—See also Notice of Increases in Frt. Rates and Pass. Fares, at §13.(4), n. 29.

Proposed change in rail classification rule 24 and similar rules in other tariffs pertaining to the use of overflow cars not shown just and reasonable. Respondents assert that former rule led to abuses in connection with incentive rates, e.g., sending lead car to one destination and overflow car to another under the terms of the stop-off rule. Such evidence is insufficient justification for proposed change as the proper way to handle such abuses is to apply specific restrictions on the rates.—Freight in Excess of Full Carload, 337 I.C.C. 509 (515-6).

Respondents' cost evidence introduced to show that service rendered in accordance with rule 24 has been expensive is not sufficiently reliable to be probative. Furthermore, cost data stated are not used in any meaningful manner considering the issue herein. Schedules ordered canceled.—Id. p. 516.

Simplification of Schedules

12. In general.—[Vols. 2, 6, 9, 19].—Commission concluded that the overlapping application of general increases has resulted in unduly and unreasonably complex tariffs. Commission ordered respondents to update their tariffs sufficiently to enable shippers and carriers to ascertain the applicable rates and charges with certainty and without unreasonable difficulty.—Increased Freight Rates, 1970 and 1971, 339 I.C.C. 125 (136-7).

Section 6. (4) Joint tariffs.—[Unchanged. See vol. 9, p. 7486.]

Amendments, see footnotes, vol. 2, p. 1461; historical note, p. 1461.

Notes of Decisions

Volume 2—p. 1461; Volume 6—p. 5214; Volume 9—p. 7486; Volume 11—p. 9226; Volume 12—p. 10277; Volume 13—p. 10985; Volume 14—p. 11486; Volume 15—p. 12063; Volume 16—p. 12695; Volume 17—p. 13367; Volume 18—p. 14130.

Section 6. (5) Copies of traffic contracts to be filed.—[Unchanged. See vol. 15, p. 12063.]

Amendments, see footnotes, vol. 2, p. 1466, vol. 15, p. 12063; historical note, vol. 2, p. 1466.

Notes of Decisions

Volume 2—p. 1466; Volume 21—p. 16779.

2. Filing contracts, agreements, or arrangements as to traffic.—[Vol. 2].—Rules and practices governing the handling of loss and damage claims affect both regulated traffic and adequate service so that, as there is no question that the adoption by the carrier groups involved of the concealed loss and damage claims rules constitutes an agreement among carriers, the agreements adopting such rules and practices should be filed with this Commission.—Loss and Damage Claims, 340 I.C.C. 515 (535-6).

Section 6. (6) Form and manner of publishing, filing, and posting schedules; unlawful use.—[Unchanged, except by the act of Feb. 5, 1976, Pub. L. 94-210, §209, 90 Stat. 45, the words "shall prescribe; and the" are struck out and the language, as set forth below, is inserted in lieu thereof. See vol. 11, p. 9227.]

*** shall prescribe. The Commission shall, beginning 2 years after the date of enactment of this sentence, require (a) that all rates shall be incorporated into the individual tariffs of each common carrier by railroad subject to this part or rail ratemaking association within 2 years after the initial publication of the rate, or within 2 years after a change in any rate is approved by the Commission, whichever is later, and (b) that any rate shall be null and void with respect to any such carrier or association which does not so incorporate such rate into its individual tariff. The Commission may, upon good cause shown, extend such period of time. Notice of any such extension and a statement of the reasons therefor shall be promptly transmitted to the Congress. The ***

Notes of Decisions

Volume 2—p. 1468; Volume 6—p. 5217; Volume 9—p. 7488; Volume 11—p. 9227; Volume 14—p. 11487; Volume 17—p. 13367; Volume 19—p. 15282.

1. Form of schedules prescribed by Commission.—[Vols. 2, 6, 9, 11, 17, 19].—The Commission's tariff rules do not require that rates reduced to meet competition be symbolized to indicate the type of competition that is being met, or in fact for what reason, if any, they are reduced; all that is required is that a reduction symbol be shown.—Matthiessen & Hegeler Zinc Co. v. Baltimore & O. R. Co., 323 I.C.C. 601 (611).

Although the proposed tariff rule, which appeared on the surface to be so simple, provided for the nonapplication of domestic rates on import and export traffic where there are in effect commodity rates or rates derived from exceptions ratings published to apply specifically on import or export traffic via any route from or to Great Lakes, north Atlantic, south Atlantic and Gulf ports found unlawful because the determination of an applicable rate on such traffic would be so onerous and complicated as to contravene rule 4(i) of Tariff Circular No. 20; proposed schedule ordered cancelled.—Application of Domestic Versus Import or Export Rates, 339 I.C.C. 9 (11).

Section 6. (7) Transportation without filing and publishing rates forbidden; rebates; privileges.—[Unchanged. See vol. 9, p. 7489.]

Amendments, see footnotes, vol. 2, p. 1472; historical notes, vol. 2, p. 1472, vol. 16, p. 12695.

Notes of Decisions

Volume 2—p. 1475; Volume 6—p. 2518; Volume 9—7489; Volume 11—p. 9228; Volume 12—p. 10277; Volume 13—p. 10985; Volume 14—p. 11487; Volume 15—p. 12064; Volume 16—p. 12696; Volume 17—p. 13367; Volume 18—p. 14131; Volume 19—p. 15282; Volume 21—p. 16780.

Prohibitions and Purposes

3. Privileges extended to be authorized by tariff.—[Vols. 2, 6, 9, 11, 15, 19].—As held in 173 F. Supp. 397, affirmed per curiam, 362 US 327, any transportation provided over internal circuitous rail routes solely to achieve increased time in transit, i.e., delay, constitutes an additional service, privilege or facility which must be published in tariff form; that rule determines the issue, in instant case, of whether plaintiff railroad's holding practice amounts to such a service since, as record clearly shows, shippers' purpose in routing shipments of potatoes over plaintiff's internal circuitous routes (some of which require backhauls) was to increase transit time in order to secure a more favorable market. The Commission correctly concluded, in investigation proceeding, that railroad's practice of holding such shipments at points on its direct route for period of time equal to that necessary for movement over specified circuitous route constituted a service of delay which violated §6(7) and the Elkins Act because there was no provision made therefor in its tariffs and there was no published charge for the service. Commission order sustained and complaint, as to that order, dismissed.—Atchison, T. & S.F. Ry. Co. v. United States, 282 F. Supp. 430 (431, 433-4, 437)*.

5. Effect of tariff in force.—[Vols. 2, 6, 9, 11, 12, 14-19, 21].—Everyone is charged with notice of legal tariff rail rates; and rail carriers must collect the full rate published in their tariffs, regardless of ignorance, misquotation, or other equitable considerations. Therefore, railroad which charged defendant shipper less than the legal tariff rate for goods shipped is entitled to collect full lawful charges on the shipment, even though carrier had marked the waybill at a lower price and shipper had relied thereon. Railroad's motion for summary judgment granted; judgment entered against defendant shipper in the amount of undercharges claimed.—St. Louis-S.F. Ry. Co. v. Miller Floors, Inc., 293 F. Supp. 869 (870-71).

Railroad tariffs, duly filed with the Commission, bind both carrier and shipper with the force of law; that is because provisions of the Act requiring tariffs to be filed involve not only the regulation of carrier-shipper relations, but also the interest of the general public in adequate, nondiscriminatory transportation at reasonable rates. And because of the public interest, it is of no consequence that plaintiff railroad had knowledge of shipper's practice of not complying with governing transit tariff and acquiesced therein; carrier cannot waive a provision of the tariff and estoppel cannot be applied against it.—Atchison, T. & S.F. Ry. Co. v. John Sexton & Co., 339 F. Supp. 1202 (1205, 1206).

Principles Governing Tariff Interpretation

10. In general.—[Vols. 2, 6, 9, 11-19, 21].—Where there is no issue of fact in a carrier's action to recover freight charges allegedly owned by shipper, and words of the tariff are used in their ordinary meaning with no particular connotation in the expert field of the Commission, then interpretation of a tariff ordinarily presents a question of law; however, as a tariff is no different from any contract, its true application must sometimes be determined by the factual situation on which it is sought to be impressed. In interpreting a tariff, its terms must be taken in the sense in which they are generally used and accepted; and it must be construed in accordance with the meaning of the words used. Also published rules relating to tariffs should have a reasonable construction and should be interpreted in such a way as to avoid unfair, unreasonable, absurd, or improbable results.—Penn Central Co. v. General Mills, Inc., 439 F. 2d 1338 (1340, 1341).

A tariff must be construed to avoid unjust, absurd, or improbable results; and all the pertinent provisions must be considered together, giving effect so far as possible to every word, clause, and sentence therein. The Commission misinterpreted tariff publishing rates from El Centro, Calif., to Philadelphia, Pa., as permitting application of those rates on shipments from central California, under the intermediate rule, although the shipments did not originate at or pass through El Centro. While paragraph (3) of tariff routing instructions provided that rates would apply via all routes made by lines of carriers parties thereto, it expressly did not supersede the provisions of paragraph (1) that the rates applied only to directly east-bound traffic through Western Gateways in Arizona, thus, precluding routing through central California. Therefore, the El Centro rate cannot be applicable over hypothetically constructed westward route through the central California origins; rate published from actual origins to Philadelphia was properly charged by the railroads.—Samuel P. Mandell Co. v. Pennsylvania R. Co., 336 F. Supp. 565 (569, 574-5)*.

It is well established that plain tariff provisions should be interpreted as published, notwithstanding that intent of the framer may be aborted thereby. At issue was whether a charge, named in another tariff item and specifically restricted to apply on rates to shipside, was applicable on shipments delivered to Government port facility under proviso in governing line-haul tariff specifying that aforementioned tariff item will apply. Commission held that provisions restricting additional charge to rates to shipside may not be ignored and thus the additional charge was inapplicable. Refund directed.—United States of America v. Southern Pacific Co., 337 I.C.C. 504 (507-8)*.

Freight charges on empty tank cars moving from construction points to points where rubber lining was installed were found inapplicable. Interpretation of the governing tariff provisions shows that these movements were between two home points which are defined as points where car owner has arrangements for construction, repair, or storage and which are published as such points in the Official Railway Equipment Register at the time of movement. Thus, the cars are instrumentalities of transportation to be credited with mileage for equalization purposes.—Tariff Provisions on New Empty Tank Cars, 341 I.C.C. 257 (262-63).

12. Ambiguities construed against maker.—[Vols. 2, 6, 9, 12, 14-16, 17-19, 21].—See also Grain by Rent-A-Train, at §6(1), n. 2 and Western Forest Inds. v. Aberdeen & R.R. Co., at §6(7), n. 14.

Since a tariff should be construed strictly against carrier that drafted it, any ambiguity or doubt as to its meaning should be decided in favor of the shipper. However, such ambiguity or doubt must be a reasonable one and should not be the result of a straining of the language; also, there must be a substantial and not a mere arguable basis in order to justify resolving such doubt against the carrier.—Penn Central Co. v. General Mills, Inc., 439 F. 2d 1338 (1341).

Railroad's export tariff, as applied to plaintiff's shipments that were billed "For Export to South Vietnam" and (as customary) were delivered by defendant carrier to naval facilities at California ports where rail carriers were not permitted to operate, found to be ambiguous. Two tariff items providing that export rates apply on (1) freight which railroad delivers to water carriers at Pacific Coast ports of interchange and (2) freight moved on bills of lading showing destination beyond Pacific Coast ports, and not diverted or held en route by shipper, create a substantial ambiguity when applied to considered situation, since the first item appears to exclude from coverage that which the second item appears to include. Such substantial ambiguity must be resolved against the rail carrier. Moreover, construing the tariff ambiguity against defendant carrier also has the effect of avoiding an unjust and improbable result with respect to rates charged on exports moved through a Government depot and on other exports via the same port.—Caterpillar Tractor Co. v. Atchison, T. & S.F. Ry. Co., 333 F. Supp. 885 (886-7).

14. Practices of carriers; handling, etc.—[Vols. 2, 6, 9, 12, 13, 15, 16, 18].—Modification of rules reducing rates of lumber when loaded to fullest visible capacity by basing such rates on cubic capacity of cars found not just and reasonable as such modifications do not cover all commodities and do not allow for irregularities in a car's capacity caused by repairs. Also, tariff rules presently published by defendant railroads establishing reduced rates on lumber at weightloads no greater than 55,000 pounds when loaded to fullest visible capacity and moved from the Pacific coast to eastern destinations found lawful, but ordered cancelled as they are ambiguous and lack adequate means of endorcement.—Western Forest Inds. v. Aberdeen & R.R. Co., 332 I.C.C. 408 (421-22).

Proposed schedules cancelling absorption of wharfage charges at indicated Gulf and

South Atlantic ports by respondent railroads ordered cancelled to the extent they are shown not just and reasonable from failure to reduce shipside rates and other charges to reflect the cancellation of absorption.—Cancellation of Wharfage Absorption, 335 I.C.C. 477 (528-9).

15. Construction not to be strained or unnatural.—[Vols. 2, 6, 9, 11-19, 21].—See also Caterpillar Tractor Co. v. Atchison, T. & S.F. Ry. Co., at n. 12, *supra*.

While a tariff must be construed in accordance with the meaning of words used therein, a strict construction against the drafting carrier is not justified where it ignores a permissible and reasonable construction which conforms to intentions of the tariff framers, avoids possible violations of law, and accords with the practical application given by shippers and carriers alike. Also, published rules relating to tariffs must be reasonably construed so as to avoid unfair, unreasonable, absurd, or improbable results. Therefore, as the trial court's interpretation of disputed language in considered rail classification "follow-lot" rule is a permissible and reasonable construction which conforms to apparent intent of framers of the tariff, whereas interpretation urged by defendant shipper would lead to an unfair, unreasonable, absurd, or improbable result, judgment of the lower court in favor of plaintiff is affirmed.—Penn Central Co. v. General Mills, Inc., 439 F. 2d 1338 (1341-2).

Rate Governed by Date of Acceptance of Shipment

39. Exceptions; storage and demurrage.—[Vols. 2, 6, 12, 15, 17, 19].—At Baton Rouge, La., heavy-duty rail cars were subject to regular demurrage charges for delay in unloading, and, in addition, were assessed special detention charges, to assure prompt release. Detention tariff set forth detention charges of about $25 per car per day after free time, but the free time period was not defined. Therefore, allowable free time provided by the demurrage tariff of 48 hours was inapplicable in connection with detention as well as demurrage. But other rules in the demurrage tariff, such as provisions for no charges on partial days of delay, have no application in computing special detention costs.—Delta Southern Co. v. Atchison, T. & S.F. Ry. Co., 332 I.C.C. 899 (902-3).

Commodity Rates

46.—Whether specific designation supersedes general description.—[Vols. 2, 6, 9, 11-19, 21].—Single-factor transit rates on piling and posts in §2 of governing tariff applied on complainant's shipments of round timber poles and pilings, creosoted in transit, rather than lower rates named in §4 of same tariff on "Timber, NOIBN." As posts, poles, and piling are each specifically named and separately rated in the governing classification, under the tariff definition of "NOIBN" the §4 rates would not apply thereon. And though §2 names rates on telegraph or telephone poles only, and there is thus no specific description covering other poles, complainant has not shown that the rates applicable on "posts" and "pilings" would be inapplicable on "poles."—Atlantic Creosoting Co., Inc. v. Southern Ry. Co., 323 I.C.C. 533 (536).

And for purposes of applying aggregate rule in the governing tariff, it is immaterial that description of "poles" and "piling" in one tariff naming rates beyond the transit point is more specific than lower-rated description "round timber" in another tariff, since, under a pertinent alternative provision, if a given article is provided with a rate in both those tariffs the lower of the two applies, and a reasonable construction of "round timber" includes creosoted poles and piling.—Id., pp. 538-9.

49.—Commodity description; determination by analogy.—[Vols. 2, 6, 9, 11-19, 21].—In deciding on the applicable rate, actual identity of article shipped is determined, and then the proper tariff classification is ascertained. While not any one is controlling, factors to consider in determining identity of a shipped article are the bill of lading description, manufacturer's description for sale purposes, and function and use of the article; on that basis, disputed government shipments of generator sets mounted on some type of trailer are found to be, in reality, trailer-mounted generator sets. Where shipped article can be classified under either of two tariff provisions, however, the more specific provision controls. Two items in governing classification refer to generator sets, but Item 73720 is the more specific and more closely fits disputed shipments, since it expressly refers to generator sets mounted on trailers; and under classification analogy rule, plaintiff is entitled to have its charges computed pursuant to Item 73720. Thus, railroad is entitled to recover amount of claimed overcharges deducted, after government post-audit, from other bills due it.—Southern Pac. Transp. Co. v. United States, 454 F. 2d 740 (744-5).

In railroad's suit against shipper which seeks application of the class 35 rate of $2.08 on radio and television towers contained in governing class rate tariff, instead of the $1.33 rate charged, on defendant's shipment of used television tower material, the important question is what commodity was in fact transported by the railroad. Equipment shipped was not a tower per se, but rather dismantled tower material; and fact that defendant intended to later use that loose salvaged steel to redesign and reconstruct a television tower is immaterial, since nature of the shipment when tendered determines its status for rate purposes. Plaintiff railroad transported loose salvaged steel, and protected it as nothing more than that; it cannot now charge a higher tariff rate on equipment of a technical nature which would have required proper packing and protection and, in fact, was not shipped. Evidence is convincing that the applicable rate is the $1.33 that was charged and that defendant paid. Judgment for defendant, with recovery of its reasonable attorney's fees and costs.—Chicago, B. & Q. R. Co. v. Duhamel Broadcasting Co., 337 F. Supp. 481 (482-3).

51. Use to which article put.—[Vols. 2, 6, 9, 11-19, 21].—In railroad's suit to recover additional freight charges on shipment of used television tower material, the fact that defendant shipper intended to subsequently use such loose salvaged steel to redesign and reconstuct a television tower is immaterial; nature of the shipment at the time tendered determines its status for rate purposes.—Chicago, B. & Q. R. Co. v. Duhamel Broadcasting Co., 337 F. Supp. 481 (483).

Although transportation characteristics of feed, fertilizer, and technical grade ureas are generally the same, evidence is conclusive that they are three separate commodities. Urea containing 42 or 45 percent nitrogen does not meet the high standards required by technical or industrial consumers, only the 46-percent grade being sufficiently free from impurities, and then only if it contains the proper amounts of certain other elements, while for feed purposes urea containing 42 percent nitrogen is the strongest that can be used. Complainant's own evidence shows that over a 4-year period all the 42-percent-nitrogen urea sold by it was used for feed, all the 45-percent was used as fertilizer, and predominant use of the 46-percent was for technical or industrial purposes; notwithstanding some 46-percent urea is used as fertilizer, evidence as a whole refutes complainant's contention that the predominant value of the urea it produces is as fertilizer.—W. R. Grace & Co. v. Illinois Central R. Co., 323 I C.C. 102 (106-8).

Even if "only" in tariff description "Urea, having value only for fertilizer purposes," is not construed literally, it cannot reasonably be found that the 42-percent-nitrogen urea used exclusively for feed purposes and the 46-percent used predominantly for technical or industrial purposes have value "only for fertilizer purposes"; those two grades plainly have considerable value for other purposes, and fact that they may have value to the fertilizer industry does not change their character for ratemaking purposes. Complainant's own "predominant use" theory supports conclusion that its ureas containing 42 and 46 percent nitrogen are feed and technical grade ureas taking rates under tariff descriptions signifying those grades, and were not entitled to lower rates maintained on fertilizer grade urea.—Id., pp. 105, 109.

53. Rates applicable to articles as commercially described.—[Vols. 2, 6, 9, 11-19, 21].—Terms used in a tariff must be taken in the sense in which they are generally accepted commercially. Complainant testified that the trade to which it sells urea regards the various grades separately according to nitrogen content and use, and a national weekly listing price quotations on chemicals classifies urea containing 46 percent nitrogen as industrial, that with 45 percent as agricultural, and that with 42 percent as feed grade. Moreover, a manufacturer's description of his products for sale purposes may be considered in determining their transportation characteristics, and complainant represented that it produced three separate products and advertised them as such under appropriate descriptions. Tariff descriptions of feed, fertilizer, and technical ureas are not shown to be ambiguous or not generally understood as applying on three separate commodities. Rates on feed, fertilizer, and technical ureas applied on complainant's shipments containing 42, 45, and 46 percent nitrogen, respectively.—W. R. Grace & Co. v. Illinois Central R. Co., 323 I.C.C. 102 (105, 109).

Publications of American Society for Testing Materials and the Board of Standardization, Department of Purchase, City of New York, refer to and describe piles made of wood as round timber piles; such trade references are entitled to weight in determining whether complainant's shipments of poles and piling, creosoted in transit, could move under the "round timber" tariff description. As poles are shown to be 55 or 60 feet in length and made of pine, a reasonable construction of that commodity description would include creosoted poles and piling.—Atlantic Creosoting Co., Inc. v. Southern Ry. Co., 323 I.C.C. 533 (539).

Proportional and Transshipment Rates

66. Tariff limitations restricting use.—[Vols. 2, 6, 9, 11-13, 15, 17, 19].—Commission found that whenever proportional rates are provided between transit and destination points they take precedence over other rates by application of the "rate-break" rule herein cited, and in effect they constitute minimum rate provisions. Fact that proportional rates do not apply over the actual route of movement is immaterial and thus assailed rates are applicable and otherwise lawful.—Lincoln Grain, Inc. v. Missouri Pacific R. Co., 335 I.C.C. 779 (781-2).

Assailed multiple-car rates on cement in bulk found applicable and not shown unlawful as transshipment rates, like proportional rates, do not extend beyond the points to which they are named and do not include further transportation services beyond such points unless specifically stated in governing tariff provisions. The meaning of the word "transshipment" is not controlling of applicability. Commission found that the decision by a hearing examiner in a previous case, cited herein as supportive of complainant shipper, was in error in finding the rate at issue therein, which is identical to the assailed rate in instant case, to be applicable as based on the dictionary definition of the word "transshipment".—Lone Star Cement Corp. v. Central R. Co. of N.J., 335 I.C.C. 786 (790).

Combination Rates

80. Not applicable when single-factor through rate is published.—[Vols. 2, 6, 9, 12-14, 16-18, 21].—The applicable rates on export carload shipments of automobile parts from Detroit, Mich. to Laredo, Tex. were the single-factor through rates subject by tariff provision to the single-factor rates from Detroit to Deming, N. Mex. as maximum. Lower combination rates sought by complainant shipper were not applicable because a factor in each combination was restricted against applying on export shipments.—Fabricas Auto—Mex., S.A. v. N.Y. Central R. Co., 332 I.C.C. 1(7).

Rates Fixed by Combination Rule

96. Effect upon the aggregate of intermediate rates.—[Vols. 2, 6, 9, 13-19, 21].—That rate charged on certain shipments was the lower of two single-factor rates published in different tariffs, each subject to an aggregate-of-intermediates rule, does not preclude application of still lower charges based on a three-factor aggregate, on theory that the more general provisions of the aggregate rule would not supersede the more specific provisions of alternative rule to which the rate charged was subject. The aggregate rule does not "supersede" the specific provisions of the tariff, but becomes operative only after consideration of those provisions under which assailed rate would produce the lower charges of the two basic rates, and since that rate was subject to an aggregate rule and a lower combination was available, latter was applicable.—Steel, Inc. v. Chicago, B. & Q. R. Co., 323 I.C.C. 509 (512-3).

And where the higher of two single-factor rates published between other points in different tariffs was subject to an aggregate rule and the lower was not, the aggregate rule was inoperative in resolving the conflict between them, since an aggregate rule operates only to displace a higher and otherwise applicable rate. Lower of such conflicting rates was applicable on complainants' shipments under alternative rule, and there was no tariff authority for invoking the aggregate rule to which the higher rate was subject.—Id., p. 514.

Intermediate Provisions

109. In general.—[Vols. 6, 9, 11-19, 21].—The Commission's interpretation of considered tariff intermediate-point rule, which permitted application of lower rate from El Centro, Calif., on plaintiff's produce shipments from central California points to Philadelphia, Pa., clearly contravenes prevailing decisional law. Because the tariff provided for "specific routing," the Commission held that shippers were free to tack together any lines of the carriers parties thereto; but, as the court held in 212 F. 2d 812, a route constructed for application of an intermediate rule must be reasonable in light of the extent and direction of circuity and the commercial usage of the route. Furthermore, on review of recent apposite cases, the court holds in instant case that the choice of lines shippers have in constructing such a route is limited by a rule of reasonableness, whether tariff routing is designated as "open" or "specific." The Commission should not have adopted the strained interpretation of the intermediate rule that it did in its decision awarding reparations against defendant railroads; and in shipper's suit for enforcement, the reparations order will not be enforced.—Samuel P. Mandell Co. v. Pennsylvania R. Co., 336 F. Supp. 565 (573-4, 575)*.

116. Reasonable and practical routes.—[Vols. 2, 9, 11-16, 18, 19, 21].—As held in 212 F. 2d 812, a "route" for "intermediate point" rate purposes must not be unreasonable, and its unreasonableness depends on (1) the extent and direction of circuity, and (2) commercial usage of such "route"; also, two recent apposite court decisions establish that directional backhaul is not a prerequisite to a finding of unreasonableness, but is merely a variety of circuity, and that the degree of circuity is not determinative of unreasonableness. On the basis of those principles, and on stipulated facts of instant case, the hypothetically constructed route from El Centro, Calif., to Philadelphia, Pa., which the Commission sanctioned in its decision awarding reparations against defendant railroads because, under tariff intermediate-point rule, lower rate from El Centro was applicable on plaintiff's shipments of produce from central California points to Philadelphia, is found to be arbitrary, unreasonable and contrary by law. Therefore, the court will not enforce the Commission's order awarding reparations to shipper; judgment in favor of defendants.—Samuel P. Mandell Co. v. Pennsylvania R. Co., 336 F. Supp. 565 (571-3, 575)*.

Conflicting Rates

160. Export and domestic rates.—[Vols. 2, 6, 9, 11-18, 21].—Railroad's export, rather than domestic, rates are found applicable on plaintiff's shipments which were billed "For Export to South Vietnam" and consigned to purchaser in care of naval facilities at two California ports, even though defendant carrier did not deliver them to water carriers at the ports but, as was customary, to tracks just outside government facilities where rail carriers were not permitted to operate. One item in the tariff provides that export rates apply only to freight delivered by the railroad to water carriers at Pacific Coast ports of interchange, while another item provides that export rates apply to freight moved on bills of lading showing destination beyond Pacific Coast ports, and not diverted or held en route by shipper; as applied to instant situation, the two items create a substantial tariff ambiguity which must be resolved against the rail carrier. Therefore, in suit by shipper seeking a refund of the difference between lower export rates and higher domestic rates charged, the court holds that export rates published in defendant's tariff apply on considered shipments. Judgment for plaintiff.—Caterpillar Tractor Co. v. Atchison, T. & S.F. Ry. Co., 333 F. Supp. 885 (886-8).

Routing

180. Restriction in tariff.—[Vols. 2, 6, 9, 11, 12, 15-19, 21].—Proposed tariff provision by respondent railroads restricting joint carload rates on shipments of fresh potatoes southbound from central Oregon only to shipments loaded in special refrigerator cars and moved over specified routes found lawful. Respondents' evidence proves that a revenue need exists for such restriction, an adequate supply of such cars exists, and that shippers may comply without undue additional burden on them.—Routing Restrictions on Fresh Vegetables, 335 I.C.C. 665 (670).

All tariff supplements establishing new interchange points were authorized with the exception of the establishment of Bound Brook, N.J., in lieu of Allentown, Pa., subject to conditions stated herein. Of these conditions, four were set forth for the first time herein and eleven were set forth in F.D. 26659, an abandonment proceeding including the provision for the establishment of a trust fund for certain of petitioner's revenues earned via the Lake Junction, N.J., interchange point.—Routing Via Oak Island Jct., New Jersey, 341 I.C.C. 129 (153-60).

181. Unrestricted rates apply over any route made up of lines of participating carriers.—[Vols. 2, 6, 9, 11-19, 21].—In its decision awarding plaintiff reparations against defendant railroads, due to alleged overcharges, the Commission held that because the tariff provided for routing via all routes made by lines of any carriers parties thereto, shippers were free to tack together any lines of the participating carriers for intermediate rule purposes; however, its interpretation of the intermediate-point rule clearly contravenes prevailing decisional law. The Court of Appeals held in 212 F. 2d 812, that a "route" for intermediate-point rate purposes must be reasonable in light of the extent and direction of circuity and the commercial usage of such route; and on review of recent apposite cases, the court in suit to enforce the reparations order holds, further, that the choice of lines shippers have in constructing such a route is limited by a rule of reasonableness, whether tariff routing is designated as "open" or "specific." The Commission's reparations award, not enforced.—Samuel P. Mandell Co. v. Pennsylvania R. Co., 336 F. Supp. 565 (573-4, 575)*.

Observance of Published Tariff

215. Departure from rate named in tariff unlawful.—[Vols. 2, 6, 9, 11, 12, 14-19, 21].—See also Southern Pac. Co. v. Miller Abattoir Co., at n. 263 below.

In railroad's suit against consignee to collect freight charges allegedly due on shipments delivered under bills of lading containing a "freight prepaid" notation, judicial recognition of consignee's defense of estoppel will not contravene anti-discriminatory purpose of the statute. On appeal from lower court's rejection of appellant's estoppel defense, the court holds that a consignee who has paid consignor full amount of the charges may raise the defense of estoppel against a carrier's claim for freight charges. Such a rule will not erode the purpose underlying §6(7) as long as the grounds for estoppel will not serve, directly or indirectly, as a cover for freight rate discrimination.—Southern Pac. Transp. Co. v. Campbell Soup Co., 455 F. 2d 1219 (1222).

The law is clear that demurrage cannot be waived by agreement between the parties; and it is equally clear that demurrage cannot be charged where cars are kept on the shipper's property for carrier's convenience until the point at which they are appropriated to shipper's use. In view of the fact that, since it was railroad's practice to place unordered "piggyback" trailers in loading slots at shipper's dock for its own convenience, the free 10-hour loading time (provided by tariff) began to run at the time that shipper started its loading operation, not at time trailers were positioned; that loading of any given trailer was completed within 3 hours; and that shipper immediately prepared a bill of lading and notified railroad of the waiting shipment, there was not any detention beyond the free time for which demurrage could be charged. In railroad's suit to recover demurrage charges from shipper, therefore, the court finds, as a matter of law, that defendant owes no demurrage charges on any of plaintiff's claims.—Chicago & N.W. Ry. Co. v. Union Packing Co., 326 F. Supp. 1304 (1306-8).

217. Strict compliance with tariff rules as to service offered.—[Vols. 2, 6, 9, 13-19, 21].—See also Norfolk & W. Ry. Co. v. Permaneer, Inc., at §1(6), n. 538, and Penn Central Co. v. General Mills, Inc., at n. 15 *supra*.

Dispute in railroad suit against shipper is over what charge, if any, is due plaintiff for services rendered under rail tariff publishing (1) a single car rate that was subject to regular demurrage or detention rules affording consignee up to 48 hours free time for unloading and specifically providing for "constructive placement," under which, on request, railroad would hold a car at the terminal until customer was ready for actual delivery, and (2) a lower "annual volume rate," available only to certain large scale shippers (such as defendant), that prescribed a special detention rule allowing only 24 hours free unloading time and making no provision for constructive placement. Defendant shipper who, during period in question, received cars or constructive placement claims that annual volume rate, and detention charges thereunder, applied; however, in view of the Act and provisions of the tariff, since shipper availed itself of constructive placement feature of the regular demurrage rules, it must pay for such services under the higher single-car rate. District court holding that the single-car rate applied, affirmed.—Southern Ry. Co. v. Champion Papers, Inc., 427 F. 2d 155 (155-6)*.

222. Carriers' duty to collect tariff charges.—[Vols. 2, 6, 9, 11-19, 21].—See also Chicago, R.I. & P.R. Co. v. Furniture Forwarders of St. Louis, Inc., 28 USC §1337, n. 1.

As the lower court concluded, in railroad's action against consignee of "prepaid" shipment to recover freight charges allegedly due, the meaning of §6(7), which imposes on carrier both the right and the duty to collect its full, published tariff charges on freight delivered, does not sustain plaintiff's claim that, under the Act, it has an absolute right and duty to collect —and consignee has an absolute duty to pay—all lawful charges which cannot be defeated by any error or mistake of carrier, regardless of whether or not it results in double payment by consignee. Therefore, considerations of common law equity were not precluded; and the public policy underlying express purpose of the Act (i.e., to prevent preferences in tariff rates) did not compel plaintiff to bring suit against consignee for "prepaid" freight charges which, in fact, consignor had not paid.—Missouri Pac. R. Co. v. National Milling Co., 409 F. 2d 882 (883-4)*.

Accordingly, the trial court's decision on the merits, (1) that where carrier had made the full lawful charge and, itself, marked the bill of lading "prepaid" thereby, in effect, extending credit and looking to consignor for payment, and consignee did pay consignor for both the goods and the freight charges, the public policy against preferences was not involved; (2) that the doctrine of estoppel was properly interposed and could be applied against the railroad by defendant consignee; (3) that the railroad should not be rewarded for its admitted negligence by penalizing consignee simply because consignor (who received payment and who apparently was insolvent) had not paid freight charges claimed to be due; and (4) that, as no genuine issue of material fact was presented, defendant was entitled to judgment on the pleadings, as amended, is affirmed.—Id., pp. 884-6.

Under §6(7), carriers are forbidden to charge any rate other than published tariff rate; and it is carrier's duty as well as its right to collect full tariff charges. Thus, in entering judgment for the railroad on its claim for additional charges incurred when shipments of lambs consigned to defendant were stopped by federal inspectors to check the lambs for screw worms, the trial court properly included prejudgment interest. Applicable tariff provided that all expenses accruing at stopping points, such as charges for inspection, would be in addition to the through rate; and to allow the carrier to recover its lawful charges without awarding prejudgment interest would be to diminish the tariff charge by an amount representing value of the use of money owed during the period prior to judgment. Such a diminution would be contrary to the statute; thus allowance of prejudgment on the railroad's claim was correct.—Southern Pac. Co. v. Miller Abattoir Co., 454 F. 2d 357 (362).

Judicial recognition of appellant consignee's defense of estoppel, in railroad's action to collect from consignee its freight charges on shipments that moved under bills of lading which carried "freight prepaid" notations, will not contravene the antidiscriminatory purpose of the statute. When railroad delivered the shipments under "prepaid" bills of lading which signified that it would look to shipper for payment of freight charges, and consignee assertedly relied on that representation and reimbursed shipper for full amount of the charges, but carrier was unable to collect from shipper, consignee who paid amount of the charges to consignor may raise the defense of estoppel against carrier's claim for freight charges. Accordingly, since the lower court has not ruled on the merits of appellant's estoppel defense, the case is remanded for further proceedings in conformity with the court's opinion.—Southern Pac. Transp. Co. v. Campbell Soup Co., 455 F. 2d 1219 (1222).

Inasmuch as, pursuant to §3(2) and §6(7), a railroad is obligated to collect from the shipper or consignee accrued demurrage charges as extended freight charges in the absence of an agreement to exonerate, plaintiff is not required to proceed first or jointly against others liable for freight charges in its action to recover demurrage charges incurred during longshoremen's strike on 53 carloads of pig iron shipped "FAS Vessel, Mobile, Ala." and delivered to consignee named on the bill of lading. Therefore, even if defendant (who had agreed to purchase 36 of the carloads) was beneficial owner of the pig iron when demurrage charges were incurred, its mere ownership thereof would not render it liable for the freight charges or demurrage; such liability may be created only by contract or by statute.—Southern Ry. System v. Leyden Shipping Corp., 290 F. Supp. 742 (745-6).

In railroad's action to recover undercharges from shipper, rail carriers are required to collect the full tariff rate on goods shipped, notwithstanding ignorance or misquotation of rates or any equitable considerations. Everyone is charged with notice of carrier's legal tariff rate; and no act or omission of the railroad, except running of the statute of limitations, can preclude its recovery of full amount of the applicable tariff charges. Therefore, although plaintiff had marked the waybill (and collected freight charges) at a lower rate and defendant had relied thereon, railroad is entitled to collect full lawful tariff charges. Moreover, though shipper claims it could have deducted the full charges from purchase price of the goods, if quoted the correct rate, estoppel is not a defense that can be invoked where preference results; nor may shipper plead laches as a defense, since laches is an equitable doctrine without application to a suit at law. There being no genuine issues of fact, plaintiff's motion for summary judgment is granted.—St. Louis—S.F. Ry. Co. v. Miller Floors, Inc., 293 F. Supp. 869 (870-71).

While the court recognizes that abundant authority supports railroad's position in its actions against consignees of "prepaid" shipments to recover freight charges allegedly due, the principles stated in 276 F. Supp. 367, aff'd 409 F. 2d 882, and rooted deeply in considerations of fairness, clearly represent the better view of the law. Accordingly, statutory construction does not sustain plaintiff's claim so as to interdict considerations of common law equity and, since no overpowering public policy compelled carrier to bring action under the statute which forbids granting of any preferences in tariff rate treatment, double payment by consignee is not required. Carrier made full and proper freight charges and extended credit to, and looked for payment from, consignor (shipper) by stamping the bills of lading as prepaid; and when defendant consignees, relying on that representation, accepted delivery and (prior to shipper's bankruptcy) paid the purchase price and full freight charges to consignor—who never remitted to carrier—they are not responsible for shipper's nonpayment.—Missouri Pac. R. Co. v.

Lake Charles Grain & Groc. Co., 320 F. Supp. 1064 (1065-6).

223. Liability for payment.—[Vols. 2, 6, 9, 13, 19, 21].—Tariff provisions to collect demurrage charges from the party (other than the consignor or consignee) ordering the detention of the car result in an unjust and unreasonable practice.—Free Time In-Car Storage at U.S. Ports, 329 I.C.C. 763 (772).

231. Misquotation by carriers or tariff error.—[Vols. 2, 6, 9, 11-18, 21].—See also St. Louis—S.F. Ry. Co. v. Miller Floors, Inc., at n. 222 *supra*.

That there may have been some errors in rate-basis numbers shown in tariffs naming assailed rates does not relieve defendants of their obligation under §6 to charge the applicable rates.—Steel, Inc. v. Chicago, B. & Q. R. Co., 323 I.C.C. 509 (513).

243. Device to depart from tariff forbidden.—[Vols. 2, 6, 9, 11].—The Commission has condemned shippers' practice of listing a higher-rated commodity on the bill of lading under a certain description to obtain lower rates, even though the higher-rated commodity may be used for the same purpose as the lower-rated. Complainant's description of shipments of industrial and feed grade ureas as "fertilizer" on bills of lading, though it invoiced them to customers as technical or feed grade, resulted in undercharges, and its admission that undercharges had accrued as result of "clerical errors" indicates that at time of shipment it understood that different rates applied on fertilizer, feed, and technical ureas.—W. R. Grace & Co. v. Illinois Central R. Co., 323 I.C.C. 102 (104, 109-10).

Actions Before the Courts and Commission

260. Construction and interpretation of tariffs by Commission.—[Vols, 2, 6, 9, 12, 16-19, 21].—In action to set aside Commission orders dismissing plaintiff's complaint for recovery of overcharges on shipments of "cast iron buttons" (having 82-percent average iron content) that are recovered from blast furnace slag, the Commission's findings that commodity shipped was iron bearing slag properly classified as "scrap iron" under the railroads' tariffs, and not slag bearing iron classifiable as "slag" as plaintiff contended, are reasonable and supported by substantial evidence of record; and since such findings involve the exercise of Commission expertise and include questions of judgment governing classification interpretation, the court should accord them great deference. Thus, upon review of the whole record, and notwithstanding some evidence therein which might be deemed supportive of plaintiff's contrary opinion, the Commission's challenged interpretation should be sustained. While the effect of that interpretation was to deny plaintiff recovery of alleged overcharges, the Commission also found the scrap-iron rate charged on the shipments applicable and not shown to be unjust or unreasonable. Commission orders sustained.—Price-Watson Company v. I.C.C., 287 F. Supp. 872 (873, 874-6)*.

Complainants submitted little or no evidence relating to the comparative values of the subject commodities, except for the mill list prices as of July 1970 for 11 prefinished hardwood plywoods and one unfinished softwood plywood ,amufactured by one of the shippers. There was little or no effort made by complainants to show that the costs, the transportation characteristics, the average loading, the average value, the competitive circumstances, or any other relevant factor affecting the higher-rated commodities were the same or similar to the commodities moving under the lower "incentive" rates. Assailed rates found applicable, and not shown to have been or to be unjust or unreasonable.—Plywood, Hardboard & Particleboard v. Aberdeen, 340 I.C.C. 836 (844-845).

263. Actions to enforce provisions.—[Vols. 2, 6, 11-15, 17-19, 21].—See also Chicago, B. & Q. R. Co. v. Duhamel Broadcasting Co., at n. 49 *supra*, and Chicago & N.W. Ry. Co. v. Union Packing Co., at n. 215 *supra*.

District court correctly held, in railroad's action against shipper to recover freight charges on various multi-car shipments, that the rational and logical meaning of the words "CL rate or rating on entire shipment" in §2(a) of classification Rule 24 is that the entire shipment should receive the c.l. rate on the lead car—which is filled to capacity—even though the trailer car is not full and that, in absence of the quoted clause, trailer car could be charged a higher rate. This gives shipper the same (but not higher) rate on the trailer car, regardless of weight of a shipment, as it receives on the lead car or cars. Interpretation urged by defendant, which conveniently ignores "CL rate" and emphasizes "rating on entire shipment," would permit an unjust and absurd result that is neither reasonable nor consistent with purposes of the tariff. While the disputed language is not perfect, when the rule is read in its entirety, the proper interpretation is as set forth by the lower court. Judgment affirmed.—Penn Central Co. v. General Mills, Inc., 439 F. 2d 1338 (1341-2).

In railroads' suits to collect storage and demurrage charges on carloads of grain that were consigned to defendant elevator and held in constructive placement short of destination because they could not be received on defendant's interchange track, the district court correctly ruled that, under applicable tariffs and Commission car service orders, the free time allowed for unloading was to be computed from first 7:00 a.m. after notice to consignee of constructive placement, but was not to include time for movement between the hold point and destination. When cars in question were constructively placed, plaintiffs sent required notices thereof to defendant and calculated the free unloading time, and the storage and demurrage charges with reference thereto; also, though actual travel time was less, 24 hours was allowed for movement from hold points to the elevator, in each case, which was not counted against the cars. Accordingly, district court's judgment against defendant for storage and demurrage charges on cars that were not unloaded within the free time allowed, affirmed.—Fort Worth & D. Ry. Co. v. Goodpasture, Inc., 442 F. 2d 1294 (1296-7, 1298).

Under §6(7), carriers cannot charge any rate different from the tariff rate; as a corollary, consignee who accepts goods shipped to him is liable for all freight charges due under applicable tariffs despite the carrier's misquotation or miscalculation of charges. And a contract to carry for less than tariff rates, being void, will not prevent recovery of the tariff rates because it is the carrier's duty as well as its right to enforce payment of the full tariff charges. Therefore, when the applicable tariff provided that all expenses accruing at stopping points, such as charges for inspection, would be in addition to the through rate, consignee of considered shipments of lambs became liable upon accepting them for all charges incurred by the railroad in the stoppage required by freight tariff which forbade rail shipment of livestock from origin state unless it had been inspected and found free of screw worms. —Southern Pac. Co. v. Miller Abattoir Co., 454 F. 2d 357 (359-60).

Thus, in railroad's action against consignee to recover additional charges incurred when shipments were stopped by federal inspectors to check the lambs for screw worms, wherein consignee asserts a breach of the shipping contract as both a defense and a counterclaim, inasmuch as the alleged breach is no defense to carrier's claim, the lower court correctly granted railroad's motion for summary judgment on its claim for freight charges. The court was also correct in allowing prejudgment interest on the railroad's claim; since the only lawful charge for the shipments is the full tariff charge, to allow recovery without prejudgment interest would be to diminish the tariff charge by an amount representing value of the use of money owed during the period prior to judgment; and such a dimunition would be contrary to the statute.—Id., pp. 359, 362.

The statute requires rail carriers to collect full lawful tariff rates, regardless of ignorance, misquotation, or any equities which might lie with the shipper; and no act or omission of carrier, except running of statute of limitations, can estop or preclude its recovery of full amount of applicable tariff charges. In railroad's action against shipper to recover alleged undercharges, defenses of estoppel and laches asserted by defendant are without merit as a matter of law; therefore, since there are no genuine issues of material fact presented, plaintiff's motion for summary judgment is granted; judgment entered against defendant in amount of undercharges claimed.—St. Louis-S.F. Ry. Co. v. Miller Floors, Inc., 293 F. Supp. 869 (870-71).

264. Set-off and counterclaim.—[Vols. 2, 6, 9, 11-15, 17-19].—See also Burlington Northern, Inc. v. United States, Gov't. traffic, §66, n. 1.

Consignee's allegation, in railroad's suit against it for additional charges incurred when shipments of lambs were stopped by federal inspectors to check them for screw worms, that it suffered damages because of carrier's failure to give the immediate notice of stoppage in transit called for in the livestock contract—though no defense to the claim for freight charges—constitutes an independent claim that is a proper subject for counterclaim. Railroad's argument that to allow recovery for alleged damages would offend §6(7), i.e., that an unscrupulous carrier could give a disguised rebate to its customer through purposely failing to give the immediate notice called for, was rejected by the Supreme Court in 281 US 14. Moreover, a customer who is truly damaged by carrier's breach of its shipping contract, whether breach is intentional or not, receives no "rebate" when carrier pays it the amount of its loss; thus, if consignee was damaged through railroad's breach of the shipping contract, §6(7) does not stand in the way of recovery.—Southern Pac. Co. v. Miller Abattoir Co., 454 F. 2d 357 (360-1).

Furthermore, contrary to plaintiff's position, publication in the Federal Register of freight tariff which explicitly stated that screw worms existed in Arizona, origin of the shipments, and that livestock leaving the state would be stopped for inspection, does not satisfy shipping contract provision that the carrier "shall immediately give notice" when a shipment is stopped in transit by quarantine. Accordingly, insofar as the lower court's order entered judgment for the railroad on consignee's counterclaim, it is reversed; and upon remand, if it is found that plaintiff railroad failed to give the immediate notice called for in the livestock contract, consignee may recover on its counterclaim any damages to which it can prove itself legally entitled.—Id., pp. 361-3.

Section 6. (8)-(10). Preference to shipments for United States; Schedule lacking notice of effective date; Penalty.——[Unchanged. See vol. 9, p. 7521.]

Amendments, see footnotes, vol. 2, pp. 1530-1532; historical notes, pp. 1530, 1531; vol. 17, p. 13389; vol. 21, p. 16800.

Notes of Decisions

§6(8): Volume 17—p. 13389; Volume 18—p. 14148; §6(9): Volume 2—p. 1531; Volume 19—p. 15307; §6(10): Volume 2—p. 1531.

Section 6. (11) Jurisdiction of Commission over transportation by rail and water.—[Unchanged. See vol. 11, p. 9238.]

Amendments, see footnotes, vol. 2, p. 1535, vol. 11, p. 9238; historical note, vol. 2, p. 1536.

Notes of Decisions

Volume 2—p. 1536; Volume 6—p. 5279; Volume 9—p. 7524; Volume 11—p. 9239; Volume 12—p. 10289; Volume 13—p. 10997; Volume 15—p. 12076; Volume 17—p. 13389; Volume 18—p. 14148; Volume 19—p. 15307; Volume 21—p. 16800.

Section 6. (12) Jurisdiction of Commission over carriers contracting with water carriers operating to foreign country.—[Unchanged. See vol. 11, p. 9239.]

Amendment, see footnote, vol. 11, p. 9239.

Through arrangements by water to foreign country

2. Construction and interpretation.—This section empowers Commission, once a voluntary establishment of international joint rates has been made, to require carriers subject to our jurisdiction to enter into like kinds of arrangements with other water carriers in the same trade. Section 6(12) also affirmatively indicates that arrangements for through routes and joint rates between domestic carriers subject to our jurisdiction and oceangoing carriers were contemplated. —International Joint Rates and Through Routes, 337 I.C.C. 625 (629).

Section 7. Combinations to prevent continuous carriage of freight prohibited.—[Unchanged. See vol. 9, p. 7526.]

Historical note, see vol. 16, p. 12715.

Notes of Decisions

Volume 2—p. 1542; Volume 6—p. 5280; Volume 9—p. 7526; Volume 16—p. 12715.

Section 8. Liability in damages to persons injured by violation of law.—[Unchanged. See vol. 9, p. 7527.]

Notes of Decisions

Volume 2—p. 1547; Volume 7—p. 5281; Volume 9—p. 7527; Volume 11—p. 9240; Volume 12—p. 10289; Volume 13—p. 10998; Volume 14—p. 11501; Volume 15—p. 12077; Volume 16—p. 12715; Volume 17—p. 13390; Volume 18—p. 14149; Volume 19—p. 15308; Volume 21—p. 16801.

To Whom Right of Action Accrues

43. Person bearing charges.—[Vols. 2, 7, 9, 13, 16-19, 21].—When the basic issue in consolidated complaint proceedings is merely one of tariff interpretation, relief sought is refund of any overcharges found to exist, and complainants paid to defendants the charges assailed, the question of who must in final analysis absorb those charges, as between buyer and seller, is immaterial. Even if, as defendants allege, seller-consignors absorbed part of the freight charges or granted complainants (buyer-consignees) equalization allowances, defendants would still be liable to complainants for any timely filed claims for over-charges collected from and paid by complainants.—Steel, Inc. v. Chicago, B. & Q. R. Co., 323 I.C.C. 509 (517).

46.—Consignee.—[Vols. 2, 7, 9, 11, 15].—Although complainant consignees rely largely on copies of bills of lading and freight bills to support their rule 1.100 statements, introduction of original paid freight bills is not the only method by which claims for reparation may be proved. That defendants have had opportunity to inspect the claim statements, and that they have not indicated that any other party has asserted claims for reparation on the shipments involved, while not significant in and of themselves, are facts entitled to weight when witnesses for both consignors and complainants testified that complainants bore the charges and defendants do not challenge the finding in the prior report that where the shipments were prepaid by the consignors they were subsequently invoiced to complainants and paid by latter to the consignors. It is clear that complainants bore the charges; thus their right to file the complaints for reparation was not contingent on assignments from the consignors and the "first step" rule announced in 88 ICC 492 is not controlling.—Thermoid Co., Southern Division v. Baltimore & O.R. Co., 323 I.C.C. 155 (162, 164)*.

Against Whom Liability Accrues

60. Carriers at fault.—[Vols. 2, 9].—See Futorian Manufacturing Corp. v. St. Louis—S.F. Ry. Co., at §15(8), no. 68.

Failure to Furnish Transportation

111. In general.—[Vols. 2, 7, 11, 17].—See also Johnson v. Chicago, M., St. P. & P. R. Co., at §1(4), n. 1.

Though plaintiff also sought injunctive relief, only his claim for damages under §8 for violation of carrier's duty under §1(4) is now before the court, an injunction against railroad's unauthorized abandonment of branch line used for coal shipments from his mine having been denied in 264 F. Supp. 437 because of pending Commission decision on the abandonment application. However, there are no damages to be recovered when, after physical deterioration of a tunnel made it impossible to provide service, the railroad suspended all operations over the branch line and lawfully imposed an embargo on further freight shipments. While validity or reasonableness of embargoes usually is for Commission determination, plaintiff elected to sue in court for damages instead of filing a complaint with the Commission, pursuant to §9, and could not challenge the embargo before the Commission. Moreover, since the Commission decided that tunnel need not be restored, to award damages for railroad's failure to restore the tunnel and provide service would result in an unjust and undue burden. Defendant's motion for summary judgment granted.—Asbury v. Chesapeake & O. Ry. Co., 314 F. Supp. 310 (312-13).

Unreasonable Rates and Charges

122. Voluntary reductions.—[Vols. 2, 7, 9, 12, 14, 17-19, 21].—Before an award of reparation under §1 may be made, it must appear that the assailed rates exceed a reasonable maximum level, and it is well settled that a voluntary reduction of a rate by a carrier does not indicate that the former rate was unreasonable. Assailed rates on feed and industrial grade ureas are not shown to be unreasonable when their present low level is due to various rate reductions made by defendants to meet competition, and still lower rates on fertilizer grade urea are on depressed basis established to meet competition.—W. R. Grace & Co. v. Illinois Central R. Co., 323 I.C.C. 102 (111,114).

128. Change in long-established relationship.—[Vols. 2, 7, 17-19].—Assailed rates on ammonium sulphate were incorrectly based on grouping of that commodity with increased rates on chemicals. Ammonium sulphate has had a long rate parity relation with fertilizer. We find that a refund is due to the extent that the increases on chemicals exceeded the increases on fertilizers.—Allied Chemical Corp. v. Norfolk & Western Ry. Co., 341 I.C.C. 266 (269-70).

Complainant is not entitled to damages for misrouting in the amount of $75.50 (the difference between original prepaid rate and the higher applicable rate) even though carrier neglected its duty to inform shipper of a conflict between the rate and route inserted in shipper's bill of lading. The shipment moved over the lowest rated available route permitting the requested stopoff and thus was not misrouted.—Futorian Manufacturing Corp. v. St. Louis-S.F. Ry. Co., 335 I.C.C. 156 (159-60).

Undue Preference and Prejudice

180.—Proof and measure of damages.—[Vols. 2, 7, 9, 11-19, 21].—Generally, evidence sufficient to establish violation of Interstate Commerce Act is not necessarily sufficient to support an award of reparations; assailed practice must be shown to have resulted in unreasonable charges in the past or otherwise to have caused damage.

No damage was shown as a result of railroads' unlawful practice of refusing to fully absorb interline switching charges and complainants are not entitled to damages as a matter of law.—Mid-States Packers, Inc. v. United States, 363 F. Supp. 275 (276-77)*.

When relief for the future is prescribed under an affirmative §3(1) finding, it does not follow that an award of reparation is warranted. To justify such an award, complainant must show, with the same degree of certainty as required by a court of law, that he has been damaged by the unlawful rate situation and the amount of his damage. Though complainant obviously has been and is being disadvantaged by the rate disparities in favor of its nearest competitor, it has not proven a monetary loss with that meticulous precision required by the statute as construed by the Commission and the courts. Reparation denied.—Matthiessen & Hegeler Zinc Co. v. Baltimore & O. R. Co.. 323 I.C.C. 601 (615)

Charges paid by complainant shipper were found unlawful due to violations of §§2 and 3(1) but have not been shown unjust and unreasonable for services performed. Fact that other shippers obtained same or greater services at a lesser charge furnishes no measure of damage to complainant. See 293 ICC 243, 246. Evidence herein, although sufficient to establish violations of the Act, is insufficient to support an award of reparations.—Public Belt R. Comm. v. Aberdeen & R. R. Co., 335 I.C.C. 162 (182-3).

Even though defendants' failure to fully absorb interline switching charges was found unduly prejudicial in violation of §3(1), complainants have failed to show that such practice resulted in unreasonable charges in the past or otherwise damaged complainants and therefore they have failed to prove that they are entitled to an award of reparations.—Armour & Co. v. Sioux City Term. Ry. Co., 341 I.C.C. 118 (128).

Section 6 of Interstate Commerce Act

193. Overcharge.—[Vols. 2, 7, 9, 11, 13, 14, 17, 19, 21].—See Price-Watson Co. v. I.C.C. at §6(7), n. 260, and United States v. Southern Pacific Co., at §6(7), no. 10.

Complaints Seeking Reparation

211. Sufficiency in general.—[Vols. 2, 9, 17-19].—Complainant seeks reparation in the amount of difference between charges paid under assailed rates and lower charges previously in effect. Assailed rates resulted from cancellation of transit privileges to complainant shipper of feed from Vicksburg, Miss. to destinations in Louisiana. Complainant has not made a prima facie case to show such cancellation unreasonable or otherwise unlawful. Complaint dismissed.—The Merchants Co. v. Illinois Central R. Co., 329 I.C.C. 713 (716).

217. Necessity of through charge being in issue—parties.—[Vols. 2, 7, 9, 11, 15-19, 21].—Where a complaint seeking reparation is concerned, the total through charge must be considered. Complainant United States has not brought charges for the through movement into issue but only charges for movement from Lathrop, Calif., to Fort Benning Junction, Ga. Commission cannot relate its finding as to reasonableness of a rate for such portion of a through movement.—United States v. Central of Georgia R. Co., 332 I.C.C. 33 (36).

Proof of Damages

221. Showing of proximate cause and financial damage prerequisite to award.—[Vols. 2, 7, 9, 11, 16, 17, 21].—See also Mid-States Packers, Inc. v. United States, at §8, n. 180.

Although initial defendant carrier had a duty to notify shipper of a conflict between the rate and route in shipper's bill of lading, whether or not failure to perform that duty resulted in damages to shipper is a matter to be specifically shown. No resultant damages to shipper were proved and shipper is entitled only to refund of overcharges beyond the applicable rate, which refund defendant has agreed to make.—Futorian Manufacturing Corp. v. St. Louis—S.F. Ry. Co., 335 I.C.C. 156 (160-61).

230.—Rule 100 statements.—[Vols. 2, 7, 9, 12, 14, 15, 21].—Complainant consignees are entitled to reparation to bases found reasonable in 303 ICC 743 on asbestos shipments from Canadian origins to destinations in the Carolinas as detailed in their rule 1.100 statements. Evidence establishes that the southern delivering carriers were willing to consider the statements submitted to them but that the Canadian and eastern carriers would not join in the certification. Defendants do not challenge the findings and testimony to effect that complainants paid or bore the charges involved, and have presented no evidence that any other persons have sought reparation on the shipments in question; nor do they contend that the rule 1.100 statements filed with the southern carriers were not accompanied by basic transportation papers enabling carriers' auditors to check their accuracy, or that each defendant did not have opportunity to make such a check. It is apparent from stipulations by counsel for complainants and defendants that the statements submitted were adequately supported by transportation documents (whether originals or copies), as well as by testimony of witnesses for consignors, consignees, and certain defendants. Amounts of reparation determined.—Thermoid Co., Southern Division v. Baltimore & O. R. Co., 323 I.C.C. 155 (158-9, 162, 164-5)*.

Attorneys' Fees and Costs

250. Proceedings before Commission.—[Vols. 2, 7, 9, 12, 15, 17].—The Commission has no power to award costs in a complaint proceeding before it.—Industrial Corp. of S. Hackensack, N.J. v. N.J. & N.Y. R. Co., 324 I.C.C. 272 (273).

Section 9. Remedies of persons damaged; election; witnesses.—

[Unchanged except that, by §243(a) of Public Law 91-452, Oct. 15, 1970, 84 Stat. 931, the second sentence was amended by striking "; the claim" and all that follows in the sentence and inserting in lieu thereof a period. See vol. 9, p. 7575.]

Amendments, see footnotes, vol. 2, p. 1650; historical note, p. 1650.

Notes of Decisions

Volume 2—p. 1651; Volume 7—p. 5368; Volume 9—p. 7575; Volume 11—p. 9246; Volume 12—p. 10294; Volume 13—p. 11001; Volume 14—p. 11505; Volume 15—p. 12082; Volume 16—p. 12724; Volume 17—p. 13402; Volume 18—p. 14158; Volume 19—p. 15319; Volume 21—p. 16811.

Election of Forum

31. Option of forum matter of right.—[Vols. 2, 7, 9, 12-15, 17, 19, 21].—Though validity or reasonableness of embargoes placed by carriers on freight shipments is usually left to determination of the Commission, plaintiff elected not to file complaint with the Commission as to embargo on further shipments over railroad branch line used to ship coal from his mine but, instead, to sue in court to recover damages from defendant for carrier's violation of its duty to provide service; and having elected the court route, he could not challenge the embargo before the Commission. However, the embargo having been lawfully imposed, plaintiff cannot recover on his claim for damages when physical conditions—deterioration of a tunnel—made it impossible for the railroad to provide transportation service over that branch line.—Asbury v. Chesapeake & O. Ry. Co., 314 F. Supp. 310 (312, 313).

Exclusive Jurisdiction of Commission and of Courts

37. General statement of rule.—[Vols. 2, 7, 12, 15, 16, 18, 19, 21].—See Nemitz v. Norfolk & W. Ry. Co., at §5(2), n. 70.

46. Particular questions as to damages of which Commission's determination is prere-

quisite. ***Application of tariff charges.***—[Vols. 2, 7, 9, 12, 15-19].—Construction and application of tariffs is not a matter within the primary and exclusive jurisdiction of the Commission unless the tariffs are couched in highly technical words used in a peculiar sense and require the Commission's expertise for their proper construction and application. Accordingly, when the district court found that the tariffs in dispute in railroads' suits to collect storage and demurrage charges were in non-technical words being used in their ordinary sense, and that the Commission's expertise was not required, the court correctly decided that it had jurisdiction to interpret and apply the tariffs.—Fort Worth & D. Ry. Co. v. Goodpasture, Inc., 442 F. 2d 1294 (1297-8).

Section 10. (1)-(4) Violations of regulations by carrier: false billings, classification, claim; inducing unjust discrimination; penalties.—[Unchanged. See vol. 9, pp. 7582, 7583, 7586.]

Amendments, see footnotes, vol. 2, pp. 1671, 1686, 1694, vol. 9, p. 7582; historical notes, vol. 2, pp. 1680, 1687, 1694, vol. 9, p. 7584.

Notes of Decisions

Volume 2—pp. 1672-1694; Volume 7—p. 5378; Volume 9—pp. 7582-7586; Volume 12—p. 10295; Volume 13—p. 11002; Volume 18—p. 14160; Volume 21—p. 16812.

Section 11. Interstate Commerce Commission; appointment, term, and qualifications of commissioners.—[Unchanged. See vol. 11, p. 9247.]

Amendments, see footnotes, vol. 2, p. 1696, vol. 9, p. 7587, vol. 11, p. 9247; historical note, vol. 2, p. 1696, vol. 21, p. 16813.

Historical Note

Reorganization Plan No. 1 of 1969, effective October 11, 1969, transferred from the Interstate Commerce Commission to the Chairman of the Commission the executive and administrative functions of the Commission, including functions with respect to (1) appointment and supervision of personnel employed, (2) distribution of business among such personnel and among administrative units of the Commission, and (3) the use and expenditure of funds; and provided that the Chairman, in carrying out any of the transferred functions, shall be governed by the guidelines and safeguards specified. The reorganization plan also transferred, effective January 1, 1970, the Commission's function of choosing the Chairman from among the Commissioners to the President without, however, precluding Commission designation of a Commissioner to be acting chairman and to perform the Chairman's functions when no Presidentially designated Chairman is available. 34 FR 15783, Oct. 14, 1969. Historical Notes, see vol. 19, p. 16813.

Notes of Decisions

Volume 2—p. 1697; Volume 7—p. 5379; Volume 12—p. 10296; Volume 13—p. 11003; Volume 14—p. 11506; Volume 15—p. 12084.

Section 12. Authority and duties of Commission; witnesses; depositions—(1) Authority, duties and proceedings of Commission, witnesses; exemptions.—[Unchanged, except by the act of Feb. 5, 1976, Pub. L. 94-210, §207, 90 Stat. 42, paragraph (1) is designated (1)(a) and new paragraph (b) is added, as set forth below. See vol. 11, p. 9247.]

(b) Whenever the Commission determines, upon petition by the Secretary or an interested party or upon its own initiative, in matters relating to a common carrier by railroad subject to this part, after notice and reasonable opportunity for a hearing, that the application of the provisions of this part (i) to any person or class of persons, or (ii) to any services or transactions by reason of the limited scope of such services or transactions, is not necessary to effectuate the national transportation policy declared in this Act, would be an undue burden on such person or class of persons or on interstate and foreign commerce, and would serve little or no useful public purpose, it shall, by order, exempt such persons, class of persons, services, or transactions from such provisions to the extent and for such period of time as may be specified in such order. The Commission may, by order, revoke any such exemption whenever it finds, after notice and reasonable opportunity for a hearing, that the application of the provisions of this part to the exempted person, class of persons, services, or transactions, to the extent specified in such order, is necessary to effectuate the national transportation policy declared in this Act and to achieve effective regulation by the Commission, and would serve a useful public purpose.

Historical Note

On August 9, 1973, the Commission recommended to Congress legislation to amend §§12(1), 204(a)(6), 304(a), and 403(a) of the Interstate Commerce Act to enable the Commission to exempt certain transportation from regulation upon a finding that the regulation is not necessary in order to effectuate the National Transportation Policy and that regulation would serve no public purpose. (S. 2458). Annual Report, 1974, p. 84.

Amendments, see footnotes, vol. 2, p. 1701, vol. 11, pp. 9247-9248; historical notes, vol. 2, p. 1701, vol. 15, p. 12084, vol. 16, p. 12726.

Notes of Decisions

Volume 2—p. 1702; Volume 7—p. 5380; Volume 9—p. 7588; Volume 11—p. 9249; Volume 12—p. 10296; Volume 13—p. 11003; Volume 14—p. 11506; Volume 15—p. 12085; Volume 16—p. 12727; Volume 17—p. 13305; Volume 18—p. 14160; Volume 19—p. 15320; Volume 21—p. 16813.

Functions of Commission

9.—Legislative.—[Vols. 2, 7, 9, 21].—Commission instituted this proceeding as empowered by §12(1) in order to formulate a uniform requirement as to public notice of independent action by member carriers of an agency operating pursuant to §5a as present regulations vary greatly and include practical potential for collective action under the guise of independent action. Amendments to §5a agreements in force and for future application ordered so as to give same notice for independent as for collective action.—Notice of Independent Action, 332 I.C.C. 22 (23-4).

Powers and Duties

15. In general.—[Vols. 2, 14, 19].—Commission recommends that the Interstate Commerce Act be amended so as to incorporate the proposed legislation, contained in appendix F hereto, as regards the adjudication of loss and damage claims by this

Commission and requirements for cargo insurance.—Loss and Damage Claims, 340 I.C.C. 515 (588-97).

19. Carrier management in general.—[Vols. 2, 7, 9, 13, 15-19].—Commission found that as long as voluntarily established multiple-carload rates on iron ore from Pilot Knob, Mo. to Granite City, Ill. are reasonable and lawful, this Commission may not interfere with defendant railroads' managerial prerogatives as to method of operation of their physical plants for such movements. —The Hanna Mining Co. v. Missouri Pac. R. Co. 332 I.C.C. 166 (171).

Inquiry into Business Management of Carriers

36. Scope of inquiry.—[Vols. 2, 19].—The Commission will not consider the question of whether carriers have updated their master tariffs so that current rates include the applicable general increases. We have instituted appropriate monitoring procedures relative to special permission applications which are required in connection with the publication of master increase tariffs. This ongoing activity does not require separate and what would be duplicating consideration of the update problem as an ingredient of this proceeding. However, the Commission will continue close scrutiny of carriers' progress in this area.—Investigation of Railroad Freight Rate Structure, 340 I.C.C. 868 (872-73).

Labor-management relations regarding wages, rules, and working conditions, among others, have been the subject of recurrent consideration by Congress and the Executive during the past decade. In light of the constant efforts of Congress, the Executive, and the courts to resolve problems arising from labor-management relations over the recent past, and our lack of jurisdiction to effect changes, the inclusion of this subject as a phase of this investigation would not be beneficial, we believe, and, therefore, is not warranted at this time.—Id., pp. 873-74.

Execution and Enforcement of Act

40. In general.—[Vols, 2, 17].—Commission may promulgate regulations governing the procedures which regulated carriers are to follow in processing loss and damage claims inasmuch as Congress conferred upon the Commission by this section broad regulatory power to administer and execute the provisions of the statute and to carry out the Congressionally declared national transportation policy even in the absence of specific statute provisions conferring such authority. See 344 US 298, 301-11. Also, Commission reaffirmed its findings in 314 ICC 467 that it has no jurisdiction to determine the merits or measure of damages of any particular loss and damage claim, those being cognizable only in the courts.—Loss and Damage Claims, 340 I.C.C. 515 (539).

Production of Books, Papers, Etc.

59. Documents subject to inspection.—[Vol. 2].—While §12(1) gives the Commission certain powers to secure information and to conduct investigations, it does not provide for inspections of documentary materials by Commission representatives; authority in part I of the Act for such inspections arises solely under §20. Moreover, neither the questioned "Formal Demand For Examination of Records" served on plaintiff railroad by authorized Commission auditors, pursuant to §20(5), nor the counterclaim filed by the United States purported to rely on §12(1). Therefore, since carrier's budget forecast materials sought to be inspected are not "other documents" within §20(5), the Formal Demand for forecast materials was not within the authority of the Commission or its representatives under that section, and the counterclaim asserted by the United States fails to state a claim on which relief can be granted. Plaintiff's motion for summary judgment granted.—Burlington Northern, Inc. v. I.C.C., 323 F. Supp. 273 (275-6, 278-9).

Regulations of the Commission

34 FR 441, Jan. 11, 1969, Part 1000: The Commission, in Appendix I to Subpart B, item 6 under "Office of Proceedings" is amended to read as follows: 6. Chairman and Members of the Motor Carrier Board, in view of consolidation of Temporary Authorities Board and Transfer Board into new Motor Carrier Board, effective Jan. 21, 1969.

34 FR 2207, Feb. 14, 1969, Part 1001: Inspection of Records, §1001.4 Requests to inspect other records not considered public under 5 USC §552, list of location of field offices amended to reflect changes of address, effective upon publication.

34 FR 12221, July 24, 1969, Part 1004: Administrative Interpretations—Statements of Policy, heading of Part 1004 amended to read as set forth and a new §1004.2 Gifts, donations, and hospitality by carriers, added, effective upon publication in Federal Register.

34 FR 18041, Nov. 7, 1969, Part 1002: Fees, §1002.1 Fees for copying, certification, and related services. Heading and paragraph (h) amended, effective on publication in the Federal Register.

35 FR 7512, May 14, 1970, Part 1001: Inspection of Records, §1001.4 Requests to inspect other records not considered public under 5 USC §552, list of field offices following §1001.4 amended to reflect certain changes of address, effective upon publication.

35 FR 10448, June 26, 1970, Part 1000: The Commission, Appendix I to Subpart B is amended by adding, under "Bureau of Traffic," the following: 8. Chairman and Members, The Tariff Rules Board. Effective July 1, 1970.

35 FR 12031, July 25, 1970: Memorandum of agreement between Department of Transportation and Interstate Commerce Commission, pursuant to which railroad waybill documents and records filed with ICC will be made available to DOT for processing of information therein.

35 FR 16802, Oct. 30, 1970, Part 1000: The Commission, §1000.5 Credentials required by special agents, accountants, and examiners. * * * (c) *Definition of special agents, accounts, and examiners,* paragraph revised effective forthwith.

36 FR 8211, May 1, 1971, Part 1124: Adequacy of Passenger Service, new Part 1124 adopting certain regulations prescribed by the Federal Railroad Administration, Department of Transportation, under rail safety statutes, added, effective May 1, 1971.

36 FR 11293, June 11, 1971, Part 1002: Fees, §1002.2 Filing fees, revised and amended to read as set forth, effective Aug. 19, 1971.

36 FR 17432, Aug. 31, 1971, Part 1002: Fees, §1002.2 Filing fees, inadvertent errors in Items 17 and 45 of §1002.2(d) corrected.

37 FR 215, Jan. 7, 1972, Part 1002: Fees, effective date of fees and regulations covering services performed in connection with licensing and related services (36 FR 11294, 17432) fixed as Jan. 12, 1972.

37 FR 9027, May 4, 1972, Part 1002: Fees, §1002.2(d) Schedule of filing fees, item 40 amended, item 38 deleted, and items 39 through 45 renumbered as items 38 through 44.

38 FR 1393, Jan. 12, 1973, Part 1280: Classification and Declassification of National Security Information and Material, §§1280.1 - 1280.5 set forth I.C.C. security rules and regulations, issued pursuant to Executive Order 11652 (37 FR 5209) and National Security Council Directive of May 7, 1972, which will become effective March 1, 1973.

38 FR 5875, March 5, 1973, Part 1002: Fees, §1002.2(d) Schedule of filing fees, item 40 corrected by adding the fee of $35 in the right hand column.

38 FR 7229, March 19, 1973, Part 1000: The Commission, §1000.5 Credentials required by special agents, accountants, and examiners, revised to read as set forth in connection with issuance of new identification credentials to Commission officials and personnel, effective on date of order.

38 FR 12744, May 15, 1973, Part 1123: Determination of Avoidable Losses (Rail Passenger Service Act of 1970), new Part 1123 governing procedure to be followed in applying for Commission determination of avoidable loss, §§1123.1 - 1123.6, added, effective 35 days after service of order.

38 FR 16230, June 21, 1973, Part 1000: The Commission, Provisions of Commission's Canons of Conduct were revised, listing employees required to submit ICC Form No. 1164.

Section 12.(2)-(7).—[Unchanged. See vol. 9, pp. 7592-7596.]

Amendments, see footnotes, vol. 2, pp. 1720-1730; historical notes, vol. 2, pp. 1720-1725.

Notes of Decisions

§12(2): Volume 2—p. 1720; Volume 13—p. 11003; Volume 14—p. 11507; Volume 16—p. 12727; Volume 18—p. 14161; Volume 21—p. 16816.

§12(3): Volume 2—p. 1723; Volume 9—p. 7593; Volume 12—p. 10297; Volume 14—p. 11508; Volume 21—p. 16817.

§12(4): Volume 2—p. 1726; Volume 7—p. 5387; Volume 9—p. 7594; Volume 11—p. 9250; Volume 12—p. 10297; Volume 14—p. 11508.

§12(5): Volume 2—p. 1728; Volume 7—p. 5388; Volume 9—p. 7595.

§12(6): Volume 2—p. 1729; Volume 7—p. 5389.

§(12(7): Volume 2—p. 1730; Volume 7—p. 5389.

Section 13, Complaints to and investigations by Commission—(1) Complaint to Commission of violation of law by carrier; reparation; investigation.— [Unchanged. See vol. 9, p. 7597.]

Amendments, see footnotes, vol. 3, p. 1731; historical note, p. 1731; vol. 21, p. 16817.

Notes of Decisions

Volume 3—p. 1733; Volume 7—p. 5390; Volume 9—p. 7598; Volume 11—p. 9252; Volume 12—p. 10297; Volume 13—p. 11004; Volume 14—p. 11509; Volume 15—p. 12086; Volume 16—p. 12728; Volume 17—p. 13406; Volume 18—p. 14162; Volume 19—p. 15323; Volume 21—p. 16817.

General Nature of Proceedings

3. Jurisdiction to entertain complaint. —[Vols. 3, 7, 19, 21].—See also Brotherhood of Ry. S. S. Clerks v. Reading Co., at §1(20), n. 1.

District court held that the Commission's order authorizing but not requiring railroads to put into effect rate increases on a great number of commodities is not reviewable as the plaintiff public utilities had not yet exhausted their remedies by applying to the Commission for a determination of propriety of particular rates to which they objected. An adverse ruling on such objections would be reviewable. Also, if plaintiff wished to complain of the reasonableness of a particular freight rate on coal being transported from a particular point of origin, they had a right to apply to the Commission to prescribe a different rate.—Atlantic City Electric Company v. United States, 306 F. Supp. 338 (343)*.

District court dismissed plaintiff manufacturer's action to annul Commission's order in 332 ICC 714, which permitted increased rates for selected commodities, by a general order affecting all railroads in the country. The plaintiff does not object to Commission's decision that increase in railroad revenues is needed but only to a specific rate as unreasonable and discriminatorily high. Plaintiff's claim is thus a fit subject for §§13 and 15 of the Act which administrative remedies must be exhausted first. See 11 F. Supp. 495.—Electronic Industries Association v. United States, 310 F. Supp. 1286 (1289)*.

Where aggrieved shippers had opportunity to challenge any particular rate which affected them under procedures of the Interstate Commerce Act, and rates which had become effective under Commission orders were permissive and not mandatory, district court lacks jurisdiction to review questioned rate increase orders of Commission permitting Class I railroads to effect general increase in their freight rates and charges.—Alabama Power Co. v. United States, 316 F. Supp. 337 (338-9)*.

Complaint seeking enforcement of order of bankruptcy court authorizing debtor carrier's trustee, effective upon the Commission's ratification, to acquire by conveyance or condemnation and without direct cost a right-of-way and certain trackage owned by complainant, a public corporation of the State of New Jersey, presents a matter beyond the Commission's jurisdiction. Even assuming the court's order to require, as distinguished from authorizing, defendant to acquire the property and seek Commission approval of the transaction, no provision of the Interstate Commerce Act or the Bankruptcy Act confers authority on the Commission to enforce adherence to the order.

The Commission has no power to compel a carrier to acquire trackage rights or a line of railroad; nor is there any basis under §5(4) for an order requiring debtor to cease operating over the trackage, since the essence of a §5(4) violation is unauthorized participation in a pertinent transaction involving two or more carriers, and debtor is apparently the only carrier involved. Complaint dismissed.—Industrial Corp. of S. Hackensack, N.J. v. N.J. & N.Y. R. Co., 324 I.C.C. 272 (273-4).

Scope of Power to Investigate

22. Duty to make investigation, reasonable grounds appearing.—[Vols. 3, 7, 13, 15].—See Steel, Inc. v. Chicago, B. & Q. R. Co., at §16(1), n. 1.

29. General revenue cases; general findings.—[Vols. 7, 9, 11-19, 21].—Orders in general revenue proceedings, and the rates and charges authorized therein, being permissive and not mandatory, increased rail rates which became effective under considered Commission orders are carrier made, not Commission made, rates; furthermore, in the Commission's ultimate conclusions and findings, any aggrieved party is assured the opportunity to challenge any particular rates which affect them under procedures provided by §13 for complaints and investigations. In such circumstances, therefore, shippers' action to enjoin and annul orders which permitted railroads to increase freight rates and charges, because of need for additional revenues to offset their increased expenses, should be governed by determination in 11 F. Supp. 487, that the court will not entertain a suit to enjoin Commission orders in a general revenue proceeding where the §13 remedy has not yet been exhausted. Accordingly, the complaint is dismissed.—Alabama Power Company v. United States, 316 F. Supp. 337 (338-9)*; Atlantic City Electric Co. v. United States, 306 F. Supp. 338 (341, 342-3)*.

District court held that Commission is correct that its action in 332 ICC 714 was in the nature of a general revenue proceeding inasmuch as Commission was primarily concerned with public need for railway service and carriers' need of revenues. Increases in rates were general, even though the percentage increase varied for each commodity but Commission did not purport to pass upon individual rates as contrasted with general level.—Electronic Industries Association v. United States, 310 F. Supp. 1286 (1288)*.

Upon further investigation in this general revenue proceeding, Commission finds increased rates and charges by respondent railroads to be just and reasonable. Such finding applies to the general bases of rates and charges and will not preclude interested parties from bringing any maladjustment to our attention for correction. Increased rates authorized herein are not considered as prescribed and are subject to complaint and investigation as provided by the Act.—Increased Freight Rates, 1967, 332 I.C.C. 280 (346)*.

Evidence proves that respondent railroads are in immediate need of additional freight revenues to offset, in part, their increased operating costs, including wages, fixed charges, and contingent interest. Accordingly, Commission vacated the interim relief granted respondents by its order of June 19, 1968 of a 3 percent general increase in favor of the full proposed increases ranging generally from 3 to 10 percent and for the most part of 6 percent or less.—Increased Freight Rates, 1968, 332 I.C.C. 590 (598-602).

Commission found proposed general increases, ranging from 6 to 10 percent in freight rates and charges just and reasonable on the large number of commodities considered herein except as specifically provided. Specific commodity movements are not at issue. Such general increases were found necessary in the prior report, 332 ICC 590, to offset increased costs. Increases approved with such modifications of our outstanding orders as may be necessary to implement the increases.—Increased Freight Rates, 1968, 332 I.C.C. 714 (714-9, 790-4)*.

Commission concluded that respondents, in Ex Parte No. 265, had shown that a serious need for additional revenues exists to meet the demonstrated increased costs of operations. Accordingly, freight rates and charges on interstate traffic may be increased not more than 6 percent, with certain limitations, as indicated.—Increased Freight Rates, 1970 and 1971, 339 I.C.C. 125 (162-79).

In Ex Parte No. 267 embraced herein, respondents have shown a need for increased rates and charges designed to improve carriers' earnings and enable them to upgrade their equipment and facilities to provide the adequate and efficient service required by §15a(2) and the national transportation policy. Accordingly, rates and charges on certain commodities may be increased not to exceed the limitations set forth herein.—Id., pp. 179-191.

With respect to transactions with affiliated companies, the Commission is not convinced that any general detrimental impact on respondents' working capital has been shown or that our conclusions with respect to revenue needs of the railroads should be adjusted to reflect any measurable reduction due to improper use of their financial resources. Further, because of persistent doubts as to the validity of the net investment base, Commission instituted a separate investigation (Ex Parte No. 271) to determine whether such base should be utilized in the future. Similarly, Commission instituted Ex Parte No. 270, a formal investigation of the structure of freight rates and charges to determine if discrimination exists between commodities in distribution of transportation burden or the imposition of rates and charges which are unjust and unreasonable in relation to costs of transportation. —Id., pp. 156-61, 165-66, 190-91.

Evidence concerning respondents' increased operating costs, revenue needs, and overall financial condition demonstrates that the nation's railroads as a whole and by major districts have a serious and immediate need for additional revenue; that their ability to meet current expenses and to provide necessary capital for improvements in equipment, facilities, and services requires prompt revenue relief; and that interests of the public and the national defense in a sound, adequate, and efficient transportation system will be adversely affected unless proposed selective increases in rates and charges, except as specifically limited, are permitted to become effective promptly. Conversely, without that additional revenue, earnings of respondents will be insufficient to enable them, under honest, economical, and efficient management, to provide adequate and efficient railway service consistent with the public interest and the national transportation policy.—Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (276-309, 313)*.

In view of the overall revenue situation of railroads, there is no merit in some protestants' position that respondents should be required to absorb all cost increases in instant proceeding. Restatement of total cost increases occurring since last general rate increase recognizes a productivity increase reflecting a continuous decline in railroad employment levels; but those cost increases greatly exceed the maximum amount of additional revenue which could possibly be obtained if sought increases were approved in full. Various protestants also contend that several "sick" lines in the East should not be used in constructing composite or average financial data for eastern carriers or for railroads generally; however, deficit lines are part of an interrelated and interdependent railroad system and, in general-revenue proceedings, the Commission must consider the needs of the carriers as a whole or at least by major territorial groupings. Moreover, even without data from deficit lines, increases sought will not be excessive for railroads generally or for a majority of those in the eastern district.—Id., pp. 303-10.

Furthermore, in keeping with the Economic Stabilization Program and with Commission regulations thereunder (approved by the Price Commission), record shows that (1) former or existing rate level is the one in effect prior to effective date of 2.5 percent interim surcharge approved in 240 ICC 358, and that the selective percentage increases, ranging from 0 to 10 percent and averaging 4 percent, are proposed in lieu of and not in addition to that surcharge; (2) maximum amount of increased revenue the proposal would provide (if fully applied and absent limitations and holddowns required) is $401 million; (3) that such additional revenue is less than amount of carriers' actual cost increases in 1971 and, therefore, no increase in net operating revenue as part of total operating revenue is expected; and (4) for like reason, no increase in the railroads' rate of return on capital is expected.—Id., p. 311.

That (5) increase proposal is cost justified and does not reflect future inflationary expectations, for increases resulting from negotiated wage contracts are not "anticipated or speculative" but are firm cost increases the industry will have to pay; (6) additional revenue derived will only partially fulfill railroads' revenue requirements and in that sense will return a minimum amount required to assure continued service, or to meet future service requirements, and (7) will achieve the minimum rate of return needed to attract capital at reasonable costs and not impair the railroads' credit. Also, (8) Price Commission policies clearly permit a pass through of increased labor costs due to the wage contracts executed before Nov. 8, 1971, and under the circumstances of record, full labor costs resulting from those and subsequently executed wage contracts should be included in considering carriers' operating costs; and (9) the increase in productivity required to close the gap between maximum revenue obtainable under considered increases and railroads' actual increased costs will exceed by far the Price Commission's suggested 6.3-percent guideline for the railroad industry.—Id., pp. 297-9, 311-12.

Petition to file tariffs providing for increased rail protective service charges is "filed by or on behalf of railroads generally throughout the United States" and consequently is subject to procedures governing general increase proceedings set forth at 49 CFR §1102. Further, Commission granted petition to institute an investigation into the adequacy of protective service charges but conditioned its approval of filing a temporary master tariff establishing interim increases for such services upon petitioner's service of a copy of the petition on all parties involved in the last general increase Ex Parte proceeding, Ex Parte No. 281, and also upon an extension of the notice date to the general public.—Protective Service Charges—1972, 341 I.C.C. 573 (576-80).

Commission herein instituted a proceeding with a view to modification of present regulations (49 CFR §§1102, 1104, 1105, 1303, and 1306) governing the filing and posting of notice and furnishing of data to the general public of proposed general increases in freight rates and passenger fares by rail and motor carriers.—Notice of Increases in Frt. Rates and Pass. Fares, 341 I.C.C. 589 (590-94).

Parties

37. Parties of whom complaint may be made; in general.—[Vols. 3, 15, 17, 21].—Since the question at issue in consolidated investigation and complaint proceedings involving lawfulness of joint rail-motor rates, established under §216(c), is the obligation of railroads participating in such joint rates to comply with provisions of part I of the Act, not any obligations of the motor carriers, it is unnecessary that motor-carrier participants continue as respondents and defendants; and orders in the proceeding will apply only to rail participants in considered rates. However, granting of motor carriers' motion to dismiss should not be construed as a finding that motor-carrier participants in such joint rail-motor rates may never be subjected to certain requirements found in part I of the Act.—Oil Country Iron or Steel Pipe, Midwest to Okla. & Tex., 332 I.C.C. 540 (542-3)*.

Pleadings, Generally

47. Effect of faulty or inadequate pleading.—[Vols. 3, 7, 14, 16-19].—Complainant United States seeks reparation for charges on movement of a freight automobile, old, used, from Lathrop, Calif., to Fort Benning Junction, Ga. Such movement is a portion of a through movement from Oakland, Calif. Inasmuch as charges for the through movement have not been brought into issue, the complaint is fatally defective. Complaint dismissed.—United States v. Central of Georgia R. Co., 332 I.C.C. 33 (35).

The Hearing

120. Right to full hearing.—[Vols. 3, 7, 9, 11, 12, 16, 17, 19, 21].—Consideration of factual material contained in accident report officially noticed by the examiner did not constitute a prejudicial error and a denial of procedural due process to applicant's rights when the factual matter referred to was not the sole basis for recommended denial of application for approval of discontinuance of automatic trainstop system. Such other factors as train speed, physical characteristics, visibility, weather, and the safety features afforded by an ATS system were all given adequate consideration in determining whether proposed discontinuance of the ATS system under the facts of record is warranted. For a determination of this issue, consideration was given to the entire record, and it is upon this basis that the application is denied.—Southern Pac. Co. Modifications of Systems, 325 I.C.C. 168 (171-2).

Defendants' contention that §16(1) of the Act, §7(c) of the Administrative Procedure Act, and rule 1.53(a) of the Rules of Practice grant them an absolute right of cross-examination is without merit. Section 16(1) makes no mention of cross-examination but refers to §13 which imposes a duty on the Commission to investigate matters complained of in such manner and by such means as it deems proper; and while §7(c) of APA states that every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, that right is dependent upon the Commission's determination that cross-examination is necessary and upon substantial compliance with rule 1.53. Also, the question of oral hearing is a matter of agency discretion and, since the record establishes that defendants' request for oral hearing raised no material issues of fact that warranted cross-examination, there is no showing of any abuse of the Commission's discretion. In the circumstances of record, defendants' renewed request for oral hearing, denied.—Mode-O-Day Corp. v. Atchison, T. & S.F. Ry. Co., 325 I.C.C. 390 (392-3)*.

123. Requisites of full hearing.—[Vols. 3, 7, 9, 11-13, 15, 16, 18].—The principal issue in the instant proceeding is one of law. On this issue the procedure utilized has constituted a full hearing within the meaning of the Act, all parties having been given full opportunity to be heard as to the step proposed to be taken. It may also be that "*** mixed questions of law and fact [may] arise whether the practices in connection therewith are reasonable, nondiscriminatory, or otherwise lawful, which will require oral hearings for the taking of testimony. If so, requests for such hearings will receive proper consideration. In the meantime, at this stage of the proceeding, such oral hearings would not be in the interest of justice nor serve any useful purpose," [citing 232 ICC 683 (686)].—Substituted Service—Piggyback, 322 I.C.C. 301 (348)*.

Defendants' blanket objection to admission of any evidence on behalf of complainants unless and until they were afforded opportunity for cross-examination at an oral hearing did not comply with rule 1.53 when they made no specific denial of any fact stated in the complaint, nor raised any issue warranting cross-examination. Although the Administrative Procedure Act states that every party shall have right to conduct such cross-examination as may be required for a full and true disclosure of the facts, that right is dependent on the Commission's determination that cross-examination is necessary, and is based on substantial compliance with rule 1.53. Whether a sufficient showing of need for oral hearing has been made is a matter of agency discretion, and the right of cross-examination may likewise be subject to reasonable administrative control.—Steel, Inc. v. Chicago, B. & Q. R. Co., 323 I.C.C. 509 (515-6).

126. Burden of proof; when upon complainant.—[Vols. 3, 7, 9, 15, 17-19, 21].—Though complainant asserts that the burden is on defendants to show that import traffic is not subject to motor competition similar to that which compelled lower domestic rates on iron and steel articles in same general territory, the burden of establishing a prima facie case rests on complainant, and on it, therefore, falls the onus of adducing evidence of motor carrier movements of those commodities from the ports to involved destinations. Complainant did not meet that burden when it merely showed that in 1 year 48.5 percent of its total import traffic moved by truck, without indicating the volume that moved from the individual ports or to the respective destinations.—Southern States Cooperative, Inc. v. Baltimore & O. R. Co., 323 I.C.C. 400 (406).

In complaint cases, the burden of proving alleged unlawfulness rests upon the complainant.—Public Belt R. Comm. v. Aberdeen & R. R. Co., 335 I.C.C. 162 (167).

127.—When not upon complainant.—[Vols. 3, 7, 9, 13, 15-19].—Existence of facts, such as differing circumstances and conditions, justifying an inequality of rate treatment is a matter of defense to be proven by satisfactory evidence; general assertions that carrier competition required reduced rates at the preferred point are insufficient as a defense where complainant's competitor at that point enjoys lower inbound rates on the same commodity. Defendants failed to instance any particular motor carrier rate or motor carrier whose competition forced such reductions, and the record was closed with filing of complainant's reply statement. Defendants cannot now introduce additional evidence, which should have been available to them previously, on an issue as to which they had the burden of proof, after an adverse ruling by the examiner, nor can they expect the Commission to make their case. Complainant's motion to strike that portion of defendants' exceptions containing additional matter concerning competition at the preferred point, granted.—Matthiessen & Hegeler Zinc Co. v. Baltimore & O. R. Co., 323 I.C.C. 601 (602-3).

Though defendants state in their exceptions that much of the motor competition claimed to justify reduced rates to the preferred point was created by "unregulated" carriers, this is a point that they should have advanced in their reply statement, in which under the Commission's rules they are required to present their evidence in chief. When a shipper or receiver presents evidence showing gross disparities in rates in favor of a competitor, the burden shifts to defendants to show a dissimilarity of conditions so marked as to warrant continued maintenance of the disparities. Defendants have failed to meet this burden; indeed, they virtually concede that, at least from six origins, they could not show that the preferential reduced rates were the result of motor competition, regulated or unregulated.—Id., pp. 613-4.

Evidence

130. Evidence, in general.—[Vols. 3, 7, 14, 15, 17-19].—Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; it is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.—Chesapeake and Ohio Railway Company v. United States, 298 F. Supp. 734 (739)*.

Complainant contended that assailed rates to two points are representative of the entire scope of the contested rates. The Commission determined that when rates to numerous points are at issue, it is unnecessary to present evidence relating to each point. There must, however, be evidence on a sufficient and varied number to establish that the data are in fact representative of all. In the instant proceeding, destinations in five states are at issue, but evidence of only two points was presented, and both of these are in Massachusetts and are within a short distance of each other. Massachusetts is the state farthest distant from the origin of traffic and to one of the points, and the assailed rate is compensatory when the traffic is moved on the car generally used. Thus the points cannot be considered representative of all destinations.—Sea-Land Service, Inc. v. New York Central R. Co., 329 I.C.C. 589 (595).

135. Application of principles of stare decisis and res judicata.—[Vols. 3, 7, 9, 11-14, 16-19, 21].—An administrative agency, even if it has followed a consistent line for some time, may, when faced with new developments or an appreciably changed factural picture in the segment of the national life which it is charged with regulating, alter its past interpretation in a formal proceeding where such rules as the proposed TOFC service rules having future effect are to be issued. When cogent reasons and the public interest compel it, even a consistent and generally unchallenged administrative practice may be overturned.—Substituted Service—Piggyback, 322 I.C.C. 301 (331)*.

The Commission's jurisdiction to pass on reasonableness of combination rates from Canada to points in the Carolinas, based on interchange with Canadian carriers at United States points 3 and 5 miles south of international boundary, is res judicata because of determination in prior report, 303 ICC 743, sustained 366 US 272; moreover, the case was not reopened for further hearing on that issue, but merely to determine amount of reparation due complainants under the prior findings.—Thermoid Co., Southern Division v. Baltimore & O. R. Co., 323 I.C.C. 155 (161)*.

136. Admissibility, in general.—[Vols. 7, 9, 11-19, 21].—Though examiner rejected complainant's attempt in its reply statement to show that assailed rates exceeded the measure of rates prescribed on involved commodities in 204 ICC 319, on ground that it was in nature of new evidence and improper in a reply statement, the rejected exhibit contained, in part, rates already introduced in complainant's opening statements, and such comparison with rates prescribed in case cited was in response to defendants' statement and argument that the assailed rates are "well below maximum allowable levels." This was not new evidence; examiner's ruling reversed.—Matthiessen & Hegeler Zinc Co., 323 I.C.C. 601 (609-10).

Accident report officially noticed by the examiner complied with rule 82 of the Rules of Practice when it was referred to with sufficient particularity as to be readily identified. Applicant's witness on cross-examination admitted knowledge of accident that occurred on applicant's line in 1937, applicant did not object to such reference at the hearing, and, though number of the report was not referred to there was only one report issued by the Commission in 1937 covering an accident on applicant's line.—Southern Pac. Co. Modifications of Systems 325 I.C.C. 168 (171).

Defendants' motion to strike portions of verified statements of two of complainant's witnesses on ground that they involve matters not within personal knowledge of persons attesting to them and are therefore inadmissible under rule 1.50 of Rules of Practice, denied. The challenged witnesses set out their qualifications as specialists in transportation matters and the assertions objected to are their conclusions based on evidence properly submitted and on their experience. Defendants' objections go in reality to weight to be given the statements rather than their admissibility.—United States v. Southern Pac. Co., 325 I.C.C. 200 (201).

140. Official notice.—[Vols. 3, 7, 9, 11-19, 21].—The Commission is permitted to take official notice of the findings and conclusions in its own prior reports; moreover, §14(3) provides for judicial notice of published reports and orders of the Commission. Examiner's reference to a prior accident investigation report of the Commission which involved an accident on applicant's line, and his use of statements therein as a basis for comparison of present with prior traffic density to show there had been no substantial change in traffic density since installation of automatic trainstop system which applicant proposes to discontinue, did not constitute prejudicial error or denial of procedural due process to applicant's rights. Factual matter in the prior report was considered in addition to the evidence presented, and was not the sole basis for denial of the application.—Southern Pac. Co. Modifications of Systems, 325 I.C.C. 168 (170-1).

The Commission takes official notice of order of district court having jurisdiction of carrier's reorganization proceeding, authorizing defendant trustee, effective upon the Commission's ratification, to acquire certain publicly owned trackage by conveyance or condemnation, which order is filed in the Commission's finance docket pertaining to the reorganization proceeding.—Industrial Corp. of S. Hackensack, N.J. v. N.J. & N.Y. R. Co., 324 I.C.C. 272 (273).

147. General legal sufficiency of evidence.—[Vols. 3, 7, 19, 21].—In support of complaint assailing charges assessed on shipments for which defendants allegedly furnished longer cars than those ordered, complainant has introduced sworn statements of qualified witnesses having knowledge of the shipments involved, and such statements comply with rule 1.50 of Rules of Practice which provides for introduction, under modified procedure, of factual evidence by verified statements; such testimony is in addition to the bills of lading issued on dates of the shipments, and other proper documentary evidence. Evidentiary deficiencies found on review of a similar proceeding in 217 F. Supp. 918 are not present, and that decision does not require complainant to submit further documentary evidence to sustain its burden of proof.—United States v. Southern Pac. Co., 325 I.C.C. 200 (208-9).

155. Relevancy.—[Vols. 3, 7, 9, 12-15, 17-19, 21].—Based on quantity of sugar beets required to produce a pound of sugar, complainants computed an alleged deficit ("burden expense") incurred by western railroads in transportation of sugar beets to western sugar producing points, addition of which to defendants' out-of-pocket costs for transportation of sugar from such points to central territory destinations would result in costs exceeding assailed rates. Examiner ruled such evidence irrelevant in absence of complaint against the raw beet rates or showing of a specific relation between such rates and those on the manufactured product; as no compelling reason is advanced for finding that ruling erroneous, it is affirmed. —American Sugar Refining Co. v. Ahnapee & W. Ry. Co., 322 I.C.C. 717 (720).

Motion to strike as irrelevant an excerpt from a tariff of Transcontinental Freight Bureau, introduced by defendants, as well as all testimony in connection therewith, overruled; the provision cited appears to have relevance to the issues and the tariff referred to is on file with the Commission. —Atlantic Creosoting Co., Inc. v. Southern Ry. Co., 323 I.C.C. 533 (535).

160. Expert opinion.—[Vols. 3, 9, 12, 13, 16, 17, 19, 21].—See Price-Watson Company v. I.C.C., at n. 185, below.

170. Exhibits.—[Vols. 3, 7, 9, 11, 15-18, 21].—Examiners' refusal to receive or mark certain exhibits offered by southern railroads after they had rested their case and after the date fixed for submission of their evidence was in accord with the procedural order adopted in investigation proceeding and did not constitute an abuse of discretion or deny the southern lines a fair hearing. Nor was there any error in examiners' rejection of certain data in northern lines' rebuttal cost exhibit as new and additional material beyond scope of rebuttal; since the northern lines refused to incorporate the material as part of their case in chief and to accord the southern lines the right of rebuttal, the matter constituted improper rebuttal and was correctly excluded.—Official—Southern Divisions, 325 I.C.C. 1(4)*.

180. Introduction of evidence at hearing.—[Vols. 3, 9].—The Commission has discretion to limit rebuttal evidence when it is, in reality, evidence on an entirely new subject.—Sofield Transfer Co., Inc., Extension—Containers, 115 M.C.C. 280 (286).

185. Weight accorded evidence.—[Vols. 3, 7, 9, 11, 13-17, 19, 21].—Record in Commission proceeding on plaintiff's complaint, in which it sought to recover alleged overcharges on rail shipments of "cast iron buttons" that are recovered from blast furnace slag, shows clearly that the Commission considered affidavits of plaintiff's metallurgists concerning nature of the commodity and its use and, also, accorded them the weight to which they were deemed entitled. Furthermore, since issues in that proceeding involved proper classification of the commodity, weight which the Commission is required to give expert testimony is greatly reduced by the well-established maxim that in interpreting a classification, as in tariff interpretation, the terms used must be taken in the same sense in which they are generally understood and accepted. The Commission reasonably concluded that "cast iron buttons" shipped were properly classifiable as "scrap iron," rather than "slag" as plaintiff contended. Sustained.—Price-Watson Company v. I.C.C., 287 F. Supp. 872 (875-6)*.

Argument

190. Manner of presenting argument.—[Vol. 3].—Complainant's opening statement of facts and argument, which is unverified, consists of conclusions drawn from exhibits and from verified statements of witnesses, and of argument; as the statement contains no other factual assertions requiring verification, it is considered as argument.—United States v. Southern Pac. Co., 325 I.C.C. 200 (201).

Modified Procedure

215. In general.—[Vols. 3, 7, 13-19, 21].—See Steel, Inc. v. Chicago, B. & Q. R., at GRP 53(a).

Section 13. (2) Complaints by State commissions; inquiry on Commission's own motion; expenses of State commissions.—[Unchanged. See vol. 9, p. 7625, amendment, vol. 11, p. 9261.]

Amendments, see footnotes, vol. 3, p. 1825; historical note, p. 1825; vol. 21, p. 16828.

Notes of Decisions

Volume 3—p. 1826; Volume 7—p. 5470; Volume 9—p. 7625; Volume 11—p. 9261; Volume 12—p. 10303; Volume 13—p. 11011; Volume 15—p. 12093; Volume 17—p. 13418; Volume 18—p. 14172; Volume 19—p. 15336; Volume 21—p. 16828.

2. Inquiry on Commission's own motion.—[Vols. 3, 7, 9, 11, 15, 19, 21].—In this proceeding, the Commission initiated an investigation into the national railroad rate structure. The investigation will primarily focus on these issues: the value of general freight rate increases as opposed to a more selective pattern of such increases; intercommodity rate relationships; intracommodity rate relationships; and the relationship of service characteristics to rates and costs. Commission also issued procedural and evidentiary guidelines for all parties to ensure that a comprehensive record will be developed in the series of conferences which will be scheduled between Commission staff members and representatives of interested parties. Commission also declared its intention to obtain necessary funding to allow the appointment of a "special counsel" and a supporting staff to implement the decisional process.—Investigation of Railroad Freight Rate Structure, 340 I.C.C. 868 (876-884).

Section 13. (3) Investigation involving State regulations; conference of State and interstate commissions.—[Unchanged. See vol. 9, p. 7626, vol. 11, p. 9261.]

Historical note, vol. 3, p. 1830.

Notes of Decisions

Volume 3—p. 1831; Volume 7—p. 5472; Volume 9—p. 7626; Volume 11—p. 9261; Volume 12—p. 10304; Volume 13—p. 11011; Volume 14—p. 11514; Volume 16—p. 12736; Volume 18—p. 14172; Volume 19—p. 15337; Volume 21—p. 16829.

Section 13. (4) Duty of Commission where State regulations result in discrimination.—[Unchanged, except by the act of Feb. 5, 1976, Pub. L. 94-210, §210, 90 Stat. 46, ":*Provided,* That" and all that follows through "hearing and decision therein" is struck out. See vol. 18, p. 14172.]

Historical note, vol. 3, p. 1830.

Notes of Decisions

Volume 3—p. 1840; Volume 7—p. 5474; Volume 9—p. 7627; Volume 11—p. 9262; Volume 12—p. 10304; Volume 13—p. 11011; Volume 14—p. 11515; Volume 15—p. 12094; Volume 16—p. 12736; Volume 17—p. 13418; Volume 18—p. 14173; Volume 19—p. 15337.

Undue, Unreasonable or Unjust Discrimination Against Interstate or Foreign Commerce

50. Revenue discriminations.—[Vols. 3, 7, 9, 11-13, 15-19, 21].—Evidence established that the commodities shipped, the wages and hours of crew members, the train performance factors, and respondents' car usages are substantially same for intrastate and interstate traffic, and generally the same service is provided to Mississippi shippers whether their freight moves in intrastate or interstate commerce. Respondents are entitled to earn revenue from Mississippi intrastate freight proportionate to that earned by such freight prior to increases on interstate freight authorized in Ex Parte No. 259. Present Mississippi intrastate rates, with specified exceptions, are unduly low and cause unjust discrimination against, and undue burden on, interstate traffic.—Mississippi Intrastate Rail Frt. Rates & Charges, 1969, 341 I.C.C. 69 (73-74).

Commission found in Ex Parte No. 259 that a critical need existed for additional revenue by nation's railroads to offset increased operations' costs not previously considered by the Commission. Respondents' rate of return on investment of 4.01 percent is right at the level considered inadequate by the Commission. Respondents' intrastate traffic is not bearing its proportionate share of revenue due to abnormally low intrastate rates thus thrusting an undue burden on, and unjust discrimination against, interstate commerce.—Virginia Intrastate Frt. Rates and Charges—1969, 341 I.C.C. 700 (721-23).

In Ex Parte No. 259 the nation's railroads showed a need for additional revenues to offset increased operating costs not previously considered by the Commission. Georgia intrastate rates are abnormally low thus preventing intrastate traffic from bearing a fair share of respondents' revenue needs and causing unjust discrimination against, and undue burden on, respondents' interstate traffic. Unlawfulness ordered removed. However, in an embraced proceeding, the Georgia maximum and minimum scale of intrastate rates was found lower than the interstate scale, for the most part, but not so much lower as to constitute a burden on interstate commerce and the investigation therein was discontinued.—Georgia Intrastate Freight Rates, 1969, 341 I.C.C. 778 (805-09).

The Commission is obligated to assure itself that intrastate traffic is paying "a fair proportionate share" of rail costs. Rail witnesses demonstrated that overall costs are higher, that respondents' rate of return on net investment is depressed and inadequate, and that costs in relation to intrastate revenues are causing a net loss to carriers on intrastate freight. Generally speaking, to extent Arkansas intrastate rates do not reflect the Ex Parte Nos. 256 and 259 increases in interstate rates, they fail to provide a fair share of additional revenue need and cause unjust discrimination against and an undue burden on interstate commerce.—Arkansas Intrastate Freight Rates and Charges, 1970, 341 I.C.C. 872 (875-77).

Intrastate rates on soybeans, rice hulls, pulpwood and woodchips are not shown unlawful. It is not apparent that the disparty between interstate and intrastate rates on these commodities is substantial and operates as a real discrimination and obstruction to interstate commerce nor that injury to interstate shippers has resulted.—Id., p. 877-83.

Investigation—Procedure

58. Quantum and character of evidence.—[Vols. 3, 7, 9, 11-13, 15-19, 21].—There is no basis of record herein to determine total increase in revenue which will be produced by sought intrastate increases. Such information, along with financial and economic data of carriers deemed necessary to certify sought increases under national Wage and Price Stabilization Program are lacking. Accordingly, Commission concludes that evidence is insufficient to meet criteria for rate increases required under §300.16 of Price Commission regulations and Commission will not order sought increases until these criteria are met.—Mississippi Intrastate Rail Frt. Rates & Charges, 1969, 341 I.C.C. 69 (78).

62. Order prescribing intrastate rate or practice.—[Vols. 3, 7, 9, 12, 13, 15-19, 21].—Commission found that the unlawfulness caused by unduly low and unjustly dis-

criminatory Mississippi intrastate rates on certain commodities, with specified exceptions, should be removed by permitting application to these intrastate rates the increases on like interstate traffic which Commission authorized in Ex Parte No. 259. However, an order effectuating the foregoing findings will not be entered unless and until respondents show that involved increases meet the criteria for rate increases under regulations of the national Wage and Price Stabilization Program.—Mississippi Intrastate Rail Frt. Rates & Charges, 1969, 341 I.C.C. 69 (77-80).

Evidence of respondents' revenue need justifies Commission's order that the increases in interstate traffic approved in Ex Parte No. 259 be applied to Virginia intrastate rates provided that such increases will not result in levels higher than the level of interstate rates or charges, in official territory, on like traffic over the same line of railroad to, from, or within Virginia.—Virginia Intrastate Frt. Rates and Charges—1969, 341 I.C.C. 700 (721-24).

The Price Commission issued notice on Feb. 10, 1972, directing that all price increases by privately owned public utilities which were not legally in effect on Feb. 9, 1972, are prohibited until the Price Commission implements changes in its regulations, if any, or until Mar. 10, 1972, whichever first occurs. Accordingly, increases in Ex Parte No. 259 levels ordered herein to remove unlawfulness would be unlawful and this Commission will enter no order effectuating increases at this time.—Georgia Intrastate Freight Rates, 1969, 341 I.C.C. 778 (780).

Commission found that unlawful discrimination in Arkansas intrastate rates should be removed by application of the level of rates approved in Ex Parte No. 259. However, Commission will withhold an order effectuating this finding unless and until respondents show that the increases meet criteria for rate increases established by the Price Commission. See 341 ICC 69.—Arkansas Intrastate Freight Rates and Charges, 1970, 341 I.C.C. 872 (873-4).

Section 13. (5) Application; Commission's exclusive authority.—[Added by the act of Feb. 5, 1976, Pub, L. 94-210, §210, 90 Stat. 46.]

(5) The Commission shall have exclusive authority, upon application to it, to determine and prescribe intrastate rates if—

(a) a carrier by railroad has filed with an appropriate administrative or regulatory body of a State, a change in an intrastate rate, fare, or charge, or a change in a classification, regulation, or practice that has the effect of changing such a rate, fare, or charge, for the purpose of adjusting such rate, fare, or charge to the rate charged on similar traffic moving in interstate or foreign commerce; and

(b) the State administrative or regulatory body has not, within 120 days after the date of such filing, acted finally on such change.

Notice of the application to the Commission shall be served on the appropriate State administrative or regulatory body. Upon the filing of such an application, the Commission shall determine and prescribe, according to the standards set forth in paragraph (4) of this section, the rate thereafter to be charged. The provisions of this paragraph shall apply notwithstanding the laws or constitution of any State, or the pendency of any proceeding before any State court or other State authority.

Section 13. (6) Petitions for proceedings; orders relating to railroads.—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §304, 90 Stat. 52.]

(6)(a) Whenever, pursuant to section 553(e) of title 5, United States Code, an interested person (including a government entity) petitions the Commission for the commencement of a proceeding for the issuance, amendment, or repeal of an order, rule, or regulation relating to common carriers by railroads under this Act, the Commission shall grant or deny such petition within 120 days after the date of receipt of such petition. If the Commission grants such a petition, it shall commence an appropriate proceeding as soon thereafter as practicable. If the Commission denies such a petition, it shall set forth, and publish in the Federal Register, its reasons for such denial.

(b) If the Commission denies a petition under subdivision (a) (or if it fails to act thereon within the 120-day period established by such subdivision), the petitioner may commence a civil action in an appropriate court of appeals of the United States for an order directing the Commission to initiate a proceeding to take the action requested in such petition. Such an action shall be commenced within 60 days after the date of such denial or, where appropriate, within 60 days after the date of expiration of such 120-day period.

(c) If the petitioner, in an action commenced under subdivision (b), demonstrates to the satisfaction of the court, by a preponderance of the evidence in the record before the Commission or, in an action based on a petition on which the Commission failed to act, in a new proceeding before such court, that the action requested in such petition to the Commission is necessary and that the failure of the Commission to take such action will result in the continuation of practices which are not consistent with the public interest or in accordance with this Act, such court shall order the Commission to initiate such action.

(d) In any action under this paragraph, a court shall have no authority to compel the Commission to take any action other than the initiation of a proceeding for the issuance, amendment, or repeal of an order, rule, or regulation under this Act.

(e) As used in this paragraph, the term 'Commission' includes any division, individual Commissioner, administrative law judge, employee board, or any other person authorized to act on behalf of the Commission in any part of the proceeding for the issuance, amendment, or repeal of any order, rule, or regulation under this Act relating to common carriers by railroad.

Section 13a. Discontinuance or change of certain operations or services.—[Unchanged. See vol. 18, p. 14183.]

Historical Note

Discontinuance of passenger train service pursuant to §13a has been limited by the Rail Passenger Service Act, its most recent amendment, the Amtrak Improvement Act of 1974 (P.L. 93-496), having extended a moratorium on discontinuance of basic system Amtrak trains and those experimental trains that were operating Jan. 1, 1973, to July 1, 1975. The RPSA moratorium on the discontinuance of intercity passenger trains operated other than by Amtrak expired Jan. 1, 1975.—Annual Report, 1975, p. 20.

Notes of Decisions

Vol. 18—p. 14185; Vol. 19—p. 15343; Volume 21—p. 16836.

1. Constitutionality.—[Vols. 18, 19, 21].—Plaintiffs argue that, in view of the alleged constitutional questions and applicable statutes involved, the court should take jurisdiction over their action to compel defendant railroad maintain passenger train service which had been discontinued pursuant to §13a(1), and which the Commission later decided to investigate. However, railroad's failure to notify the plaintiffs in the first instance of its intention to file its discontinuance notice, and the Commission's failure in the first instance to conduct an investigation, fall far short of a violation of due process requirements of the Constitution. As a matter of law, under the circumstances, railroad had a right to discontinue considered train service; and, as §13a(1) prohibits the Commission's ordering a restoration thereof until after the investigation, clearly the court cannot order restoration (while it is pending) by directing the agency to contravene the statute. Moreover, should the Commission's findings be such as to permit discontinuance, plaintiffs and other parties would not be precluded from taking further judicial action by reason of the court's denial of injunctive and other relief prayed for. Defendants' motion for dismissal sustained.—Howell v. United States, 302 F. Supp. 772 (773, 774-5).

The Commission is entrusted with the administration of §13a(1) and with the exercise of powers defined therein, but it has not been given jurisdiction to determine the section's constitutionality. That question is for another forum.—Boston & Maine Corp. Discontinuance, 324 I.C.C. 418 (423).

2. Construction and interpretation.—[Vols. 18, 19, 21].—By enactment of §13a, Congress provided a uniform federal scheme to supersede the prior confused and time-consuming procedure under which the States supervised discontinuance of passenger trains; thus, a single federal standard was to govern train discontinuances whether interstate or intrastate, though procedure of §13a(1) for discontinuing an interstate train was made somewhat different from procedure for discontinuance of intrastate trains. But, under the statute, the Commission has the final say in each case and the same substantive standard now governs discontinuance of either interstate or intrastate trains. Whether the Commission should investigate a §13a(1) discontinuance is within its discretion, a matter which is not reviewable, but a decision to investigate indicates that a substantial question exists under the statutory standards; therefore, its report deals with the merits in each case and is reviewable.—City of Chicago v. United States, 396 U.S. 162 (165-7)*.

Judgment of the district court, which vacated and set aside the Commission's order denying railroad's petition under §13a(2) for authority to discontinue operation of two passenger trains between Chicago and Danville, Ill., vacated; proceedings remanded to the District Court with directions to remand the matter to the Commission for a determination as to whether the trains involved constitute an "intercity" service within meaning of §102(5) of the Rail Passenger Service Act of 1970.—United States v. Chicago & E.I.R. Co., 400 U.S. 987*.

In action to overturn Commission decision allowing discontinuance of certain passenger trains, the question of whether the public interest would be best served by continuing or discontinuing the trains is one that requires exercising informed expert judgment and balancing and weighing many complicated and intricate facts, which the statute leaves to the Commission. Each case must stand or fall on its own facts as presented at the hearings; and Congress assigned to the Commission, not the courts, the balancing of all factors pertinent to determination of whether a train should be continued or discontinued. In finding that public convenience and necessity did not require continuance of trains involved, the Commission relied on evidence showing the declining patronage and the adequacy of other available rail, motor, and airplane service; its finding that continued operation would unduly burden interstate commerce was based on evaluation (after considering evidence of past, and projected future, operating losses) of effect a continuation would have on carrier's financial condition. There being sufficient evidence of record and ample statutory authority to support the Commission's decision, its order is sustained.—State of New York v. United States, 299 F. Supp. 989 (994, 998-1001)*.

In review of Commission order which permitted three railroads to discontinue operating their respective segments of two interstate passenger trains south of Carbondale, Ill., and allowed one of them (IC) to effect certain changes in service north of that point, there is no logical basis for plaintiffs' theory that the Commission could not consider proposed service changes in the §13a(1) proceeding because they would take place wholly in Illinois. The statute is a remedial one which reflects Congress' concern over serious financial losses often sustained in passenger-train operations; and the basic jurisdictional requirement of §13a(1) is that a train sought to be discontinued must be operating from one State to another. Since the IC runs the trains through five States, they are interstate in character; and since, once the Commission has jurisdiction over trains involved, it can accept or reject some or all of the proposal, the Commission had authority under §13a(1) to dispose of proposed service changes. That the Commission's decision results in operation of a purely intrastate train, is certainly no bar to assumption of jurisdiction over an initially interstate operation; complaint dismissed. —City of Chicago v. United—States, 300 F. Supp. 115 (117-8)*.

District court lacks jurisdiction over suit to compel defendant railroad to maintain passenger service that had been discontinued pursuant to §13a(1); and, in present status of the case, the court has no power to order restoration of such service. After railroad filed notice under §13a of its intention to discontinue operating certain trains, and no Commission investigation was begun within 30 days, it had a right to effect proposed discontinuance although the commission later decided to investigate the matter. The Commission has specific authority to require continuance or restoration of such service after the investigation, but it lacks power to order restoration until its investigation is closed; therefore, it can hardly be argued that if the Commission is prohibited by statute from issuing such an order, the court has authority to order restoration of the service pending final Commission determination by directing that agency to contravene the statute.—Howell v. United States, 302 F. Supp. 772 (773-4).

Moreover, plaintiffs' contention that the Commission had no right in the first instance not to conduct an investigation, and further that it was bound to require continuance of the train service during such investigation, loses its viability by reason of the fact that it is within the Commission's exclusive discretion to determine whether it should investigate a proposed discontinuance and whether it should order continuance of train service during such investigation. Such discretionary powers are not subject to judicial review. Therefore, in present posture of the case, the court is without jurisdiction; defendants' motion to dismiss, for lack of jurisdiction, sustained.—Id., pp. 744, 745.

In action by members of Minnesota Public Service Commission, moving the court to assert jurisdiction and issue an order declaring the Commission's "Notice" of decision not to investigate defendant railroad's proposed discontinuance of two passenger trains to be arbitrary and null and void, and enjoining the train discontinuances permitted by that "Notice," plaintiffs' arguments are not persuasive that the court should take jurisdiction and then reverse or overrule the Commission's discretionary decision. While some dispute exists as to propriety of a three-judge court's jurisdiction over the matter in issue, decision in 238 F. Supp. 107, is still the better point of view; also, several of the cases plaintiffs cite may be distinguishable because they deal with actual orders, rather than mere election not to investigate. Thus, following the case cited, if the Commission decides not to interfere with service cutbacks, it simply terminates the investigation; and its decision to take no action is not reviewable. Defendant's motion to dismiss for failure to state a claim on which relief can be granted, and lack of subject matter jurisdiction, granted.—Anderson v. United States, 309 F. Supp. 494 (495-6)*.

Legislative history of §13a(1) clearly indicates that Congress did not intend to usurp all power of a State regulatory agency over interstate train discontinuances, but to set forth a method by which railroads could, *at their option*, submit proposed discontinuances to the Commission. Therefore, if the Commission is to obtain jurisdiction of passenger train discontinuances affecting several States, notice procedure authorized by the statute must be strictly followed; otherwise, jurisdiction properly belongs to the States. In instant case, notice requirement of §13a(1) was not met when 30 full days did not elapse between date that carrier's discontinuance notice was filed with the Commission and the effective date of proposed discontinuance; thus, the Commission obtained no jurisdiction to approve or disapprove the discontinuance, and its order instituting the investigation was defective. Also, having failed to obtain jurisdiction of the matter, it was error for the Commission to dismiss plaintiffs' (protestants') petition to reject the discontinuance notice which carrier filed with it; plaintiff's motion for summary judgment granted.—Pennsylvania Public Utility Commission v. United States, 311 F. Supp. 1024 (1026-8, 1029, 1031)*. [But see dissent.]

Prior to final hearing and order of the commission, Federal district court has no jurisdiction under the statute to grant injunctive relief sought in complaint attacking the Commission's action in not requiring continued operation of the trains involved during pendency of its investigation under §13a(1) of railroad's proposal to discontinue service of two of its passenger trains. The jurisdictional defect is in large part a matter of timeliness, since final Commission orders under §13a(1) are reviewable by the courts and when it makes a final determination then, upon request, it will be within the courts' province to review such determination. However, at this time the requisite finality is lacking to permit the court to grant requested injunctive relief requiring continued operation of the trains during pendency of the Commission investigation. Defendants' motions to dismiss for want of subject matter jurisdiction, sustained; plaintiff's petition for temporary restraining order, dismissed.—Iowa State Commerce Commission v. United States, 313 F. Supp. 648 (649-50)*.

The Supreme Court clearly set forth the meaning of §13a(2) when, in 372 US 1, it held that Congress intended to leave initial jurisdiction over trains operated wholly within a State with the State regulatory commissions. Thus, the Interstate Commerce Commission cannot take jurisdiction under §13a(2) until the State has denied the railroad's application or failed to act thereon; and if a different proposal involving intrastate trains is presented to the commission, of course it is not one denied by the State. Therefore, in proceeding on Missouri Pac. R.'s petition for authority to discontinue two pairs of trains (Nos. 14 and 17 and Nos. 15 and 16) operated between St. Louis and Kansas City, Mo., the Commission had no authority to exercise initial jurisdiction to authorize discontinuance of trains Nos. 14 and 15, which it did in substance, since such a proposal was never submitted to, heard or denied by the Missouri Public Service Commission.—Jefferson City v. United States, 318 F. Supp. 751 (755-6)*.

And though MoPac's two separate petitions to the Missouri commission, each of which involved one pair of the trains, were consolidated "on a joint record" and after hearings denied in orders referring to all four trains, that State commission did not consider or deny a proposal to discontinue four "unpaired trains"; issues to be determined by it were made by the separately filed petitions, not consolidation order or the order denying both petitions. Moreover, instant record does not show that the Commission felt it was simply modifying a request initially made to the State commission to discontinue four unpaired trains. Nevertheless, Interstate Commerce Commission order which purportedly permits discontinuance of trains Nos. 14 and 17, but leaves Nos. 15 and 16 in operation, in reality authorizes discontinuance of Nos. 14 and 15 by initiating a change of schedule for No. 15 to that of discontinued No. 17; and MoPac renumbered train No. 15 as No. 17 in implementing that order. Therefore, that part of the Commission's report and order authorizing MoPac to discontinue trains Nos. 14 and 17, set aside; defendants are permanently enjoined from discontinuing those trains until, in new proceedings, proper authority therefor is secured in accordance with law.—Id., pp. 756-7.

Defendants' motion to dismiss, for lack of jurisdiction, plaintiff's request for temporary restraining order requiring continued operation of considered rail passenger trains pending conclusion of the Commission's investigation of their proposed discontinuance (Commission notice of investigation having permitted the railroad to discontinue operating the trains pending outcome thereof), sustained. While the evidence overwhelmingly supports continuance of the trains during the Commission investigation, and the court would require their restoration if it had any discretion in the matter, the court does not have discretionary power to countermand the discontinuance when the record shows that the Commission followed the applicable statute and regulations, and that there has been no denial of due process.—United Transportation Union v. United States, 320 F. Supp. 14 (15).

Furthermore, while plaintiff contends that the Commission should be required to reinstate considered trains because the Chairman thereof represented to a Congressman of Minnesota that the trains would be continued pending outcome of the investigation, such a representation cannot serve to estop an appropriate Division of the Commission from acting in a manner inconsistent with the Chairman's statement.—Id., p. 15.

In action to set aside Commission order which permitted discontinuance of Illinois Central R.'s only two passenger trains between St. Louis, Mo., and Carbondale, Ill., the function of the court is ended once it determines that the Commission's ultimate findings are supported by substantial evidence on the whole record and do not involve an error of law. Purpose of §13a was to provide a remedy whereby a railroad could be relieved of the burden of maintaining trains which the Commission finds are not required, balancing the burden against the public need. In instant case, the Commission's findings that operation of considered trains was not required by public convenience and necessity, and that continued operation would constitute an undue burden on interstate commerce, were in keeping with the evidence presented to it.—Illinois Commerce Commission v. United States, 320 F. Supp. 205 (208, 210)*.

Record shows that the Commission considered and ruled on joint-facility expenses incurred by Illinois Central for operation of St. Louis Union Station; and the Commission finding that such cost would be saved by discontinuance of the only IC trains served by that terminal was within the scope of its authority. Also, sufficient evidence was before the commission upon which it could find that railroad would retain all the feeder revenues from considered trains when, while there was some testimony that part of the feeder value would be lost, there was sufficient other evidence on which that finding could be made. On review, the court finds no prejudicial departure from requirements of the law, nor does it find any abuse of the Commission's discretion. Commission findings and decision sustained; temporary restraining order dissolved.—Id., pp. 210-11.

Petition to set aside Commission decision permitting Baltimore & O. R. to discontinue operation of two passenger trains between Chicago, Ill., and Akron, Ohio, and to change the schedules of trains east of Akron because, since B&O did not segregate Chicago-Akron revenues and expenses, there is no evidentiary basis for the necessary findings, denied. The Commission found, on evidence of the costs incurred and losses sustained and the carrier's financial condition, that continued operation of the two trains would result in operating deficits and that discontinuance would produce an improvement in B&O's income; in making that finding, it was not required to determine how much of the projected deficit was due to the Chicago-Akron segment and how much to the segment east of Akron. The only evidence required is that continued operation of the trains involved would result in operating deficits and that discontinuance, along with the rescheduling, would provide carrier a substantial net benefit; B&O presented such evidence and the Commission accepted it.—Public of State of Indiana v. United States, 325 F. Supp. 1223 (1224, 1225-6)*.

And, contrary to plaintiffs' argument of failure to meet the statutory requirement, the Commission's finding that proposed concurrent changes in train schedules east of Akron are "permitted by public convenience and necessity" was sufficient. There is no requirement in §13a(1) that if the Commission concludes present operations or services of such trains are not required, it must find both that continuance of the existing schedule is not required by public convenience and necessity, and that continuance will unduly burden interstate commerce. If the continuation is not required, there is no need to inquire into the burden on carrier which proposed the changes. Furthermore, the Commission's finding with respect to proposed change in schedule is tantamount to a finding that existing schedules are not required by public convenience and necessity.—Id., p. 1226.

Also, there is no merit in plaintiff's argument that the discontinuance order should be set aside because it is based in part on schedule changes for two other trains over which the Commission did not obtain jurisdiction due to B&O's failure to post the statutory notice on equipment on those trains and that, the addition of two stops on the other trains being an essential element of the discontinuance proposal, such jurisdiction was necessary. The Commission, while approving proposed discontinuance, entered no order with respect to the other two trains, and its decision does not indicate that addition of two stops on those trains was essential to its authorization of the Chicago-Akron discontinuance; therefore, jurisdiction over the other two trains was not required.—Id., pp. 1226-7.

Under provisions of §13a(1), the Commission has no discretion to approve or disapprove a proposed discontinuance of train service, but must investigate a proposal to discontinue. Only upon finding that the operation of the involved train or trains is required by public convenience and necessity and will not unduly burden interstate commerce may the railroad be required to continue or restore the service investigated, and in no event can the Commission require the service to be continued for more than 1 year from the date of the order. Congress, in enacting §13a, addressed itself to a problem distinct from that reflected by overall unprofitable operation of an entire segment of railroad line. Instead, it was primarily concerned with the problem posed by passenger services for which significant public demand no longer exists and which are consistently deficit-producing, forcing carriers to subsidize them out of freight profits.—Louisville & N.R. Co. Discontinuance, 320 I.C.C. 669 (690, 694).

Municipality contends that, insofar as operation of two of considered trains is intrastate, such operations should be dismissed from proceedings relating to interstate operations. To adopt this position would require the fragmentizing of the operation of all interstate trains, an approach not intended by the statute. Section 13a contemplates two kinds of trains; those operating from a point in one state to a point in another state, and those operating wholly within a single state. The two trains fall only in the first category, and are governed by §13a(1) only. Motion to dismiss denied.—Boston & Maine Corp. Discontinuance, 324 I.C.C. 418 (423-4).

Also, individual protestant's contention that Boston & M. Corp. is a new corporation and not a carrier subject to §13a is without merit. While corporate shell of its predecessor disappeared when it came into being, predecessor's rights, liabilities, and accounts continued in the new corporation; thus, since petitioner clearly qualifies as a carrier subject to the Act, as defined in

§1(1)(a) and §1(3)(a), it is subject to §13a. And, while it may be within the province of Massachusetts to permit elimination of intrastate service, there is no legal capacity in any State to alter the railroad's status insofar as its interstate obligations are concerned.—Id., pp. 423, 451.

With respect to protestant's contention that §13a(2) does not confer jurisdiction upon the Commission to authorize in one proceeding the discontinuance of all or substantially all passenger train service within a State, it was held in 317 ICC 111 that §13a(2) applies to discontinuance of a group of trains as well as one train; record affords no basis for disturbing that finding.—Id., 324 I.C.C. 705 (707-8).

Motion to dismiss on ground that the Massachusetts Department of Public Utilities, with which carrier's predecessor filed the "application or petition", is not a "State authority having jurisdiction thereof" because State statutes delegate to the department only a limited jurisdiction over railroads, denied. Since it would be inappropriate for the Commission to attempt to define the limitations, if any, upon the jurisdiction of the State authority to act upon a petition duly presented to it in accordance with Massachusetts laws, the Commission proceeded upon the assumption that the department was "the State authority having jurisdiction" over the matter herein contemplated under §13a(2). And, there is no requirement that the presentation before the Commission be identical to that made before the State authority. Regardless of what data was presented to the Department of Public Utilities, when the Commission's jurisdiction attached upon the filing of the carrier's petition here after the department had failed to act within 120 days, the matter came to us for a determination *de novo*. Motion to dismiss denied.—Id., pp. 707-9.

Those portions of the National Transportation Policy which are particularly pertinent in a §13a proceeding direct the Commission to administer the Act so as to recognize and preserve the advantages of each (mode); promote safe, adequate, economic, and efficient service and foster sound economic conditions in transportation and among the several carriers; cooperate with the several States and the duly authorized officials thereof, all to the end of achieving an adequate national transportation system by the various modes. To this end, both the regional rail passenger problems underlying the notice of discontinuance of all interstate passenger trains and the national rail passenger crisis of which they are a part must be considered. And, the National Transportation Policy does not distinguish between "freight" and "passenger" services, nor can it be inferred that one of these services has priority over the other for regulatory purposes; moreover, §13a(1) leaves to the Commission's determination whether, in a discontinuance proceeding, one of these services may be given preference over the other under the statutory standards; however, history of national rail activity demonstrates that rail passenger services are less desirable in certain fundamental ways than rail freight service.—New York, N.H. & H.R. Co. Discontinuance, 327 I.C.C. 151 (154-5).

Prior to enactment of §13a, the power to control changes or discontinuances of passenger train service was reserved to the States. However, under §13a(1) the Commission is given specific initial jurisdiction to consider curtailments of interstate passenger operations, and when the Commission enters upon an investigation of a proposed discontinuance, continuation of all or part of the involved service may be required, for as much as a full year, only if that operation or service is required by public convenience and necessity and will not unduly burden interstate or foreign commerce. Moreover, the Commission's jurisdiction cannot be invalidated in a §13a(1) proceeding by reason of rail carrier's contractual obligations with State authorities to continue to operate the trains sought to be discontinued, since neither the statute on its face nor its legislative history indicates the Federal jurisdiction should be defeated by existence of those obligations.—Id., pp. 199-200, 201-2.

Two commonly controlled railroads may elect to proceed initially before the Commission under §13a(1) with respect to that portion of an interstate train pair which is operated by one of the carriers between points within a single state.—Kansas City S. Ry.

Co. and Louisiana & A. Ry. Co. Discontinuance, 333 I.C.C. 51 (55-7).

In considering the needs of the entire public, Commission has not excluded therefrom those passengers whose passage is based on less than full fare (see 317 ICC 5). Transportation needs of passenger using a valid pass merit no less consideration than those of a passenger paying full fare.—Penn Central Co. Discontinuance of Trains, 334 I.C.C. 312 (332).

Among matters to be considered under §13a(1) are whether public convenience and necessity require continued operation of the trains to be discontinued and whether such continued operation would constitute an undue burden on interstate commerce. Several factors, including the six listed, are to be considered; however, no one factor by itself is decisive or controlling. Where, as in instant proceeding, the evidence of railroad's operating revenues and expenses shows that the particular services result in financial losses to carrier, the overall financial condition of the carrier is a factor in determining whether the burden imposed by continuation of such services would be undue. A showing of substantial need for the service might justify its continuation even if it were performed at a substantial loss to the railroad, particularly when it involves carrier's last passenger trains in the service area. In short, the statute requires a balancing of needs, the public's and the carrier's. —Norfolk & W. Ry. Co. Discontinuance, 334 I.C.C. 506 (522)*.

In considering public need there is nothing in the statute which precludes the Commission from giving consideration to all passengers—both free and revenue. Although no precise determination can be made herein as to value of free transportation, such transportation increases cost of operation at least insofar as additional equipment is required. —Penn Central Co. Discontinuance of Trains, 336 I.C.C. 518 (525).

There is no statutory basis for finding that exemptions from provisions of §13a were intended in regard to any passenger train operating within the United States by a railroad subject to part I of the Act. Trains herein are subject to Commission's jurisdiction under principles established in 328 ICC 610.—Grand Trunk W. R. Co. Discontinuance, 338 I.C.C. 254 (256-7).

It is the essential character of the service, rather than numbering or description, that is the primary indicium of the nature of a train. Subject passenger cars transport through passengers between Cincinnati, O., and New York, N.Y., and therefore are within this Commission's jurisdiction even though locomotives and train crews may operate solely within one state. Protestants' contention that certain trains herein are segments of a through train service and that appropriate notices were not posted is without merit. Subject trains originate and terminate at stated points and through passengers must change trains to complete their journey. Applicants are not required to file discontinuance notices past the named terminals.—Penn Central Transportation Co. Discontinuance, 338 I.C.C. 380 (388-89).

Evidence of record shows that all trains considered herein are primarily commuter service as defined by criteria in 338 ICC 621, especially as regards trip distances, equipment used, multiple stops, and peak period use, and are therefore within Commission's jurisdiction under §13a.—Chicago S.S. & S.B.R. Restructuring of Pass. Serv., 342 I.C.C. 154 (179-80).

15. Procedure; notice; hearings.—[Vols. 19, 21].—See also Public of State of Indiana v. United States, and United Transportation Union v. United States, at n. 2 *supra*.

District court holding, in remanding Commission decision allowing Chicago & E.I.R. to discontinue two ("Georgian") trains which it operated between Chicago and Evansville, Ind., and in conjunction with Louisville & N.R. trains between Evansville and Atlanta, Ga., that notice of proposed discontinuance was inadequate because the governors and people of Kentucky, Tennessee, and Georgia were not notified, reversed. While §13a(1) required C&EI to give notice to Illinois and Indiana, the only States in which the line operated, it made no provision for notice to States served by connecting railroads which might be affected by a discontinuance. When the Commission ruled that statutory notice requirements had been met, and permitted the discontinuance, it must have interpreted "such train" in §13a(1) to refer to a train operated by only one railroad; and only the Chicago-Evansville discontinuance was then before it. On this issue, the court accepts the definition of "train" given by the agency having supervision over the problem.—United States v. City of Chicago, 400 U.S. 8 (9-10)*.

While C&EI and L&N functioned in close harmony and, since the "Georgian" and L&N's "Hummingbird" trains connect at Nashville, Tenn., (and coaches and sleepers are transferred between them) discontinuance of service on one line might have substantial effect on the other, such relationship is not unique in railroading. Congress, being aware of the mutual interpendence of railroads, designed a federal regulatory system that displaced the state regulatory system when it could defeat a carrier's attempt to discontinue a passenger train; hence, it would distort §13a(1) to treat it so as to require the giving of notice to States which had no regulatory power over the carrier. Accordingly, Commission decision permitting L&N to discontinue its "Hummingbird" trains having also been remanded because of the close relationship to the "Georgian," the consolidated causes are remanded for district court review of any questions on the merits that may remain unsolved.—Id., pp. 10-11.

In accord with the court's earlier opinion in 400 US 8, and for similar reasons, those portions of the district court's judgment which reversed and remanded orders of the Commission authorizing the Denver & R.G.W. R. Co. and the Western Pac. R. Co. to discontinue their operations of the "California Zephyr" passenger trains, because no notices of discontinuance were served on Governors of some States, and notices were not posted at stations in some States, along the entire San Francisco—Chicago route of those trains, reversed and the cases remanded to the trial court for further proceedings; and that portion of the judgment appealed from which sustained the Commission's order authorizing Southern Pac. R. Co. to reduce the service of its "City of San Francisco" passenger trains is affirmed.—City of Chicago v. United States, 400 U.S. 987*.

In action to review the Commission's order permitting discontinuance of certain passenger trains between Carbondale, Ill., and Jacksonville, Fla., plaintiffs' suggestion that the Commission erred in failing to hold a hearing in Illinois is without support in cases or logic. Nothing in the statute requires hearings at any particular place or at more than one place; furthermore, no plaintiff ever made formal request for a hearing in Illinois. Inasmuch as plaintiffs' real concern was with discontinuance of southern leg of the train operations involved, the Commission acted properly and reasonably in holding eight days of hearings (at which plaintiffs filed briefs) in six cities in the three southern states directly affected by proposed discontinuance.—City of Chicago v. United States, 300 F. Supp. 115 (116, 118)*.

Initial issue in suit to set aside Commission decision allowing defendant railroad to discontinue two interstate passenger trains, claiming that carrier failed to effectively invoke the Commission's jurisdiction by not filing the notice thereof at least 30 days in advance of proposed discontinuance, is whether §13a(1) notice provision was complied with when, on Feb. 18, 1969, railroad filed with the Commission its notice of discontinuance of those trains effective March 20, 1969. Rule 6(a) of the Rules of Civil Procedure provides for computing any period of time prescribed by statute; reference therein to "any applicable statute" is broad and can reasonably be said to refer to any statute that will be applied in a District Court action; thus, computation of the 30-day period set forth in §13a(1) is governed by Rule 6(a). Applying that rule to the facts in instant case, date of the Commission's receipt of the notice (filing date) would not be counted, computation would begin with the next day and, counting forward from Feb. 19, the thirtieth day would be the effective date of proposed discontinuance.—Pennsylvania Public Utility Commission v. United States, 311 F. Supp. 1024 (1026-8)*.

Furthermore, while legislative history is of little aid in determining if the actual intent was that 30 full days should expire before discontinuance could take effect, Congress must have had some specific objective in mind when it approved language of the statute providing that a carrier can "file with the Commission * * * notice at least thirty days in advance of any such proposed discontinuance * * *"; and the most reasonable interpretation is that it used those particular terms to insure that 30 full days would pass before any discontinuance occurred. Therefore, since 30 full days did not elapse between date on which railroad's notice was filed with the Commission and the effective date of the proposed discontinuance, notice requirement of the statute was not met. And since carrier's failure to comply with notice provision of §13a(1) deprives the Commission of jurisdiction to approve or disapprove the discontinuance, the matter must be disposed of on that basis; plaintiff's motion for summary judgment granted.—Id., pp. 1029, 1031. [But see dissent.]

The Commission acted within the scope of its authority in accepting railroad's notice of its proposed discontinuance of two passenger trains between St. Louis, Mo., and Carbondale Ill., which was posted and served as required by §13a(1) and contained, in addition to the minimal requirements, a statement that substitute bus service would be provided by named carrier (not a party to the proceedings) upon discontinuance of those trains. It may be that under certain circumstances a notice might be so replete with redundant and immaterial matter that it would be stripped of its true purpose as a notice of train discontinuance; but in instant case, the mere assertion that the bus service would supplant train service was not so over-reaching as to invalidate the order. Also, while plaintiffs urge that addition of the bus service to the notice tended to lull people into a state of complacency, evidence of such effect was not submitted to the Commission; and the court does not find such a lulling effect to have occurred. Commission decision, which permitted the trains to be discontinued, sustained.—Illinois Commerce Commission v. United States, 320 F. Supp. 205 (209-10, 211)*.

Motions to dismiss §13a(1) proceedings, filed by protesting parties on various grounds, denied, as follows: (1) as to railroad's alleged failure to prove losses claimed, when the method used in determining financial results of operating the two trains to be discontinued are on actual bases where possible and those allocated are based on reasonable averages; (2) as to railroad's alleged failure to include freight revenues earned on the line, citing 210 F. Supp. 675, when cited case is on appeal and deals with §13a(2) proceeding; and (3) as to defect in the discontinuance notice (in that it was not served on the Governors and State commissions of Illinois, Wisconsin, Idaho and Wyoming), those states are beyond the physical limits of considered Minneapolis—Deer Lodge, Montana run; moreover, posting at stations and depots is required only at those points where the trains physically operate.—Chicago, M., St. P. & P.R. Co. Discontinuance, 320 I.C.C. 566 (572, 584-5).

Due to press of time and imminent expiration of 4-month statutory period (as briefly extended voluntarily by carrier) during which, pending investigation, railroad was required to continue operation of interstate trains involved, the Commission's order was not accompanied by a report; purpose of instant report, therefore, is to set forth in detail the findings of fact and reasons for the conclusions on which the order is predicated. And, though hearings in the three §13a(1) proceedings were held before the same examiner and at same time and place as hearing in the §13a(2) case on proposed discontinuance of intrastate trains, railroad's request that report in latter case be issued jointly with that in the §13a(1) cases is denied. As a practical matter, joint issuance of timely decisions in all four dockets would be impossible in view of (1) the number of trains involved, (2) short period of time provided for determinations under §13a(1) and carrier's unwillingness to postpone discontinuances proposed thereunder while the §13a(2) case is decided, and (3) the unusually large record.—Boston & Maine Corp. Discontinuance, 324 I.C.C. 418 (419, 424).

Similarly, due to carrier's financial crisis and its urgent need for relief from undue burdens of intrastate passenger operations, it is most appropriate that order authorizing such relief should be issued immediately upon the Commission's determination that relief is warranted; report, issued pursuant to that order and following it as soon as practicable, is intended to describe circumstances upon which order is based, and provide findings of fact and conclusions as required by Administrative Procedure Act.—Id., 324 I.C.C. 705 (706).

Also motions to dismiss §13a(1) proceedings, filed by protesting parties on various grounds, are denied, as follows: (1) State's motion (for railroad's failure to sustain its burden of proof) when evidence of record is sufficient to support the Commission's ultimate findings and to satisfy the statutory standards; (2) individual protestant's (for lack of Commission jurisdiction and alleged unconstitutionality of §13a(1)) when petitioning railroad clearly is within §1(1)(a) and §1(3)(a) definition of a carrier subject to the Act and, while the Commission is authorized to administer §13a(1) and exercise powers defined therein, the question of its constitutionality is for another forum; (3) municipality's (insofar as operation of certain trains is intrastate) when, while §13a contemplates two kinds of trains—those operating between points in different States and those operating wholly within one State—trains in issue are in the first category, and are governed by §13a(1) only.—Id., 324 I.C.C. 418 (422-4).

State protestants' motions to dismiss §13(1) proceedings, denied, as follows: (1) as to contractual obligations with State authorities to continue operation of substantially all trains sought to be discontinued, the statute, being permissive and an alternative to State procedures, on its face and in its legislative history, indicates Federal jurisdiction should not be defeated by existence of these contractual obligations; and, (2) as to railroad's inclusion of unrelated trains in a single notice, since discontinuance of all trains is now being sought, Commission's simultaneous consideration of the three general service segments in which the trains operate will facilitate rather than impede determination; moreover, the Commission's rules are not to be read so literally as to interfere with reaching a just and timely decision on the broad issues.—New York, N.H. & H. R. Co. Discontinuance, 327 I.C.C. 151 (199-201).

Protestant's motion to dismiss the "application" in §13a(1) proceeding is inappropriate; once the Commission enters upon an investigation, it must determine whether continued operation of considered trains is required by public convenience and necessity and whether such continued operation will unduly burden interstate commerce. Granting a motion to dismiss would, in effect, discontinue the investigation without making the required statutory findings to support discontinuance of the investigation or to support an order requiring continuance of service. Grounds for the motion treated as argument of protestant that continuance of the trains should be required.—Southern Pac. Co. Discontinuance, 330 I.C.C. 685 (687).

Where two commonly controlled railroads seek discontinuance of three passenger train pairs, two of which operate over lines of one of the railroads wholly within a single state, carriers may elect to proceed before the Commission under §13a(1) rather than before the State body. Motion to dismiss the Commission's investigation of the intrastate portion denied.—Kansas City S. Ry. Co. and Louisiana & A. Ry. Co. Discontinuance, 333 I.C.C. 51 (55-7).

Protestant's motion to dismiss this proceeding is based on grounds that applicant failed to sustain the Commission's jurisdiction by its substitution of State-approved bus service for rail service disrupted by the burning of a trestle. Motion denied as such substitution was the only feasible solution and does not vitiate our jurisdiction.—Seaboard Coast Line R. Co. Discontinuance of Trains, 334 I.C.C. 337 (339).

Notice and supporting statement in all proceedings under §13a is required to be mailed to Governors and State commissions of all states involved in such proceedings. Although Commission did not reject the application herein, all concerned parties are warned that failure to timely mail such notice and statement may be grounds for initial rejection by this Commission.—Louisville & N.R. Co. Discontinuance of Trains, 334 I.C.C. 566 (567).

Commission construed the phrase "at least" in §13a as regards timely filing of notice to require that only the first day in the period of computation be excluded. Thus, applicant has given the full 30 days notice required by §13a and has successfully invoked the Commission's jurisdiction.—Chicago, B. & Q. R. Co. Discontinuance of Trains, 334 I.C.C. 874 (877).

Inasmuch as discontinuance in notices herein was to become effective more than 6 months from the date of our prior decision, report, and order, the Commission's jurisdiction has been properly invoked under §13a(1) which automatically restores jurisdiction to the States upon expiration of Commission's order requiring continuance unless carrier again invokes §13a(1) to supersede State jurisdiction. Inclusion of erroneous information as to scheduling of subject trains in discontinuance notice does not render such notice invalid inasmuch as 49 CFR §1122 does not require inclusion of scheduling information. Also, oral testimony establishes that applicant had properly posted its original notice of discontinuance containing said erroneous scheduling information and, since no such information is required, it is unnecessary to decide whether certification of a revised notice was proper.—Penn Central Transportation Co. Discontinuance, 336 I.C.C. 416 (418-20).

Notice to public that passenger train operations between Chicago, Ill. and Port Huron, Mich. proposed to be discontinued held to be precise and complete and without deception to the public despite applicant's failure to specify that subject trains also operate between points in Canada beyond Port Huron.—Grand Trunk W. R. Co. Discontinuance, 338 I.C.C. 254 (257-8).

Protestants' petition to dismiss this proceeding on grounds that applicant's refusal to voluntarily continue subject trains and the Commission's condensed hearing schedule deprived them of an opportunity for a fair hearing is denied inasmuch as the district court had provided the equivalent of an extension of its order restraining proposed discontinuance. Further, the Commission in empowered by §12 to obtain from carriers such information necessary to carry out its duties and therefore Commission's closed session meetings with officials of applicant do not constitute improper ex parte communications and are not a basis for the Commission to disqualify itself. Petitioner's reliance on 269 F. 2d. 221 is inapplicable as there is no allegation herein of private approaches to members of the Commission.—Penn Central Transportation Co. Discontinuance, 338 I.C.C. 380 (384-89).

20. Showing required and burden of proof.—[Vols. 18, 19, 21].—Railroad's continued operation of two passenger trains between Aberdeen, S.D. and Deer Lodge, Mont. found not required by public convenience and necessity where record is persuasive that (1) consideration of a fare increase would not significantly affect carrier's losses, as fares would have to be increased 240 percent; (2) while carrier opened the territory traversed by the trains and people settled along its line, that does not obligate it to continue passenger service; and (3) various changes in service effected as result of prior discontinuance did not constitute a deliberate attempt to discourage travel because when the length of service was shortened, carrier properly considered a comparable reduction in equipment consist on the trains in order to reduce operating losses thereon, while still maintaining adequate service to the public.—Chicago, M., St. P. & P. R. Co. Discontinuance, 320 I.C.C. 566 (573, 577, 579, 585-7).

Furthermore, continuance of considered trains was not required for survival of fast, dependable mail, parcel post and express service. In handling the mail, the U.S. Government is the carrier (with the railroad acting only as its agent under a contractual arrangement) and, since it did not protest, it may be presumed that the Post Office Dept. will make other arrangements; and express traffic has declined as result of REA choosing other means of moving its traffic.—Id., pp. 580-1.

The issue of burden of proof in a discontinuance proceeding would be decisive only if no substantial evidence were adduced or if the evidence were equally balanced. Where neither of these conditions is present, the question of which party bears the burden of proof is of more theoretical than practical importance.—Louisville & N. R. Co. Discontinuance, 320 I.C.C. 669 (671).

Notwithstanding substantial increases in population in areas served by commuter trains to be discontinued, public patronage has declined steadily during the past 12 years. Protestants urge that the railroad has not encouraged use of the trains, nor attempted to generate more business by instituting a new stop at nearby NASA plant facility; however, when prospective passengers must be coaxed by advertising to use a particular commuter train they obviously have no urgent need for it. The evidence clearly shows that the railroad investigated every inquiry concerning service at the NASA plant without success, and in absence of assurances of additional passengers who would actually use such service, it could hardly be expected to assume substantial expenditures in purchasing additional equipment, construct station facilities, and revise its schedules, merely on a trial basis; moreover, its offer to provide service to the plant on a contractual basis was declined. —Id., pp. 674-5, 680-6, 691-2.

Protestants' evidence must be considered mainly in the light of the testimony of persons who actually depend on considered trains for essential transportation needs; and, in determining public convenience and necessity, needs of the entire public as distinguished from the relatively few must be the governing consideration. Accordingly, while residents of four small points served by the trains are without primary or secondary highways, have only the railroad's service available, and must use skiffs or other small boats to reach any highway, evidence established that daily average use of the trains in the preceding year was 1 and 1.5 passengers, respectively for two of those points and none for the other two.—Id., pp. 692-3.

In discontinuance proceedings the Commission may properly give varying weights to the carrier's overall prosperity in different situations. Where directly affected communities would be subject to serious injury and continuous operation would impose relatively light burden on a prosperous carrier, it may be given great weight; but where demands of public convenience and necessity are slight and the carrier may not justly be required to continue to bear financial losses of continued operation, its overall prosperity may be given little weight. Evidence is persuasive that public needs for considered commuter service is slight; and, notwithstanding the carrier's overall prosperity, evidence of its substantial losses from operation of the trains, decreasing use thereof and resultant dwindling of revenues therefrom, warrant finding that their continued operation would constitute an undue burden on interstate commerce.—Id., pp. 694-5.

The concept of public convenience and necessity in §13a proceedings has many facets. One is seen in the number of passengers using the railroad, but it is not necessarily controlling; there are others which, in circumstances here, may be of equal or greater importance. The many employees of businesses dependent on Boston & M.'s transportation, employees of the railroad itself, and all people whose jobs would be affected by collapse of the railroad or impairment of its service are to be considered. Discontinuance of certain passenger trains would require numerous commuters and travellers to change their riding habits and adjust to alternate service; however, with demise of the railroad, jobs would be lost, unemployment would be widespread, and serious dislocation of the area's general economy could occur. In the circumstances, public convenience and necessity requirements are not to be determined principally on basis of number of passengers who have been using considered trains.—Boston & Maine Corp. Discontinuance, 324 I.C.C. 418 (453).

Record makes it abundantly clear that the railroad needs substantial help at once, if its service is to remain available. Thus, since continued operation of considered interstate passenger trains, even under optimum conditions of service, fares and passenger-use, would, in the end, help no one, but would only increase the deficit and make certain carrier's quick demise, an unjust and undue burden on interstate commerce within meaning of the statute would thereby be created.—Id., pp. 452-3; similar conclusions concerning public convenience and necessity and carrier's financial condition made in intrastate discontinuance proceeding.—Id., 324 I.C.C. 705 (723-4).

While the railroad cannot long survive without outside assistance, salutary aid is available through its contract with new Massachusetts agency, MBTA, which would make direly needed working cash immediately available and probably assure a deficit-free passenger operation for the contract term, thus offering immediate possibility of rejuvenating the carrier. That help, and carrier's survival, might be out of reach if carrier is required to continue operation of all trains in issue; continuance of unnecessary service would constitute a drain on carrier's financial resources and impose an undue and unnecessary burden on interstate commerce, and is not justified by public convenience and necessity. Moreover, carrier can provide adequate service to meet the public needs with the trains ordered continued, and at the same time realize substantial economies essential to its survival.—Id., 324 I.C.C. 418 (439-40, 454).

Carrier's condition can no longer tolerate continuance of passenger operations that fail to contribute significantly to railroad upkeep. Total net loss on considered intrastate trains, almost $2 million per year, far exceeds losses on interstate trains considered in companion report; consequently, continuance of considered trains would impose even a greater burden on the carrier and upon interstate commerce. Since all of carrier's efforts to overcome the problem have been to no avail, elimination of that burden is required in order that the railroad itself may be preserved to provide essential services over the wide New England area for the hundreds of communities which are greatly dependent upon it for their economic well-being and general welfare. Public convenience and necessity certainly permits, even requires, discontinuance of intrastate trains in issue.—Id., 324 I.C.C. 705 (723).

While record does not support contention that railroad's freight service is "more essential" to New England than passenger service, evidence clearly shows that carrier is providing a greater quantity of passenger train service than is required by the public and that about 50 percent of its existing through train schedules are not really warranted by patronage requirements. In view of carrier's financial condition, continued operation of excessive train service, not realistically responsive to a public need, constitutes an undue burden on interstate commerce; therefore, a finding that there is no justification for allowing total discontinuance of railroad's passenger service does not preclude a finding that the dual criteria of §13a(1) may allow discontinuance of particular trains.—New York, N.H. & H. R. Co. Discontinuance, 327 I.C.C. 151 (203-5).

In balancing the public need for the service in passenger train discontinuance proceeding against the financial losses suffered by carrier in rendering that service, record shows the use of the service is relatively insubstantial in view of the area's population density and passenger traffic potentially available. Financial losses from the operations involved have been heavy over an extended period of time, the name of passengers has steadily declined, and continued operation of the trains at an uneconomic level constitutes an unnecessary and wasteful service; therefore, in view of proponent carrier's large system passenger deficit and its recent poor earnings record, evidence, as supplemented on further hearing, warrants conclusion that continued operation of two considered passenger trains is not required by public convenience and necessity and continued operation thereof would constitute an undue burden on interstate commerce.—Chicago, R.I. & P.R. Co. Discontinuance, 328 I.C.C. 278 (295-6)*.

Further, while passenger revenues cannot always be determined with mathematical precision, the computation thereof should present a reasonably close approximation of the actual revenues earned; carrier's application of the average fare per revenue passenger to the total number of revenue passengers handled on each conductor's runs, during the monthly study periods, in accordance with method found acceptable in prior discontinuance cases, produces that result. —Id., pp. 290-1.

Among factors to be considered in a train-discontinuance proceeding are the effect of the discontinuance upon the localities served, use the public presently makes of the service, availability of alternative transportation, and costs incurred and financial losses sustained by carrier in providing the service; but no factor, standing alone, is decisive; in addition, the burden imposed on the carrier and ultimately on interstate commerce must be considered in direct relation to need for the service which under certain circumstances justify continuance of service even at loss to the carrier. However, as to considered trains, carrier has incurred substantial and continuing losses which it can ill-afford in view of its precarious financial health, its heavy burden of long-term debt and fixed charges, and the need to preserve and improve its important freight operations as a commercial conduit to the economy of New England. Continued operation not required.—Boston & Maine Corp. Discontinuance, 328 I.C.C. 594 (600, 605, 607)*.

The unrebutted evidence shows that current and projected out-of-pocket expenses of operating considered passenger trains, exclusive of maintenance of ways and structures and joint terminal expenses, outstrip the revenues by a substantial margin; in addition, record shows a continuing increase in operating expenses, and no probative evidence supports the allegation that decline in patronage is attributable to failure on part of applicant to maintain high standards of service, nor is there foundation for criticism of train schedules, since scheduling is dictated by head-end services. Balance lies in favor of permitting discontinuance of two trains. Authorized.—Louisville & N.R. Co. Discontinuance, 330 I.C.C. 551 (560-1).

Despite the fact that the California Zephyr moving between San Francisco and Salt Lake City has 78.2 percent passenger capacity and in summer virtually full capacity, the passenger deficit is approximately $560,000, not including maintenance and repair costs on a long-term basis. However, record is not persuasive that carrier's loss experience is hopeless and, since 135,000 people travelling on considered trains each year enjoy some of the most spectacular scenery in the country, public convenience and desire, rather than necessity or essentiality, require continuation of the service. Continued operation of subject trains for period of one year required.—Western Pac. R. Co. Discontinuance, 330 I.C.C. 577 (584, 586-7, 589).

Certain criteria and factors involved in determining public convenience and necessity in passenger train discontinuance cases under §13a are similar to those applied in rail abandonment proceedings under §1(18); and, with respect to such similar factors, the precedents applicable to abandonments usually apply in discontinuance cases; such factors include population of the service area, patronage of the service, public and private alternate transportation available to the territory, financial results of operation, and financial condition of the carrier.—Southern Pac. Co. Discontinuance, 330 I.C.C. 685 (704).

While continuation of commuter services by a trunkline railroad may be a hardship if not a burden, the commuter is an important patron since his travel is related to his working day and he is a regular, rather than an occasional customer; his needs may not be downgraded because his trip is short or unprofitable. And, in considering proposed discontinuances of the early inbound and late outbound commuter trains (operating at a loss of $32,000 annually) and the rescheduling of two remaining trains, evidence shows that the trains are fully occupied with standees on all except the late evening train; that the proposed change will result in further curtailment of service because the early inbound and late outbound trains do not carry passengers in the same direction and rescheduling of the remaining trains may be less attractive to present riders; that alternate services do not fulfill demonstrated needs; and that most patrons prefer a reasonable fare increase rather than discontinuance. Continued operation under existing schedules is required for one year.— Pennsylvania R. Co. Discontinuance—Chicago & Valparaiso, 331 I.C.C. 464 (473-5).

Although offered too late for cross-examination, the following exhibits were properly received into evidence: (1) work papers depicting methodology of financial analyst in calculating distribution of revenues and avoidable costs among three train pairs when operated by two railroads, received as detailed explanation which would tend to minimize cross-examination; (2) letter by city council member asserting that she did not authorize the mayor to represent her as favoring discontinuances, received as a statement of position; and (3) a letter from REA Express advising discontinuing use of considered trains at a future date, received as a late-filed exhibit. However, evidence of amounts paid as crew wages calculated by unidentified persons, as represented in appendix to protestant's brief, was stricken as unsupported by the record.—Kansas City S. Ry. Co. and Louisiana & A. Ry. Co. Discontinuance, 333 I.C.C. 51 (54).

In considering whether the two trains should be discontinued, it is impossible to determine the operating losses, if any, where (1) passenger revenues should be substantially greater than carrier's projections based on the first 4 months of 1968, (2) expenses applicable to "deadheading" diesel unit not needed to move one train are not properly chargeable and (3) joint-facility expense is overstated due to including such diesel unit as a part therein. Moreover, since over 100,000 passengers a year use the limited capacity trains and since carrier's system retains the mail and express revenue, railroad has the financial capacity to support passenger operations. Further, fact that application was filed almost immediately following the diversion of all headend revenues from considered trains to the new, solid mail and express train service (which was done at carrier's suggestion), record does not provide a basis for reaching a conclusion as to the actual operating results under the new arrangement. In view of the profitable operations in the past and carrier's favorable financial position, continuance of both trains is required for 9 months.—Pennsylvania N. Y. Central Transp. Co. Discon., 333 I.C.C. 638 (643-5, 647-9, 658-61).

Carrier's showing of financial losses on operation of trains involved herein is not controlling evidence supporting discontinuance as the record clearly shows that carrier has deliberately downgraded its service to discourage passengers and the Commission cannot find the burden on interstate commerce to be "undue" under §13a if such burden is voluntarily created by the carrier (see 320 ICC 319).—Southern Pac. Co. Discontinuance, 333 I.C.C. 783 (799).

Public need for subject trains' service is reflected in the number of passengers who use the train and not necessarily by the number of witnesses who appear at a hearing.—Chicago, B. & Q. R. Co. Discontinuance of Trains, 334 I.C.C. 874 (896).

Although unable to find that applicant has deliberately downgraded its service, the Commission found that applicant's lack of concern as reflected in condition of subject service (especially on-time performance) so as to preclude a finding that declining patronage represents a diminishing public need for service.—Illinois Central R. Co. Discontinuance of Trains, 336 I.C.C. 601 (616).

21. Other service available.—[Vols. 19, 21].—Discontinuance of indicated passenger trains between Omaha and Lincoln, Nebraska approved as patronage of the segment is meager and can be satisfactorily served by other trains of applicant or by alternative means of transportation available between those points.—Chicago, B. & Q. R. Co. Discontinuance of Trains, 334 I.C.C. 248 (258).

In view of the alternate service already available, it is apparent that the train passengers can obtain transportation to and from work without operation of the Boston & M. passenger trains in the 9 intrastate service areas. Some adjustment will have to be made; some inconvenience is likely and perhaps some hardship; but these factors become subordinate when measured against the drastic effect that loss of the entire railroad would have upon the economy of the New England area served by it.—Boston & Maine Corp. Discontinuance, 324 I.C.C. 705 (720).

22. Continued service needed.—[Vols. 19, 21].—Public convenience and necessity and undue burden criteria of §13a(1) are not confined to whether a given train, in fact, produces an operating deficit. Other factors to be considered are railroad's financial condition, its continuing deficits, its lack of capital to renew its existing facilities, diminishing patronage, and increasing competition from other media, as well as its strategic service value to a vast general public; and specific characteristics of each train include average patronage, average revenues, frequency, convenience of schedule, usage by commuters, usage in through connecting train service, and availability of comparable train service. Continuation of those train services which are essential to meet the demonstrated needs of the public and appear to have sufficient potential for being economically viable is required.—New York, N.H. & H.R. Co. Discontinuance, 327 I.C.C. 151 (205).

Inasmuch as the 135,000 people who travel on the California Zephyr between San Francisco and Salt Lake City each year enjoy some of the most spectacular scenery in the country, and discontinuance of those two trains would no doubt require discontinuance of connecting railroads' operations of the Zephyr trains between Salt Lake City and Chicago, public convenience and desire, rather than necessity or essentiality, require continued operation of considered trains for one year. Carrier's financial condition is stronger as result of higher earnings during past several years, its current predicament results from upward spiral of operating costs, not from its lack of diligence; and record is not convincing that material improvement in its loss experience is hopeless. However, at the end of one year, another notice of discontinuance can be filed and, if there is no material improvement, the Commission might have no alternative to permitting discontinuance of the Zephyr trains.—Western Pac. R. Co. Discontinuance, 330 I.C.C. 577 (586-7, 588).

Although, at this time, continued operation of considered trains for one more year would not constitute an undue burden on interstate commerce, four possible developments which would reduce or eliminate the burden are suggested as methods of material improvement: (1) the divisions of revenues between connecting carriers may be inequitable and, therefore, the Commission is concurrently instituting an investigation under §15(6) to determine and possibly prescribe equitable divisions; (2) the Post Office Department may decide to provide carrier with sufficient mail business to reduce the losses; (3) in view of the interest of public agencies and officials, public authorities will be given a year to implement programs of assistance to preserve the service; and (4) carrier itself should exhaust all possibilities of self-help, such as negotiations for more efficient use of personnel and changing of fares to receive more benefit.—Id., pp. 579-80, 588-9.

Although the early inbound and late outbound commuter trains to be discontinued are operating at a loss of $32,000 annually and the two remaining trains are to be rescheduled, continued operation under existing schedules of the four trains is required for one year where (1) the annual loss from operating the four trains averages $8,000; (2) trains are well patronized with daily standees except on the late outbound train; (3) survey shows good proportion of riders desire operation under existing schedules; and (4) many patrons will suffer hardships under applicant's proposal.—Pennsylvania R. Co. Discontinuance—Chicago & Valparaiso, 331 I.C.C. 464 (474-5).

Where two commonly-controlled railroads, seeking discontinuance of their last three pairs of passenger trains, have good overall profits and are financially healthy and despite the loss of all RPO mail cars and express traffic or that annual losses could amount to $480,000 from operating a single train pair, public convenience and necessity require operation of one pair of trains between Kansas City, Mo., and New Orleans, La., for 6 months to determine how anticipated losses relate to the public need.—Kansas City S. Ry. Co. and Louisiana & A. Ry. Co. Discontinuance, 333 I.C.C. 51 (65-6, 71-2).

Continued operation of carrier's "Portland Rose" trains between Kansas City, Mo., and Portland, Oreg., is required for 1 year where the public is left without satisfactory alternate service because of the severe nature of the terrain traversed, the inaccessibility of certain areas, and the weather; moreover, the majority of patrons cannot utilize railroad's luxury train whose transcontinental characteristics are undesirable. Further, despite an estimated loss of $1.7 million due to the transfer of all mail and express to other modes in early 1968, record shows 62,500 passengers a year patronize these trains in each direction, averaging 172 passengers per train trip and 40 passengers per train mile. However, additional passenger traffic to offset reduced revenue may be realized from transfer of patronage from other train discontinuances, increased population, and faster service because of elimination of headend traffic. Moreover, fact that carrier had not suffered any losses in past operating periods as well as its strong financial position precludes a finding that continuance of considered trains would unduly burden interstate commerce. —Union Pacific Railroad Company Discontinuance, 333 I.C.C. 348 (352-4, 368-9).

Although convenience and necessity warrants a finding that carrier's two night trains be discontinued, nevertheless, continued operation of its two day trains is required for a 1-year period during which time the public will be able to demonstrate by its patronage whether continued service will be essential to its needs. Record shows considered trains transported over three times the revenue passengers carried on the night trains; half the stations they serve would be without alternate rail transportation; and continued operation would provide morning and evening service from both Kansas City and Omaha to meet the public need. Moreover, the carrier is financially healthy. Therefore, despite the fact that loss of mail and express revenues will result in a projected out-of-pocket loss of $232,100, continuance of considered day trains is required.—Chicago, B. & Q. Ry. Co. Discontinuance, 333 .C.C. 395 (402-3, 405-7).

While the two considered trains have been operating at a loss, more recently aggravated by discontinuance of mail and express traffic, fact that they transport over 53,000 revenue passengers a year or an average of 73 persons per trip over the 140 miles traversed between Chicago, Ill., and Madison, Wis., is of some consequence. Even more meaningful is fact that weekend and other high-peak periods account for 57 percent of the trains' total traffic. Thus, weighing the demonstrated public use of the trains during such periods against an estimated annual loss of less than $30,000 reflecting week-end operations only as compared with the estimated annual loss of $126,000 based on full-time operations, continuance of considered trains between the two terminal cities on reduced or limited schedules is warranted.—Chicago, M., St. P. & P.R. Co. Discontinuance, 333 I.C.C. 466 (471, 479, 482-3).

Continued operation of certain east-west trains between New Orleans, La., and Los Angeles, Cal., is required as these trains provide the last reasonably direct rail passenger service between these two cities, provide the only such service at various intermediate points, and have received substantial continuing patronage. Operation ordered continued for 1 year. Record is convincing that Southern Pacific has deliberately downgraded service on its trains between New Orleans and Southern California and thereby forfeited its claim that financial losses it helped to create are an undue burden upon interstate or foreign commerce.—Southern Pac. Co. Discontinuance, 333 I.C.C. 783 (798-99, 800).

Operation of one train providing passenger service to and from Gilman, Ill. ordered continued for 1 year as record indicates a need for such service by residents of Gilman. However, discontinuance of another train serving Gilman approved as its operation was found superfluous.—Illinois Central R. Co. Change in Service, 333 I.C.C. 806 (813).

Operation of two daily trains between Harrisburg, Pa. and Buffalo, N.Y. ordered continued for 6 months on an alternate-day basis, Such partial discontinuance will significantly reduce operating deficits but will not adversely affect revenues or public interest as this is last remaining passenger service between these two points and patrons have "no place else to go".—Penn Central Co. Discontinuance of Trains, 334 I.C.C. 312 (334-6).

Considered in the light of Norfolk & W.'s overall prosperity, losses being incurred from operation of its trains between St. Louis and Detroit (the only remaining noncircuitous passenger trains between those cities), while not insubstantial, are not so great as to create an undue burden on interstate commerce. That considered trains meet a necessary and continuing public need is amply shown by the intense interest, and testimony, of the public witnesses and, also, by the fact that a substantial number of passengers still patronize the trains, especially in traveling to and from rather sizeable intermediate points. While available alternate service between Detroit and St. Louis appears reasonably adequate, alternate service between the terminals and intermediate points is not nearly as desirable or adequate. There is no alternate service which parallels route of the trains; many intermediate points are not on existing bus routes, others have only limited bus service with infrequent schedules, and available air service is not convenient to many of them. Therefore, continued operation of considered trains, for a 1-year period, is required.—Norfolk & W. Ry. Co. Discontinuance, 334 I.C.C. 506 (511-12, 522-3)*.

Operation of subject trains herein ordered continued for 1 year as they represent the last remaining rail passenger service between Flomaton, Ala. and Chattahoochee, Fla. and their elimination would significantly damage the through service of which they are an integral segment as well as destroying the last transcontinental service between Los Angeles, Calif. and Jacksonville, Fa. Applicant's financial losses are outweighed by the public need.—Louisville & N. R. Co. Discontinuance of Trains, 334 I.C.C. 566 (583).

Discontinuance of two passenger trains between Cumberland, Md. and Parkersburg, W. Va. approved as these trains operate at a substantial loss and record shows an insignificant number of passengers who may be adequately served by other of applicant's trains or by alternative carriers with little inconvenience. Fact that applicant's overall system is profitable is not controlling absent demonstrated need for service.—Baltimore & O. R. Co. Discontinuance of Trains, 334 I.C.C. 689 (703).

Inasmuch as patronage of last remaining passenger trains between Kansas City, Mo. and Tulsa, Okla. herein has been substantial and has remained reasonably constant for the past 5 years, applicant's financial losses are outweighed by continuing public need for service, especially in view of applicant's overall prosperity. Operation ordered continued for 1 year.—Atchison, T. & S. F. Ry. Co. Discontinuance of Trains, 334 I.C.C. 735 (745-7).

Operation of subject trains between Chicago, Ill. and Lincoln, Nebr. ordered continued for 8 months in view of these trains' heretofore profitable operations; applicant's failure to support its projected financial losses with acceptable data; significant patronage of these trains; applicant's deliberate downgrading of service; and the good financial position of applicant.—Chicago, B. & Q R. Co. Discontinuance of Trains, 334 I.C.C. 874 (897).

Operation of subject trains between St. Paul, Minn. and Seattle-Tacoma, Wash. ordered continued for 1 year as applicant was found to have discouraged passengers through its deliberate downgrading of service and therefore, it cannot be found that the public has abandoned its need for these trains, a view supported by large number of public witnesses opposing discontinuance. —Northern Pacific Ry. Co. Discontinuance of Trains, 336 I.C.C. 7 (38-40).

Operation of subject trains between Madison, Wis. and Chicago, Ill. ordered continued for 1 year. Applicant has received a satisfactory level of patronage for the reduced schedule on which these trains operated during a 1 year study period ordered in a previous proceeding.—Chicago, M., St. P. & P. R. Co. Discontinuance of Trains, 336 I.C.C. 105 (116).

Operation of one set of the last two sets of trains between Omaha, Nebr. and Kansas City, Mo. ordered continued for 1 year inasmuch as discontinuance of both sets of trains would remove the last passenger trains between the two termini. Both sets now operate at a loss but removal of one set and consequent increase in patronage on the remaining set will substantially reduce applicant's projected loss.—Chicago, B. & Q. R. Co. Discontinuance of Trains, 336 I.C.C. 159 (172-3).

Operation of subject trains ordered continued for 9 months inasmuch as public use is significant especially in view of applicant's lack of facilities, the sparse population of the area served, and the inadequate alternative modes of transportation. Also, applicant's sound financial position and future introduction of service from Harrisburg to Phila., Pa. requires such continuation.—Penn Central Transportation Co. Discontinuance, 336 I.C.C. 416 (449-450).

Operation of subject trains ordered continued for 6 months in view of the heavy public reliance on the present service and the fact that the overall operation of these trains is conducted at a considerable profit. —Chicago South Shore & S.B.R. Discontinuance, 336 I.C.C. 454 (467-8).

Operation of subject trains between Pittsburgh and Philadelphia, Pa. ordered to be continued inasmuch as patronage, although declining, remains substantial; alternate service appears inadequate; and the financial loss through continued operation is substantially less than applicant projected and is not a burden on interstate commerce.—Penn Central Co. Discontinuance of Trains, 336 I.C.C. 518 (526-7).

Operation of subject trains ordered continued between Chicago, Ill., and Carbondale, Ill., for 1 year as testimony herein indicates a public need, especially by university students, for continuation of service between these two points and alternate means of service available are neither practical nor convenient. However, a portion of these same subject trains' service, between Carbondale and Memphis, Tenn., is ordered discontinued for lack of public need.—Illinois Central R. Co. Discontinuance of Trains, 336 I.C.C. 601 (615).

Commission ordered continuance of 20 of 34 trains involved herein in view of substantial passenger usage and the increase in revenues resulting from an intercity passenger fare increase and discontinuance of the 14 other trains considered herein.—Penn Central Transportation Co. Discontinuance, 338 I.C.C. 380 (471-78).

Commission held that approximately half the trains sought to be abandoned should be retained due to inadequacy of other modes of transportation, possible further erosion of patronage reduced schedules would cause, and probable detrimental impact on the environment.—Chicago S.S. & S.B.R. Restructuring of Pass. Serv., 342 I.C.C. 154 (186-196).

Feeder value.: [Vols. 19, 21].—Operation of two trains between Florence, S.C., and Augusta, Ga., ordered continued for 9 months. Record shows that these trains furnish last rail passenger service between these two cities and their main worth is the feeder value to the through coach and sleeping car service to and from the Washington-New York area and such need outweighs applicant's financial losses.—Seaboard Coast Line R. Co. Discontinuance of Trains, 334 I.C.C. 337 (348-49).

25. Losses from operation.—[Vols. 18, 19, 21].—See also Illinois Commerce Commission v. United States, at n. 15 *supra;* Pennsylvania N.Y. Central Transp. Co., at n. 20 *supra;* and Union Pacific Railroad Company Discontinuance, at n. 22 *supra.*

In §13a(1) proceeding the use of systemwide expenses in making appropriate allocations with respect to those particular expenses which are not itemized in the carrier's accounts is permitted. Also, carrier's freight revenues earned on the line need not be considered; and, decision in 210 F. Supp. 675, cited by protestants in support of contention to the contrary, is without merit inasmuch as that case, on appeal before the Supreme Court, involves a §13a(2) proceeding.—Chicago, M., St. P & P. R. Co. Discontinuance, 320 I.C.C. 566 (572, 584-5).

Although the railroad has increased commuter fares between points served by the trains to be discontinued since the prior decision involving the same trains, 307 ICC 173, wherein it was found that operation between Ocean Springs and Pas Christian, Miss., was not required by public convenience and necessity but that existing public need required continued operation between latter point and New Orleans for a period of 1 year, improved operating results optimistically anticipated in that report have not materialized. Unrebutted evidence shows that out-of-pocket costs far exceed revenues accruing from operation of considered commuter trains.—Louisville & N. R. Co. Discontinuance, 320 I.C.C. 669 (673-6, 690).

Carrier continued operation of the trains for over 3 1/2 years after expiration of the 1-year period previously required, and although population increased in the area served, use of the trains substantially declined—from a daily average in 63 to an average of 38 passengers in last 5 years. Despite reduction in mileage and increased fares, revenue provided by considered trains has continued to decline while out-of-pocket losses have steadily increased thus, it is clear that the hoped for "break-even" point in annual operating results has not been achieved. Residents in the area have had ample opportunity to demonstrate, by regular patronage, that continued service is essential to their convenience and necessity; this they have failed to do. Evidence of carrier's substantial losses from operation of the trains, the decreasing use thereof, and resultant declining revenues, warrants finding that no public need exists for the commuter service and that continued operation of the trains would constitute an undue burden on interstate commerce.—Id., pp. 690-5.

In considering proposed discontinuance of all of carrier's interstate passenger service except on Connecticut River line, (cost and revenue data being considered on basis of service areas rather than individual trains and passenger data being appraised on the basis of service area and individual train and station), evidence is conclusive that carrier cannot continue to provide service without immediate and substantial help.—Boston &

Maine Corp. Discontinuance, 324 I.C.C. 418 (425, 441-51, 452).

Record shows that carrier has exploited all means for reducing costs and maximizing revenues but still is unable to stem the outflow of cash; its working capital is in a deficit position and available cash is so low that a single emergency could bring entire railroad to a standstill. The fact that the annual passenger deficit probably could not be brought below $2 million, coupled with persistent overall heavy losses for many years, extremely critical working capital position, and restless creditors, make bankruptcy almost a certainty, unless substantial relief is given immediately. Discontinuance authorized, except as to certain daily commuter-train service.—Id., pp. 427, 429-33, 442, 455.

With the intrastate train discontinuances authorized, and that authorized in companion case (324 ICC 418) involving interstate trains, most of the system costs allocable to passenger service would probably be saved; and substantial part of saving would be allocable to the intrastate trains involved. Consequently, in carrier's unique situation, overall savings attainable from discontinuances in the 9 intrastate service areas, are likely to well exceed the $2 million per year. Fare increases cannot be expected to offset the deficit because the large increase required would undoubtedly produce a significant drop in patronage. In view of the carrier's strained financial condition, its minimal cash reserves, heavy capital debt payments, and its recently declining freight revenues, service reduction and fare increases do not, in themselves, offer a practical alternative to discontinuance.—Id., 324 I.C.C. 705 (710, 714).

The total net loss on intrastate trains, almost $2 million per year, far exceeds the losses on interstate trains; consequently, continuance of the trains in issue would impose an even greater burden upon the carrier and upon interstate commerce. Elimination of that burden is required in the public interest in order that the railroad itself might be preserved to provide essential services over the wide area of New England for the hundreds of communities therein which are greatly dependent upon it for their economic well-being and general welfare. Public convenience and necessity most assuredly permits, even requires, the discontinuance of trains.—Id., p. 723.

In its study of rail deficits from passenger operations in 306 ICC 417 and 313 ICC 411, the Commission, recognizing that railroads with heavy passenger obligations have an urgent need for assistance at both State and Federal levels if solution to the problem is to be achieved, concluded that preservation of a railroad's essential transportation services depends in the final analysis upon the cooperative effort made by all having a stake in the carrier's survival. The action by the Commonwealth of Massachusetts in providing for the demonstration project of the Mass Transportation Commission and the creation of the MBTA is an example of what the Commission was advocating. This type of local action affords the people of a metropolitan area the opportunity to preserve for themselves desired rail passenger service, while making possible the retention of a distressed carrier's service necessary to the general welfare. Adjacent communities, as well, may benefit by voluntary participation. Plans of this nature might well bear emulation by other localities similarly situated.—Id., p. 724.

Hypothetical income statement showing the operating consequences of a theoretical "freight only" operation is of little more assistance than similar operating results shown in railroad's Form A annual report since in essence it is an "office analysis" intended not to show the actual costs which would be eliminated by discontinuance of passenger service but rather to estimate, from books of account, the total revenues and expenses which would not have appeared in carrier's 1964 income accounts; moreover, to convert into a freight only railroad, a substantial period of time would be needed to adjust its labor force, plant, and operating facilities for performance of those more limited operations. Furthermore, the similarity in net result between the special study and its Form A annual report and the fact that the special study projects a reduction in those expenses now common to both passenger and freight services, run contrary to accepted theory concerning the separation rules.—New York, N.H. & H.R. Co. Discontinuance, 327 I.C.C. 151 (190-3).

Similarly, the special study designed to show the effect on revenues and expenses of superimposing upon the hypothetical 1964 "freight only" operations a suburban passenger service between New Haven and Grand Central Station is rejected, since a more reliable method would be to compute the actual "avoidable costs" resulting from discontinuance of service east and north of New Haven, which area constitutes a potentially severable operating segment with separate revenue and cost characteristics. And, to the extent the projected $7.3 million annual "deficiency" in income includes $5.6 million in allowance for return on investment, at 6 percent, is utilized as an indicator of a desirable minimum level of income, there is no objection; however, a 6 percent "return" on investment is not a specific cost contributory to the "passenger deficit" as projected in the special study.—Id., pp. 194-5.

Although the Bureau of Enforcement's study to show financial results of carrier's passenger operations for 1964 based on fully allocated costs at varying levels of costs and separated as to principal groups of involved trains provides a useful starting point in determining relative burden represented by each segment, it is not conclusive because it does not determine costs as actually incurred by the particular segments of service, either on the basis of an avoidable cost analysis or an engineering study of the particular operations involved.—Id., pp. 196-7.

Terminal income of tenant and joint user in common is a relevant factor in estimating the "undue burden" for purposes of §13a proceeding and in determining the level of carrier's ultimate "passenger deficit", regardless of whether such income is transportation or non-transportation revenue. Under the terminal arrangement New Haven's actual costs and its net income are computed on a basis governed by the frequency of its passenger car entrances to the terminal itself; thus, its proportionate operating costs in using the terminal are offset to the extent that the income reduces the joint facility costs. Therefore, if its passenger service were discontinued, all of its income from this source, with one exception, would cease.—Id., pp. 198-9.

While average train mile revenues, by themselves, are not reliable quantitative measures of profitability, they have value as broad gauges of a train's potential for profit and earnings comparability within a given system of passenger service. And, although certain of considered trains show comparatively large train mile earnings for head-end revenues, nevertheless, considering their scheduling and patronage, and the availability to this traffic of other trains at comparable scheduling, head-end revenue considerations do not justify continued operation of those trains in passenger operations; however, imaginative management is admonished to find adequate means and methods of preserving such income to the corporation. —Id., pp. 215-16.

While joint facilities expenses proven savable have been acknowledged as such in most §13a cases dealing with the issue, the confusion caused by disparity between two lines of decisions (one line using a rule under which such expenses are acknowledged as savable and the other cases not applying that rule) should be dispelled. Therefore, on further consideration, the Commission concludes that it is error to disallow an expense shown to be savable. Reason and logic require that a proven fact be acknowledged; and in all §13a cases, joint facility expenses should be allowed as prospective savings where supported by specific and concrete proof. Furthermore, when such expenses (so supported) are allowable, fact that savings to proponent carrier might result in shifting expenses to other carriers using the facility or in creating an undue burden on interstate commerce is a matter wholly unrelated to whether proponent will realize a saving. However, in some instances, it may be appropriate to weigh proponent's total burden (including avoidable joint-facility expenses) against the burden thrust on the other carriers.—Chicago, R. I. & P. R. Co. Discontinuance, 328 I.C.C. 278 (286-7)*.

Even though applicant, in its data showing financial results of operation, failed to include net gain realized from piggyback and piggyback feeder operations on trains to be discontinued, and there is precedent for its position that the Commission's accounting regulations preclude it from crediting to those trains any net gain realized from the piggyback traffic hauled thereon, inclusion of those items would only serve to reduce the net operating loss and such reduction would not affect ultimate conclusion; nor would fact that systemwide its overall operations, freight and passenger, are profitable alter the situation. Continued operation of two passenger trains is not required.—Louisville & N. R. Co. Discontinuance, 330 I.C.C. 551 (557, 561).

Although the two passenger trains to be discontinued clearly are responsible for some portion of carrier's track-maintenance costs, record does not show whether unit cost used in computation thereof resulted from a prior joint study, a compromise, or an approximate figure agreed on as a result of that study and, in absence of a showing of actual savings to be realized, the $115,900 claimed as expense of track maintenance must be disallowed; savings of such nature are imprecise and cannot be treated as out-of-pocket expenses which would be eliminated by discontinuance of individual trains. However, giving effect to revenue changes and adjustments, carrier's projected 1967 operating deficit on an avoidable cost basis approximates $560,000 without considering anticipated increases in such costs as wages and rehabilitation of equipment; and such projected passenger deficit is not relatively small in relation to carrier's net income for the years 1964 and 1965.—Western Pac. R. Co. Discontinuance, 330 I.C.C. 577 (581, 583, 587).

In addition, the projected passenger deficit does not disclose true dimensions of carrier's problem; the California P.U.C. estimates that its deficit, computed on a long-term basis, is $1.2 million a year; also, maintenance and repair costs will mount as equipment needs replacement and the carrier's estimate of expenditures required in the near future for renovating, modernizing, and replacing equipment is essentially unrebutted. However, the passenger service losses result from upward spiral in costs of operation and carrier's reluctance to make large capital investments, not from lack of diligence on its part; and record is not convincing that the service is not economically viable, nor does it show that material improvement in carrier's loss experience is hopeless.—Id., pp. 587-8.

The undue burden on interstate commerce attributable to passenger trains to be discontinued is the out-of-pocket loss generated by operating those trains plus the benefit, or minus the loss, to system revenues upon discontinuance thereof. To determine this the Commission examines the out-of-pocket financial operating results of considered trains; also the pro forma results (including the net revenues from traffic to be retained and transported on carrier's remaining trains and the net feeder revenues to be lost to the remaining service upon discontinuance) of proposed discontinuance on system operations of the railroad are considered to determine if an adverse effect upon system revenues and operations might nullify the savings upon discontinuance, thus continuing the burden on interstate commerce.—Southern Pac. Co. Discontinuance, 330 I.C.C. 685 (701, 708).

Many principles governing computations of revenues and expenses in railroad abandonment cases under §1(18) are equally applicable to passenger train discontinuances under §13a; but, unlike abandonments where operating results of both passenger and freight service are examined, in discontinuances of conventional passenger trains it is only the passenger train operation and service that is involved. However, since considered trains are mixed trains, performing both freight and passenger service, the financial results of operation are properly computed from passenger train revenues and expense, and should exclude all freight revenue and expense. Record is convincing that continued operation of the two considered trains would constitute an undue burden on carrier and on interstate commerce.—Id., pp. 703-5, 710.

Since mail and express services on considered trains accounted for 86 percent of revenue in the two years preceding their diversion to other modes and since losses for 1968 without such revenue will exceed $1 million, continued operations of the six trains will unduly burden interstate commerce. Moreover, while a few riders may suffer inconvenience, the record is clear that adequate alternate public transportation service is available from four passenger trains operating daily between St. Louis, Mo., Fort Worth, Tex., and New Orleans, La., in addition to bus service reflecting approximately the same time schedules as the subject trains. Further, although some 45 witnesses testified, only about one-half actually used considered trains; therefore, discontinuance of such trains is allowed. —Missouri Pac. R. Co., Texas & Pacific R. Co. Discontinuance, 333 I.C.C. 419 (427, 436-8).

Proposed discontinuance of 2 trains between St. Louis, Mo. and Fort Worth, Tex., approved. Evidence clearly shows that applicant's loss of mail transportation revenues causes substantial deficits that a steadily declining passenger use cannot reverse. Applicant's proposal to add passenger stops to its remaining trains, the existence of alternative common carrier transportation, and lack of evidence of deliberate downgrading of service further support discontinuance. Although Commission is mindful of prior decisions stating where a railroad retains mail revenues in freight service, its financial capacity to support passenger operations may not be altered, the railroad herein historically realized insignificant amounts of passenger revenue.—Missouri Pac. R. Co., Texas & Pacific Ry. Co. Discon., 333 I.C.C. 820 (837-39).

Operation of indicated trains betweeen Galesburg, Ill. and Omaha, Nebr. ordered continued for 1 year as record indicates that passenger patronage, although declining, remains substantial. Also, return of storage mail traffic and the reduction of overstated loss factors will decrease projected revenue loss substantially.—Chicago, B. & Q. R. Co. Discontinuance of Trains, 334 I.C.C. 248 (258).

Applicant's estimate of achievable savings through elimination of train crews does not reflect the "protected" status of these employees under prior labor agreements which guarantee these employees stated compensation in event of transactions such as herein. Avoidable labor expenses are thus overstated in this respect as well as others indicated and are hence unacceptable.—Penn Central Co. Discontinuance of Trains, 334 I.C.C. 312 (333).

Railroad's data on operating results show that losses from operation of passenger trains it proposes to discontinue have increased greatly in the last 4 years, primarily because of decline in revenues; that the losses in mail and express revenues far exceeded the cost reduction of about $200,000 carrier was able to achieve from curtailed services; and that its revenue from passengers declined almost 20 percent during the same period. Considering the revenues and expenses shown for operation of those trains during the last 2 years, the revenue figures are not questioned since revenue, as reported, is the actual revenue from the trains; and, following an approved method for developing expense items, the expenses, as shown, are actual to the extent that they are available, and based on system average unit-expense data where actual figures were not available. Since the record contains adequate evidence of such expense items, it is concluded that the railroad had losses of $460,243 in 1967, and $576,466 in 1968, from operation of the two trains involved.—Norfolk & W. Ry. Co. Discontinuance, 334 I.C.C. 506 (512-15)*.

But precise amounts of loss cannot be determined on the present record, since the amount which could be saved if the trains were discontinued presents a question. For example, in the repair of locomotives and passenger cars, carrier shows savable expenses of $106,664 and $113,495 for 1968 which, in turn, are based on system average unit-expense figures. A comparison of total locomotive-miles or car-miles for 1967 and 1968 with the dollar amounts for repair charged against the respective years is indicative of whether such expenses can be reduced in proportion to the reduced number of work units involved; and those data indicate that neither the locomotive, nor passenger-car, repair expenses vary directly with the comparable total miles. However, a number of variables are involved and, while it is not possible to evaluate what portion of the expenses would be savable, the data indicate a correlation exists between operating reduced numbers of locomotive-miles and car-miles. Use of a factor of about 20 percent, to eliminate the "overhead" in accounts based on unit-expense data, would reduce repair expenses shown by about $44,000; and, if similarly adjusted, carrier's claimed operating losses would be reduced by about $64,000.—Id., pp. 515-16.

Proposed discontinuance of two passenger trains between Richmond, Va. and Atlanta, Ga. approved in view of staggering financial losses to an applicant whose financial position has steadily declined and the very small number of passengers who may be adequately served by alternative modes of transportation.—Seaboard Coast Line R. Co. Discontinuance, 334 I.C.C. 759 (775).

Discontinuance of two trains between Kansas City, Mo., and New Orleans, La., approved as applicant is suffering substantial financial losses and the minimal public need for this service may be met by alternative common carrier services. The prior case in which the public need was shown to require continued operation of the subject trains is not controlling herein inasmuch as the basic findings therein that patronage of the subject trains would increase upon discontinuance of competing trains has been clearly shown to be wrong.—Kansas City S. Ry. Co. and Louisiana & A. Ry. Co., 334 I.C.C. 807 (820, 822).

Carrier's filing of application for discontinuance is based on anticipated future operating losses from the elimination of mail and express revenues. In absence of evidence as to actual experience in operations under new arrangement, record does not provide a basis for a conclusion as regards the financial state of applicant after elimination of such revenues.—Chicago, B. & Q. R. Co. Discontinuance of Trains, 334 I.C.C. 874 (897).

Inasmuch as applicant is in strong financial condition, in part due to land grant holdings, and as its passenger revenues would have been more substantial in the absence of its deliberate downgrading of service, Commission cannot find applicant's undeniable losses to be an undue burden on interstate commerce.—Northern Pacific Ry. Co. Discontinuance of Trains, 336 I.C.C. 7 (40-41).

Subject trains operate at a substantial loss due to drop in mail revenues and a decline in passenger revenues. Remaining mail revenues are insufficient to support passenger operations and passenger revenues would have to double to offset losses. There is no probative evidence of downgrading of service and, accordingly, operation of subject trains is ordered discontinued.—Erie Lackawanna Ry. Co. Discontinuance of Trains, 336 I.C.C. 206 (234-5).

Discontinuance and reduction in service sought herein of subject passenger trains between Springfield, Mass. and Hartford, Conn. approved inasmuch as evidence is uncontroverted that applicant's deficit from such service is inordinately high and may be reduced by approval herein and in view of applicant's overall financial condition which requires appropriate remedial action.—New York, N.H. & H.R. Co. Trustees Discontinuance, 338 I.C.C. 23 (41).

Commission approved discontinuance of subject trains between Chicago, Ill. and Council Bluffs, Iowa in view of applicant's prior overall financial condition, the loss sustained on such trains, and the net savings that would be lost if the now suspended service were to be restored.—Chicago, R. I. & P. R. Co. Discontinuance of Trains, 338 I.C.C. 68 (83-4)*.

Commission found that continued financial losses of passenger trains between Chicago, Ill. and Port Huron, Mich. require a discontinuance of such trains. Reasonable substitute service exists and ill effect upon public is less damaging than continued financial drain upon applicant.—Grand Trunk W. R. Co. Discontinuance, 338 I.C.C. 254 (275-6).

Commission approved discontinuance of 14 of the 34 trains involved herein in view of obvious minimal need by public for such service, insolvency of the carrier, limited effect upon territory encompassed, proportionately large losses incurred by carrier, relatively few number of passengers involved, and minimal adverse effect on employees.—Penn Central Transportation Co. Discontinuance, 338 I.C.C. 380 (478-9).

—Computation; out-of-pocket costs: [Vols. 19, 21].—Joint terminal and facility expenses are savable to the carrier, in whole or in part, depending on whether its use of the facility ceases entirely or is merely reduced upon discontinuance of considered trains; and such expenses should be allowed as prospective savings where supported by specific and concrete proof. A particular carrier's proportionate share of joint facility expenses is computed in various ways and, since such expenses may include numerous cost items (depending on the agreement among carriers using the facility), it is incumbent on proponent carrier to show the underlying basis on which the expenses are computed and the precise manner and extent to which savings will be realized upon discontinuance of subject trains; among other things, record should show that claimed joint facility expenses include proper items of cost directly assignable to subject trains and that they will not be further incurred by the carrier as a result of the discontinuance.—Chicago, R.I. & P.R. Co. Discontinuance, 328 I.C.C. 278 (286-7)*.

On further consideration, additional evidence presented by proponent railroad to clarify and supplement that already of record, including excerpts from agreements governing use of joint facilities and data showing total number of units of all roads using each facility, total expenses, cost per unit, proponent's total units and total expenses with and without operation of trains to be discontinued, shows that it used approved method for computation of its share of joint facilities expenses incurred in operation of considered trains; the expenses are reasonably related to operation of the facilities, include proper items of cost, and are direct expenses of subject trains. Record, as supplemented, clearly shows that carrier would have realized substantial savings in its terminal and joint-facility expenses if it had not operated those trains during the preceding year; analysis of restated revenues and allowable out-of-pocket costs for first 6 months of that year shows that its total savable expenses attributable to those trains would be almost $90,000 more than amount allowed in prior report.—Id., pp. 288-90, 293.

Costs associated with maintenance of way and structures are not savable since they would not be eliminated upon discontinuance of passenger trains. See 320 ICC 648. Moreover, to the extent that unfilled firemen positions are required under Arbitration Award No. 282 to be filled in freight service, their salaries and benefits would not be saved assuming discontinuance of all passenger trains. However, depreciation charges of locomotive equipment are allowable as avoidable costs on the considered trains to the extent of their use. When equipment is depreciated on a group basis, depreciation continues to be accrued until the equipment is retired regardless of its age and when new equipment replaces it, depreciation charges continue at rates set by the Commission.—Kansas City S. Ry. Co. and Louisiana & A. Ry. Co. Discontinuance, 333 I.C.C. 51 (62-64).

Commission found that expenses claimed as labor portion for repairs and certain "overhead" items for carrier's shop facilities are non-savable items. Depreciation was also held a non-savable expense where equipment was not to be retired. Additionally, the carrier overstated the wages of involved employees and failed to consider the value of certain company-related transportation.—Southern Pac. Co. Discontinuance, 333 I.C.C. 783 (788-93).

Commission rejected applicant's estimate of savable average casualty expenses inasmuch as such estimate is based on applicant's overall system expenses where the average yearly expense of the involved trains is more appropriate and accurate as an approximation.—Seaboard Coast Line R. Co. Discontinuance, 334 I.C.C. 759 (774-5).

Inasmuch as subject trains ran only 180 days during the year on a reduced schedule, applicant's depreciation figure based on 1 year's service is overstated. Also, expenses have not been based on the actual number of cars essential to the operation and should be reduced.—Chicago, M., St. P. & P. R. Co. Discontinuance of Trains, 336 I.C.C. 105 (116-7).

Applicant's projected savings in labor costs is overstated as most of the involved employees enjoy a protected labor status and such saving would not be realized immediately. Also, to the extent express revenue has been shifted from subject trains to applicant's freight service, applicant's ability to continue operating the subject trains has not been significantly reduced.—Penn Central Transportation Co. Discontinuance, 336 I.C.C. 416 (439, 450-52).

Commission reaffirmed its finding in Chicago South, 320 ICC 440, 453, that maintenance-of-way and structures expense is not properly includable as operational savings. Also, maintenance of equipment expense, various taxes, rents, and expenses for transportation not eliminated by this proposal are nonsavable costs.—Chicago South Shore & S.B.R. Discontinuance, 336 I.C.C. 454 (463-5).

Applicant's estimated savings from proposed discontinuance are overstated inasmuch as applicant would still incur the costs of transporting free passengers, and the considerable amount of company mail and materials presently moving on subject trains.—Penn Central Co. Discontinuance of Trains, 336 I.C.C. 518 (525-6).

In computation of short-term savings, the accuracy of input data need only come within a range that provides a substantial and persuasive evidentiary basis for decision. —Penn Central Transportation Co. Discontinuance, 338 I.C.C. 380 (478).

—Feeder value: [Vols. 19, 21].—Feeder revenue of trains to be discontinued (revenues derived by carrier's other system trains from passengers and traffic interchanged with subject trains), developed from a ticket count for one month, is not understated merely because it is based upon a one-month study; nor is it overstated by reason of carrier's application of the 50-percent cost formula, used in abandonment and discontinuance proceedings when costs associated with production of feeder revenues cannot be accurately determined. In the absence of a more precise method, the 50-percent formula has been used in prior discontinuance proceedings as reasonably reflecting the cost of producing contributed traffic.—Chicago, R.I. & P.R. Co. Discontinuance, 328 I.C.C. 278 (291-2)*.

30. Employees.—[Vols. 18, 19, 21].—While the Commission gives consideration to the probable effect of a §13a train discontinuance on railroad employees in determining whether public convenience and necessity required continuation of such service, it has consistently held that, unlike powers granted in other sections of the Act, it has no statutory authority to condition a discontinuance under §13a(1) on labor protective conditions. Interpretation by an agency of a statute which it is charged with administering is entitled to great weight; and the Commission's interpretation of §13a(1) in 307 ICC 59, has a "reasonable basis in law"; therefore, for the reasons stated in that decision, the agency's interpretation of §13a(1) should be affirmed.—Illinois Commerce Commission v. United States, 347 F. Supp. 1217 (1219-20)*.

While public convenience and necessity embrace consideration of the interests of employees, the Commission is without warrant in the law to impose employee protection conditions in passenger train discontinuances. And, since probable effect which discontinuance of considered commuter trains will have on the railroad's employees are not such as to require continued operation of those trains, it would be contrary to the national transportation policy to require continuance of wasteful and uneconomic transportation services merely to preserve jobs of the employees.—Louisville & N.R. Co. Discontinuance of Trains, 320 I.C.C. 669 (695).

Commission restated its findings in 307 ICC 59, that it is without authority to impose conditions for the protection of railway employees who may be adversely affected as a result of discontinuance of passenger service.—Chicago, B. & Q. R. Co. Discontinuance of Trains, 334 I.C.C. 248 (258-9).

Although term "public convenience and necessity" is broad enough to embrace consideration of employee interests in §13a proceedings, this Commission has uniformly held that it lacks power to impose employee protective conditions (see 307 ICC 59, 74-76).—Penn Central Transportation Co. Discontinuance, 338 I.C.C. 380 (467-8).

35. Orders of the Commission.—[Vols. 19, 21 .—See also City of Chicago v. United States, at n. 15 *supra*, and Jefferson City v. United States, at n. 2 *supra*.

Whether investigation should be made of a §13a(1) discontinuance is within the Commission's discretion, a matter that is not reviewable; however, when it undertakes to investigate, it is under the mandate of §14(1) to make a report in respect thereto and, as a decision to investigate indicates that a substantial statutory question exists, the Commission report deals with the merits. Technical form of the order is irrelevant since, whether discontinuance is allowed or not, the Commission is deciding the merits in each case. Instant cases are similar to the "negative orders" dealt with in 307 US 125; and, in accordance with that decision, aggrieved persons may obtain judicial review of Commission orders discontinuing its investigations in two §13a(1) passenger train discontinuance cases. District court decisions, reversed.—City of Chicago v. United States, 396 U.S. 162 (164-7)*.

District court decision remanding for consolidation and further hearings (1) Commission report and order allowing Chicago & E.I.R. to discontinue two trains ("Georgian") between Chicago and Evansville, Ind., operated in conjunction with Louisville & N.R. trains between Evansville and Atlanta, Ga., because notice of the discontinuance was not given to the governors and people of Kentucky, Tennessee, and Georgia, and (2) Commission decision approving L&N's discontinuance of its "Hummingbird" trains (which connect with the "Georgian" at Nashville, Tenn.) because of its close relationship with the C&EI case, reversed and remanded. The dissent argues that "such train" in §13a(1) could be interpreted as either the C&EL's Chicago-Evansville train or the "Georgian" between Chicago and Atlanta; but only the Chicago-Evansville discontinuance was before the Commission when it ruled that statutory notice requirements had been met. On that issue, the court defers to the interpretation of the administrative agency having supervision over the problem. Consolidated causes remanded for district court review of any unsolved questions on the merits.—United States v. City of Chicago, 400 U.S. 8 (9-11)*.

Judicial review of an administrative agency's findings is quite restricted; the court is without authority to intervene, in action to review the Commission's order which authorized three railroads to discontinue certain interstate passenger trains and permitted one of them to effect proposed changes in service, unless there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion. Therefore, since the Commission had jurisdiction over proposals of the railroads, and the evidence amply supported its findings that continuance of the trains was not required by public convenience and necessity and that continued operation would unduly burden interstate commerce, the reviewing court will not disturb the Commission's order. Temporary restraining order now in effect is dissolved; complaint dismissed.—City of Chicago v. United States, 300 F. Supp. 115 (118)*.

When, after defendant railroad filed with the Commission a statement proposing to discontinue two passenger trains and plaintiffs filed a protest thereto, the Commission informed plaintiffs by a "Notice" that it had decided not to investigate proposed discontinuance, the Commission's discretionary decision not to interfere with the cutbacks in service is not reviewable by the court. [Citing 238 F. Supp. 107.] Accordingly, plaintiff's request for declaratory and injunctive relief is denied; defendant's motion to dismiss for failure to state a claim on which relief can be granted, and for lack of subject matter jurisdiction, granted.—Anderson v. United States, 309 F. Supp. 494 (495-6)*.

Since the Commission is entirely a creature of Congress, the determinate question in suit to set aside its decision, which allows defendant carrier to discontinue two interstate passenger trains, is not what the agency thinks it should do but what Congress has said it can do. Accordingly, though the Commission took much testimony and did much work on the case, plaintiffs are entitled to summary judgment when, since failure to comply with notice requirements of §13a(1) deprives the Commission of its jurisdiction to approve or disapprove the discontinuance, its order instituting the investigation was defective. However, in the event that holding on §13a(1) notice requirements is not sustained, a careful review of entire record makes it clear that, as to issues raised on the merits, the court would not be justified in setting aside the decision; on record before it, the Commission's findings on the merits are proper and supported by substantial evidence; and plaintiffs failed to carry the burden of showing that the findings as to public convenience and necessity, or the Commission's use of cost, revenue or other financial data in carrier's exhibits, were erroneous.—Pennsylvania Public Utility Commission v. United States, 311 F. Supp. 1024 (1029-31)*.

The court's function, in suit to set aside Commission order requiring railroad to continue operating its passenger trains ("Wabash Cannonball") between St. Louis and Detroit for a 1-year period, is to determine whether the ultimate findings are supported by substantial evidence on the whole record and do not involve an error of law. Plaintiff's argument that the Commission's finding of public need is not supported by substantial evidence but, rather, resulted from an "arbitrary rejection" of marketing survey made by Little, Inc. for the railroad, is premised on the fact that the study was not in terms discussed in the Commission report; however, failure to specifically refer to evidence may not be equated with a failure to consider it. Moreover, there is no legal mandate that a Commission report explicitly refer, and state weight accorded, to the testimony of each witness; and considered report stated that contentions not specifically discussed had been considered and found to have no merit or material significance. The Commission's decision is not arbitrary or capricious, is in accord with applicable law, and is supported by substantial evidence on the whole record; sustained.—Norfolk & W. Ry. Co. v. United States, 316 F. Supp. 1396 (1399-1400, 1402)*.

Administrative record in Commission proceedings under §13a(2) wherein the New Haven railroad was authorized to discontinue all passenger service between Boston, Mass., and certain suburban communities, provided the authority was exercised within one year from effective date of the Commission's order, contains substantial evidence on which to base a finding that New Haven effectively discontinued those services by, within 1-year period allowed in the order, posting notices in all stations served by trains involved that on date specified New Haven's service would be terminated in accordance with Commission authority and that, pursuant to its contract with the Massachusetts Bay Transp. Authority, future service would be provided by the railroad for the account of MBTA, and also, by issuing new timetables informing the commuting public of the new relationship between it and the MBTA.—Town of Norwood, Mass. v. United States, 318 F. Supp. 1391 (1392-3)*.

Consequently, the court finds that when the New Haven was reduced to role of a disclosed agent of a disclosed principal, it had discontinued its service within meaning of the Commission's discontinuance order, and, accordingly, the Commission did not abuse its discretion in its subsequent denial of plaintiff's petition for a declaratory order. Moreover, since sufficient facts of record support the finding of discontinuance, there is no merit to plaintiff's contention that the Commission relied on extra-record evidence to support its order denying the requested declaratory order. Summary judgment for defendants; and plaintiff's motion for summary judgment denied.—Id., p. 1393.

There is no merit in plaintiffs' contention that Commission order permitting Baltimore & O. R. to discontinue two passenger trains between Chicago, Ill., and Akron, Ohio, should be reversed because the financial condition of Chesapeake & O. Ry., which owns 94 percent of B&O's stock, was not made part of the record. Although "piercing the corporate veil" may be warranted in some situations, as where fraud or misleading representations are made or where some unlawfulness may be involved, no question of fraud or unlawfulness has been raised. Moreover, the fact that C&O is profitable would not change any relevant facts in instant case because B&O itself shows a net income for three recent years. And since the Commission in effect found (with support in the record) the demands of public convenience and necessity to be slight, it was not required to make an extensive examination of B&O's financial condition. Order of the Commission, sustained.—Public of State of Indiana v. United States, 325 F. Supp. 1223 (1227)*.

Action to set aside the Commission's findings that operation by the Milwaukee railroad of two passenger trains (the Afternoon Hiawathas) between Chicago, Ill., and Minneapolis, Minn., is not required by public convenience and necessity, and that continued operation of those trains will unduly burden interstate commerce, dismissed as moot because the railroad had entered into a contract with Amtrak prior to May 1, 1971, pursuant to the Rail Passenger Service Act of 1970, and the trains in issue were not made part of Amtrak's national network.

Since the Milwaukee is no longer obligated to operate rail passenger service as a result of its contract with Amtrak, further proceedings in instant case would be purely academic. In such circumstances, the action must be dismissed, since the court has no power to decide moot questions or abstract propositions.—Illinois Commerce Commission v. United States, 347 F. Supp. 1217 (1219, 1220)*.

In accordance with decision in 317 ICC 761, since the Commission's jurisdiction in prior §13a(1) proceeding expired with expiration of the 1-year period specified in the order, it has no power to order restoration of the operations or services thus discontinued; therefore, request by protestants for restoration of service must be denied.—Chicago, M., St. P. & P. R. Co. Discontinuance, 320 I.C.C. 566 (584).

Regulations of the Commission

36 FR 5219, March 18, 1971, Part 1122: Discontinuance or Change of Operation or Service, §1122.9 Notice of discontinuance filed pursuant to the Rail Passenger Service Act of 1970, §401(a)(1), added, effective on date of order.

Section 14. Reports and decisions of Commission—(1) Reports of investigation by Commission.—[Unchanged. See vol. 9, p. 7636.]

Amendments, see footnotes, vol. 3, p. 1858; historical note, p. 1858.

Notes of Decisions

Volume 3—p. 1858; Volume 7—p.5497; Volume 9—p. 7636; Volume 11—p. 9263; Volume 12—p. 10308; Volume 13—p. 11014; Volume 14—p. 11515; Volume 15—p. 12099; Volume 16—p. 12743; Volume 17—p. 13428; Volume 18—p. 14188; Volume 19—p. 15367; Volume 21—p. 16878.

1. The report; requisites. —[Vols. 3, 7, 9, 11-19, 21].—See also Tose, Inc. v. United States, at APA, 5 USC, *Reports;* and United States v. Allegheny-Ludlum Steel Corp., at APA, 5 USC, *Procedure.*

As a result of the Commission's consideration of two §5 and two related §207 applications (involving proposed purchase of portions of vendor's operating rights by different vendees) on a consolidated record and in one report and order, the report, being one document, did not separate item by item the findings in regard to each application; however, the method of drafting its report certainly cannot be fatal to the Commission's orders. Form does not govern substance, and the Commission's findings in the §207 proceedings are fully applicable to the same issues in the purchase cases. Furthermore, a study of the Commission report warrants the conclusion that its discussion rationally separates and disposes of all issues raised in each proceeding.—Consolidated Copperstate Lines v. United States, 293 F. Supp. 858 (861-2)*.

In action to enjoin and set aside Commission order, insofar as it concludes that proposal to increase waterborne charge at western ports was not shown to be just and reasonable, challenged order is supported by findings in the report that (1) testimony presented by the carriers was inconclusive, (2) current application of the waterborne charge weakened the justification for proposed increase, and (3) the western carriers presented no clear and precise representative cost evidence showing a need for additional revenues. While the Commission may not find merely that the carriers failed to meet their burden of proof, its determination in considered case necessarily was required to be phrased in negative terms; and where the ultimate finding is in negative form, it is required only that the report contain sufficient basic findings of fact to warrant a reviewing court to conclude that the Commission did not act without rational grounds. The Commission's report contains adequate findings to support its order; complaint dismissed.—Atchison, T. & S.F. Ry. v. United States, 334 F. Supp. 651 (653-4, 655)*.

In approving proposed new per-car charges for in-transit inspection of grain in the West, the Commission failed to explain its departure from prior norms and its legal basis for doing so. Though it recognized that western railroads' line-haul grain rates included the first stop for inspection, the Commission did not require any rate reduction in relation to the reduced service; nor did it repudiate or overrule its prior decisions that a proposed separate charge for an accessorial service, presently included in line-haul rates, cannot be approved without substantial evidence that such charge is justified when measured against the overall services rendered and overall reasonableness of the resulting increased aggregate rate. Thus, for purposes of the court's review, the Commission's distinguishing of instant case from its prior decisions, and its legal basis for the decision under review, are not adequately explained. Case remanded for further Commission proceedings consistent with the court's opinion; proposed charges suspended and held ineffective until otherwise ordered by the court.—Wichita Board of Trade v. United States, 352 F. Supp. 365 (368-9)*.

Section 14. (2). —[Unchanged. See vol. 9, p. 7639.]

Section 14. (3) Publication of reports and decisions; printing and distribution of annual reports. —[Unchanged. See vol. 9, p. 7639.]

Amendments, see footnotes, vol. 3, p. 1862; historical note, vol. 11, p. 9265.

Notes of Decisions

Volume 3—p. 1862; Volume 12—p.10308; Volume 13—p. 11015; Volume 14—p. 11516.

3. Judicial notice of Commission's reports and orders. — See Southern Pac. Co. Modifications of Systems, §13(1), n. 140.

Section 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.—(1) Commission empowered to determine and prescribe rates, classifications, etc. —[Unchanged. See vol. 9, p. 7640, vol. 11, p. 9265.]

Amendments, see footnotes, vol. 3, p. 1864, vol. 7, p. 5500; historical notes, vol. 3, p. 1865, vol. 9, p. 7640, vol. 13, p. 11015, vol. 21, p. 16880.

Historical Note

Nothing in the amendments to §15 made by §202 of the act of Feb. 5, 1976, Pub. L. 94-210, 90 Stat. 31, shall be construed to modify the application of §§2,3, or 4 of the Interstate Commerce Act in determining the lawfulness of any rate or practice; to make lawful any competitive practice which is unfair, destructive, predatory, or otherwise undermines competition which is necessary in the public interest; to affect existing law or the Commission's authority with respect to rate relationships between ports; or to affect the Commission's authority and responsibility to guarantee the equalization of rates within the same port. The Secretary of Transportation and the Commission are separately to study the effect of the amendments made by §202 on the development of an efficient and financially stable railway system and to transmit the results of their studies to Congress.—90 Stat. 39.

Notes of Decisions

Volume 3—p. 1869; Volume 7—p. 5501; Volume 9—p. 7641; Vol. 11—p. 9265; Volume 12—p. 10309; Volume 13—p. 11015; Volume 14—p. 11517; Volume 15—p. 12099; Volume 16—p. 12745; Volume 17—p. 13429; Volume 18—p. 14189; Volume 19—p. 15368; Volume 21—16880;

Nature of Commission's Functions

48. Jurisdiction statutory. —[Vols. 3, 7, 11, 19].—See Rardin Grain Co. v. Illinois Central R. Co., at §6(1), n. 2.

Nature of Matters Subject to Commission's Determination

50. Rates, fares, and charges. —[Vols. 3, 7, 9, 11, 13, 14, 17-19].—See Electronic Industries Assn. v. United States, at §13(1), n. 3.

55. Regulations, practices, and classifications, in general. —[Vols. 3, 7, 9, 11-16].—See Detroit Harbor Terminals, Inc., Terminal Allowance, at §1(5), n. 521.

Basis for Determination by Commission

67. Powers exercisable only when Act violated. —[Vols. 3, 7, 9, 12, 13].—The maintenance of reduced joint rates with the use of less than 70-ton cars could be accomplished only at the expense of revenue losses to the carriers concerned. The primary consideration is how to achieve a balance in rail transportation costs between competing shippers under similar transportation conditions without unduly sacrificing the revenues of the carriers. Since the evidence establishes substantial savings from the use of the larger cars and there is nothing in the record to establish any extra cost in providing such cars, these savings to be accomplished through innovations in equipment, service and technological efficiencies should be promoted under the national transportation policy, rather than discouraged, and passed on to all shippers in competing origins. However, the refusal of respondent to enter into reduced joint rates tied to use of less than 70-ton cars does not constitute a violation of the Act and prescription of such a basis of use, under §15(1), is not justified.—Coal, Ky., Tenn. and Va. to North Carolina, 329 I.C.C. 572 (586)*.

Section 15. (2) Orders of Commission. —[Unchanged, except by the act of Feb. 5, 1976, Pub. L. 94-210, §302, 90 Stat. 48, ", not less than thirty days, and shall" is struck out and "as the Commission may prescribe. Such orders shall" is inserted in lieu thereof. See vol. 9, p. 7649.]

Amendments, see footnotes, vol. 3, p. 1901; historical notes, p. 1901; vol. 21, p. 16882.

Notes of Decisions

Volume 3—p. 1901; Volume 7—p. 5514; Volume 9—p. 7649; Volume 11—p. 9267; Volume 13—p. 11017; Volume 14—p. 11519; Volume 16—p. 12747; Volume 17—p. 13430.

9.—Suspension or modification by Commission. —[Vols. 3, 7, 9, 11, 14, 16].—The outstanding unexpired order published in 215 ICC 684 is hereby modified to allow petitioner railroad to increase its charges for protective service on perishable freight not to exceed 25 percent of its charges published under §2 of the appropriate tariff.—Charges for Protective Service to Perishable Freight, 332 I.C.C. 136 (152)*.

Section 15. (3) Establishment of through routes, joint classifications, joint rates, fares, etc. —[Unchanged, except by the act of Feb. 5, 1976, Pub. L. 94-210, §203, 90 Stat. 39, the new sentence, as set forth below, is added to the end of the section. See vol. 11, p. 9267.]

***With respect to carriers by railroad, in determining whether any such cancellation or proposed cancellation involving any common carrier

by railroad is consistent with the public interest, the Commission shall, to the extent applicable, (a) compare the distance traversed and the average transportation time and expense required using the through route, and the distance traversed and the average transportation time and expense required using alternative routes, between the points served by such through route, (b) consider any reduction in energy consumption which may result from such cancellation, and (c) take into account the overall impact of such cancellation on the shippers and carriers who are affected thereby.

Amendments, see footnotes, vol. 3, p. 1905, vol. 11, pp. 9267-9268; historical notes vol. 3, p. 1906, vol. 9 p. 7651, vol. 21, p. 16882

Notes of Decisions

Volume 3—p. 1907; Volume 7—p. 5516; Volume 9—p. 7651; Volume 11—p. 9268; Volume 12—p. 10310, Volume 13—p. 11017; Volume 14—p. 11520; Volume 15—p. 12101; Volume 16—p. 12747; Volume 17—p. 13431; Volume 18—p. 14190; Volume 19—p. 15370; Volume 21—p. 16882.

22. Joint rates, fares, and charges. —[Vols. 3, 7, 9, 13-15, 17, 18, 21].—Refusal of defendants to participate in reduced rates conditioned on the use of 70-ton cars was found not justified on the record. Such a refusal to supply the facilities necessary to provide service to complainant restricts the free movement of coal and access to the market at reasonable rates on a related competitive basis and has, in effect, closed the routes in a commercial sense in contravention of the basic purpose of §15(3) of the Act. This refusal also violates §1(6) of the Act and must be condemned in order to provide the complainant, and its shippers, with free, open, and adequate transportation service.—Coal, Ky., Tenn. and Va. to North Carolina, 329 I.C.C. 572 (587)*'

50. Cancellation of through routes; joint rates. —[Vols. 12, 14, 15, 17-19, 21].—Following the standard definition of "consistent with public interest", i.e., the interest of the general public as manifested by the traffic moved and capable of being moved over the routes which would be closed, as well as the interest of the other carriers which may participate in the [specified] rates [302 ICC 637, 653, 303 ICC 103, 106], the Commission held that proposed through routes and joint rates cancellation would contravene the provisions of §15(3).—Lake Cargo Coal, Ky., Va., and W. Va. to Ashtabula Harbor, 326 I.C.C. 63 (71)*.

Section 15. (4) Through routes to embrace entire length of railroad; temporary through routes. —[Unchanged. See vol. 11, p. 9269.]

Amendments, see footnotes, vol. 3, 1924, vol. 11, pp. 9269-9270; historical notes, vol. 3, p. 1924, vol. 9, p. 7659, vol. 16, p. 12748, vol. 21, p. 16885.

Notes of Decisions

Volume 3—p. 1925; Volume 7—p. 5521; Volume 9—p. 7659; Volume 11—p. 9270; Volume 12—p. 10311; Volume 13—p. 11018; Volume 14—p. 11521; Volume 15—p. 12103; Volume 16—p. 12749; Volume 17—p. 13434; Volume 18—p. 14197; Volume 19—p.15376; Volume 21—p. 16885.

Relation to Other Sections

9. Sec. 3(1). —[Vols. 3, 7, 14-17, 19].—Section 15(4), which recognizes a carrier's right to its long haul, is by its express terms subordinate to provisions of §3; protection of the long haul is withheld where undue preference and prejudice forbidden by §3 are shown to exist.—Alabama State Docks Dept. v. Alabama, T. & N. R. Co., 323 I.C.C. 185 (189)*.

Applicability

32. Existing routes. —[Vols. 3, 7, 9, 12, 14, 16, 18, 21].—The physical ability to interchange traffic is not controlling in determining status as a connecting carrier. A connecting line is not confined to those carriers having a direct physical connection, see 270 US 287, but rather it applies to all lines making up a through route, see 284 US 288. Complainant and defendants are connecting carriers as they hold themselves out to the public as participants in through routes via the Baton Rouge gateway.—Missouri Pac. R. Co. v. Louisiana & A. Ry. Co., 332 I.C.C. 569 (578-9).

Section 15. (5) Transportation of livestock in carload lots; services included. —[Unchanged. See vol. 9, p. 7664.]

Historical note, vol. 3, p. 1940.

Notes of Decisions

Volume 3—p. 1940; Volume 7—p. 5530; Volume 9—p. 7664; Volume 11—p. 9271; Volume 12—p. 10313; Volume 13—p. 11019; Volume 14—p. 11522; Volume 15—p. 12105; Volume 16—p.12751; Volume 18—p.14199; Volume 19—p. 15377.

Section 15. (6) Commission to establish just divisions of joint rates, fares or charges; adjustments.—[Unchanged, except by the act of Feb. 5, 1976, Pub. L. 94-210, §201, 90 Stat. 34, paragraph (6) is redesignated (6)(a), and new paragraphs (b), (c), and (d) are added, as set forth below. See vol. 9, p. 7669.]

(b) Notwithstanding any other provision of law, the Commission shall, within 180 days after the date of enactment of this subdivision, establish, by rule, standards and procedures for the conduct of proceedings for the adjustment of divisions of joint rates or fares (whether prescribed by the Commission or otherwise) in accordance with the provisions of this paragraph. The Commission shall issue a final order in all such proceedings within 270 days after the submission to the Commission of a case. If the Commission is unable to issue such a final order within such time, it shall issue a report to the Congress setting forth the reasons for such inability.

(c) All evidentiary proceedings conducted pursuant to this paragraph shall be completed, in a case brought upon a complaint, within 1 year following the filing of the complaint, or, in a case brought upon the Commission's initiative, within 2 years following the commencement of such proceeding, unless the Commission finds that such a proceeding must be extended to permit a fair and expeditious completion of the proceeding. If the Commission is unable to meet any such time requirement, it shall issue a report to the Congress setting forth the reasons for such inability.

(d) Whenever a proceeding for the adjustment of divisions of joint rates or fares (whether prescribed by the Commission or otherwise established) is commenced by the filing of a complaint with the Commission, the complaining carrier or carriers shall (i) attach thereto all of the evidence in support of their position, and (ii) during the course of such proceeding, file only rebuttal or reply evidence unless otherwise directed by order of the Commission. Upon receipt of a notice of intent to file a complaint pursuant to this paragraph, the Commission shall accord, to the party filing such notice, the same right to discovery that would be accorded to a party filing a complaint pursuant to this paragraph.

Historical notes, see vol. 3, p. 1945, vol. 21, p. 16887.

Notes of Decisions

Volume 3—p. 1946; Volume 7—p. 5537; Volume 9—p.7669; Volume 11—p. 9273; Volume 12—p. 10313; Volume 13—p. 11019; Volume 14—p. 11523; Volume 15—p. 12106; Volume 16—p.12752; Volume 17—p. 13437; Volume 18—p. 14200; Volume 19—p. 15378; Volume 21—p. 16887.

Construction

7. In general. —[Vols. 3, 7, 9, 12-17, 19, 21].—Argument that requirement of §15(6) that divisions be fixed as among the several carriers means that the Commission may not recognize geographic areas or rate territories in establishing primary divisions was rejected by the Supreme Court in 261 US 184 shortly after enactment of §15(6).—Official-Southern Divisions, 325 I.C.C. 1 (30)*; and while requirement that the Commission give due consideration to importance to the public of the transportation services of the carriers concerned does not embody a sectional concept, but entails consideration of the public interest of all concerned, it does not require uniformity of divisions as between the territorial carrier groups, since §15(6) was designed to help the weak by preventing needed revenue from passing to more prosperous connections.—Id., p.27.

There is no statutory or other legal requirement that Commission find, as a prerequisite to using relative costs of service as basis for prescribing new divisions of joint, interterritorial rates, that higher costs of one group of participating carriers result from inherent territorial disadvantages. Congress enacted §15(6) with sweeping authority so as not to restrict Commission's determination for such divisions to comparisons of costs of service or other factors.—Official—Southern Divisions, 337 I.C.C. 74(92-3)*.

Prescription of Divisions

21.—Under Transportation Act, 1920. —[Vols. 3, 7, 9, 15, 17].—See Western Pac. R. Co. Discontinuance, at §13a, n. 22.

22. Mode and basis of establishment affecting power to change.—[Vols. 3, 7, 9, 14-16, 21].—Findings in original report (321 ICC 17,

84) and in first supplemental report (322 ICC 491, 524), concerning payment of intermediate switching charges from primary divisions, interpreted, to apply on all transcontinental traffic interchanged at St. Louis, Mo., or East St. Louis, Ill., by the named intermediate switching carriers, regardless of whether those carriers transport the shipments across the Mississippi River.—Akron, C. & Y. R. Co. v. Atchison, T. & S. F. Ry. Co., 339 I.C.C. 540 (545)*.

Lines of the Louisville & Nashville Railroad and Southern Railway System which run between Cincinnati, Ohio, and East St. Louis, Ill, found to be in southern territory, and thus the bridge traffic moving between official and transcontinental territories over these lines is not subject to the findings and order of the Commission in the original report (321 I.C.C. 17, 76).—Id., p. 551.

Rulings on certain primary dividing points, (border points) prescribed in original report (321 ICC 17, 85-87), first supplemental report (322 ICC 491, 525-527), and third supplemental report (335 ICC 895, 902), amplified to include as border points: El Paso, Texas, for westbound traffic over route H; Pueblo, Colo., for eastbound traffic, and Belen or Rincon, N. Mex., for westbound traffic over route I; and Denver, Colo., for eastbound traffic, and Belen or Rincon for westbound traffic over route J.—Id., p. 548.

26. Discretion of Commission.—[Vols. 3, 7, 9, 12, 21].—Commission order prescribing new divisions of joint rail rates on traffic between official and southern territories, on finding that (on a relative cost basis) northern lines' higher costs of rendering the service justified an increased share of the revenues, held not to be supported on the record when, having stated that its standard for resolving the question was the relevant costs of handling specific north-south traffic to which the divisions apply, the Commission accepted unadjusted Rail Form A territorial average costs as reflecting northern lines' higher costs of handling the north-south traffic. There are no automatic restrictions on scope of the remedies which the Commission may choose in solving a divisions case or in forming its expert judgment as to what scale of costs should be used; exact division of each rate of each carrier is not necessary, and precision and exactitute in a mathematical sense are not possible; however, nature and volume of the traffic in question must be known and exposed, if costs of other traffic are to govern a division of rates.—Baltimore & O. R. Co. v. Aberdeen & R. R. Co., 393 U.S. 87 (90-92)*.

Also, when Rail Form A costs are shown to be distorted as applied to particular traffic over which a divisions dispute arises, some effort must be made to make an adjustment which fairly reflects difference in the costs or to make it clear that there is in fact no basic, material difference; reliance on administrative "expertise" is not sufficient. Though the Commission made some "adjustments" in Rail Form A territorial average costs to reflect costs attributable to north-south traffic in issue (respecting 5 of 12 proposed adjustments), it should make specific findings on several items of the so-called "adjustment," including (1) question of the northern lines' commuter deficit, (2) costs of interchanging cars in north-south traffic at territorial border points, and (3) empty freight car return ratios. District court's ruling that, absent any evidence relating territorial average costs to the north-south traffic, the Commission's use of such average costs did not meet statutory requirement for precise and relevant findings, and its remand of the case for further proceedings, affirmed as modified.—Id., pp. 92-6.

Prescription of equitable divisions involves the making of practical judgments rather than the solving of a problem with mathematical certainty. Careful evaluation of the factors other than costs which the Commission must consider under §15(6) does not disclose that they require either northern or southern lines to be accorded higher divisions of joint interterritorial rates than the other group. The cost evidence, weighed in the same balance, affords a reasonable basis for exercise of practical judgment; everything else being substantially equal, the parties' relative costs reflecting their respective operations as to the traffic involved can properly serve as a guide for determination of just, reasonable, and equitable divisions for the future.—Official—Southern Division, 325 I.C.C. 1(49-50)*.

34. The order. —[Vols. 3, 7, 9, 12, 14, 16].—Provisions of order prescribing new divisions of Official—Southern joint rail rates are not separable, as argued by plaintiffs seeking to set aside only that part which prescribed increased divisions for northern lines; the Commission determined only one issue in two steps, i.e., it found that old divisions were unjust, unreasonable, and inequitable and prescribed new divisions for the future. The court has authority, under 28 USC §2321, to set aside "in whole or in part" an order of the Commission; however; since the order in question is not severable and the court lacks jurisdiction to prescribe divisions of rates, function of the court ends if it finds that the order is contrary to law or unsupported by adequate findings or substantial evidence. Order, in its entirety, set aside and cause remanded to the Commission for further proceedings consistent with the court's opinion.—Aberdeen & R. R. Co. v. United States, 270 F. Supp. 695 (699-700, 712-13)*.

Reasonableness

40. In general. —[Vols. 3, 19].—See Washington & Old Dominion R. Abandonment—Virginia, at §1(18), n. 60, and Western Pac. R. Co. Discontinuance, at §13a, n. 22.

Section 15. (7) Commission to determine lawfulness of new rates; suspension; refunds. —[Unchanged, except by the act of Feb. 5, 1976, Pub. L. 94-210, §202, 90 Stat. 36, the new sentence, as set forth below, is added to the end of the section. See vol 11, p. 9273.]

***This paragraph shall not apply to common carriers by railroad subject to this part.

Amendments, see footnotes, vol. 3, p. 1957, vol. 11, p. 9274, historical notes, vol. 3, p. 1958, vol. 21, p. 16895.

Notes of Decisions

Volume 3—p. 1959; Volume 7—p. 5543; Volume 9—p. 7676; Volume 11—p. 9274; Volume 12—p. 10314; Volume 13—p. 11019; Volume 14—p. 11524; Volume 15—p. 12107; Volume 16—p. 12753; Volume 17—p. 13438; Volume 18—p. 14200; Volume 19—p. 15379; Volume 21—p. 16895.

In General

1. Jurisdiction of courts in preventing change of rates. —[Vols. 3, 7, 17-19, 21].—See also Electronic Industries Association v. United States, at §13(1), n. 3.

Order of the Supreme Court stayed, on condition set forth, district court judgment remanding the Commission's decision (which approved proposed rail charges for in-transit inspection of grain) and suspending proposed charges in question until that court ordered otherwise, pending final determination of the appeal. Stay is subject to the condition that each railroad collecting the challenged in-transit inspection charges shall (1) keep accurate accounts of amounts received therefrom during the stay, and (2) voluntarily refund such charges (with interest) to shippers if the lower court decision is affirmed. If the district court is not affirmed, amounts of the charges collected will be disposed of by such further order as the court may deem appropriate.—Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade, 409 U. S. 801.

Although the District Court had power to suspend the operation of the Commission's order pending the final determination of shipper's suit [28 USC §2324], entering an injunction forbidding the railroads to implement a proposed change in rates is not an injunction suspending the order, and was in error. The power conferred on the District

Court by §2324 does not in itself include a power to enjoin the railroads from implementing a new charge. Rather, that power must be considered as at best ancillary to the general equitable powers of the reviewing court, and protective of its jurisdiction. Such a power must be inferred from Congress' decision to permit judicial review of agency action, and judicial review would be an idle ceremony if the situation were irreparably changed before correction could be made.—Atchison, T. & S.F. Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800 (818-819)*.

On plaintiff's motion for preliminary injunction against Commission orders allowing proposed interim surcharge on certain rail tariff rates to go into effect without suspension, the district court has jurisdiction to provide the relief sought because of the Commission's failure to issue an impact statement, under the National Environmental Policy Act, in conjunction with the challenged orders. Although the Commission has sole and exclusive power to suspend proposed rates, and its failure to suspend is not judicially reviewable, the NEPA implicitly confers authority on federal courts to enjoin *any* federal action taken in violation of procedural requirements thereof, even if jurisdiction to review the action is otherwise lacking. Moreover, recognition of that independent jurisdiction under NEPA does not undermine the Commission's broad discretion with regard to suspension, or its primary authority to determine reasonableness of proposed rates; nor does judicial insistence on compliance with non-discretionary procedural requirements of NEPA interfere with the Commission's substantive discretion. Preliminary relief granted.—Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) v. United States, 346 F. Supp. 189 (196-8)*.

Furthermore, although its earlier decision, 346 F. Supp. 189, is pending on appeal to the Supreme Court, the district court has jurisdiction to rule on plaintiff's present motion for preliminary injunction against subsequent Commission action approving proposed selective percentage increases in rail rates. In claiming the court lacks jurisdiction, defendant cites the settled rule that filing of an appeal vests jurisdiction over the cause of action in the appellate court and denies the lower court jurisdiction to take any further action in the case; however, that rule is subject to well recognized exceptions, including the principle that an appeal from a lower court order granting a preliminary injunction does not divest the lower court of jurisdiction.—Id., 353 F. Supp. 317 (320, footnote)*.

2. Breadth of investigation and suspension power of Commission. —[Vols. 3, 7, 9, 11, 12, 14-19, 21].—Determination by the Commission that a rate is unreasonable or discriminatory, being peculiarly a matter for its judgment and discretion, is conclusive and binding on a reviewing court if it is supported by substantial evidence and there is no procedural irregularity or erroneous application of law. In investigation and suspension proceeding under review, however, the record is not persuasive that the Commission fully discharged its responsibility in passing upon railroad's proposed tariff rules. Although plaintiff is disadvantaged by having the shortest direct route, Commission decision disapproving proposed rules (which would provide for its unpublished delay service at the through rate on shipments of potatoes from California origins to Kansas City, Mo., routed over its internal circuitous routes) does not reflect that consideration was given to any competitive disadvantage of plaintiff and to any unreasonable or unjust preference or advantage accruing to other rail carriers with longer lines upon disapproval of proposed tariff items. Commission order remanded for further proceedings.—Atchison, T. & S.F. Ry. Co. v. United States, 282 F. Supp. 430 (434-5, 437)*.

While decision in 372 US 658 grants the Commission broad discretion at the suspension stage in rate proceedings, the court is not convinced that it precludes a grant of preliminary relief sought. Apparent thrust of the doctrine is that judicial review is available only when rates in question are Commission-made rather than carrier-made; so long as rates are authored by the carriers, the Commission's mere failure to suspend them is not reviewable. In instant case, the finding of reasonableness does not, by itself, convert considered rates into a Commission-made tariff; but the Commission affixed detailed conditions to its approval of the interim surcharge without suspension and, also, made it amply clear that it would suspend proposed rate increases if the conditions were not added. An agency may not use its suspension power to, in effect, make rates and still avoid judicial review. And a suspension decision which blackmails carriers into submitting agency-authored rates is not distinguishable from an agency order setting those rates; such orders are, of course, judicially reviewable.—Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) v. United States, 346 F. Supp. 189 (196-7)*.

The Commission has power to suspend any "new rate, fare or charge", any "new classification" or any "new regulation or practice affecting any rate, fare or charge" when "filed" and before it becomes effective. The suspension power is sufficiently broad as to include a situation where a new application of a "dormant" or inoperative rate is involved.—Lake Cargo Coal, Ky., Va., and W. Va. to Ashtabula Harbor, 329 I.C.C. 549 (551-552)*.

4. Transportation subjects which may be considered; in general. —[Vols. 3, 7, 9, 21].—Respondent railroads' contention that the Commission lacks jurisdiction over proposed schedule provisions concelling absorption of wharfage at indicated Gulf and south Atlantic ports is rejected as such cancellations are of specific amounts of wharfage absorption published in respondents' tariffs filed with the Commission and directly affect charges paid by the public to carriers subject to our jurisdiction for transportation of property.—Cancellation of Wharfage Absorption, 335 I.C.C. 477 (520-22).

5.—New rates, fares, and charges. —[Vols. 3, 7].—Expiration dates in a published tariff are not rates as that term is used in §15(7), but they are within the meaning of the language of that section as it pertains to a regulation affecting any rate. The fact that expiration provisions in tariffs become effective subsequent to rate schedules does not preclude suspension of such provisions just prior to the time they would otherwise have become operative. Instead, it is this very feature of expiration provisions in tariffs which establishes their newness for purposes of the exercise of the suspension power under §15(7) and makes them a "new regulation" which will affect the "rate, fare, or charge."—Lake Cargo Coal, Ky., Va., and W. Va. to Ashtabula Harbor, 329 I.C.C. 549 (552-53)*.

7. Latitude of managerial discretion. —[Vols. 3, 7, 9, 19, 21].—Motion to strike certain testimony of a witness for respondent MKT because neither counsel who interrogated the witness nor the witness entered an appearance, overruled; that railroad is a respondent and appearance was made on behalf of all respondents.—Wheat and Flour, Midwest & S.W. to Gulf-Chicago—Export, 322 I.C.C. 581 (599).

Suspension Period

14. Accounting order when rates automatically effective. —[Vols. 3, 21].—On reconsideration, record is convincing that railroads' basic reason for proposed per-car charges for in-transit inspection of grain is increased freight car utilization; that respondents are more concerned with increasing the use of the freight car fleet than with collecting proposed charges; and that the revenues derived from greater use of cars would substantially exceed the amount to be obtained from proposed charges. However, it is impossible to determine at this stage the amount of revenue to be collected as a result of considered charge; therefore, since such a determination is a relevant and material factor because of conflicting forecasts as to effect of imposition thereof, respondent railroads are required to maintain a record of the amount of money collected from assessment of the charge, to file reports setting forth total amount collected by each respondent during the 6-month periods specified, and to continue such 6-month reports pending further order of the Commission.—Inspection in Transit, Grain and Grain Products, 340 I.C.C. 69 (73)*.

Procedure

35. Burden of proof upon the hearing; in general. —[Vols. 3, 7, 9, 11-19, 21].—The Commission, in approving separate charges for inspection of grain while in transit (a service that had previously been provided under long-haul rates did) not adequately justify its departure from the longstanding rule that separate charges are unlawful unless the carriers can satisfy the burden of proving that their line-haul rates are insufficient to cover the entire transportation service, including that portion for which separate charges are proposed. In such instances of departure from policy, the Commission must set forth clearly the grounds on which it acted. Failure to do so resulted in remand.—Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800 (807)*.

A specific and long-standing administrative interpretation of a statute should not be overruled except for weighty reasons; such administrative rule has the force and effect of a statute and rules of evidence apply to both in the same manner. The Commission departed from prior norms when, without repudiating its well established rule as to the burden of proof on railroads proposing a separate charge for an accessorial service previously included in line-haul rates, it found proposed charges for in-transit inspection of grain in the West to be reasonable when related to costs of specific services for which they would be assessed, even though carriers failed to prove overall reasonableness of the increased rate, composed of line-haul rate plus in-transit charge, that would result from approval of proposed charges. In effect, the Commission excused respondents from meeting substantial proof requirements of its evidentiary rule because of their "inability" to sustain that burden; and as held in 347 US 645, since legal basis therefor is not explained, such a departure from prior norms is not permissible. Case remanded to the Commission; proposed charges suspended until further order of the court.—Wichita Board of Trade v. United States, 352 F. Supp. 365 (367-9)*.

No protests having been filed in connection with proposed reduction in free time from 48 to 24 hours for storage of cars held for unloading and loading or reconsignment on public team tracks, that proposal became effective as published; and in subsequent investigation instituted by the Commission into the lawfulness of such change the examiner properly ruled that respondent did not have the burden of proof with respect to lawfulness of said change and did not have to present any evidence unless protestants first submitted evidence. Found not to be unjust or unreasonable.—Reduced Free Time At Points on Long Island R., 325 I.C.C. 714 (715, 721).

Respondent sought to justify proposed changes on the ground that considered joint, single, and multiple-car rates were established with expiration dates and with the understanding of shippers and connecting railroads that the rates would be permitted to expire if and when approval was given by the Commission of a pending railroad purchase proceeding. However, much more is required in proceedings arising under §15(7); respondents are not free of their responsibilities and burdens merely because the proposed changes in rates are the result of expiration dates in tariffs, and shippers' understanding as to duration of particular rates is not controlling in §15(7) proceedings. See also 206 ICC 127 and 258 ICC 63. Accordingly, respondent has the burden of establishing that the proposed elimination of the considered joint rate is just and reasonable and it must show, where the issues are properly presented, that such action does not result in rates that contravene other sections of the Act.—Lake Cargo Coal, Ky., Va., and W. Va. to Ashtabula Harbor, 326 I.C.C. 63 (68-9)*.

In an embraced proceeding, the record indicated some misunderstanding concerning the burden of proof. The rules under investigation in docket No. 34585 and many of those in the subnumbered proceedings were in effect when the investigations were instituted and, while reissued, were not subsequently changed. The burden of proof in those instances is not upon the respondents. However, in connection with the proposed rules in I. & S. No. 8218 and the rules proposed and those changed during the pendency of the subnumbered proceedings, the burden is on the respondents.—Detention of Vehicles & Loading & Unloading Provisions, 329 I.C.C. 220 (222).

The burden of proof is on the respondents to prove that proposed rates are just and reasonable, and a minimum requirement in sustaining this burden is a convincing showing that the proposed rates will be reasonably compensatory for the service to be performed, such showing being necessary even if there is competitive justification for the proposal.—Paper, Central Territory to North Atlantic Ports, 329 I.C.C. 281 (289).

The burden of establishing that the proposed elimination of the joint rate is just and reasonable remains upon the respondent because the expiration date in the effective tariff brings into effect a change in rate. Since evidence establishes that the cancellation of the considered rates will result in rates to Ashtabula Harbor which are substantially higher than those maintained to the ports of Toledo and Sandusky, and that Ashtabula will lose considerable tonnage as a result thereof, the respondent has the burden of establishing a dissimilarity of circumstances and conditions which is sufficient to justify the preferential and prejudicial treatment of the competing ports.—Lake Cargo Coal, Ky., Va., and W. Va., to Ashtabula Harbor 329 I.C.C. 549 (553-54)*.

In a hearing to modify an existing Commission order so as to increase rail charges for protective service for perishable freight, the burden of proof is upon petitioning carrier. Burden has been met herein only by petitioner Louisville & Nashville R. Co. by introduction of probative cost evidence to show losses resulting from such service.—Charges for Protective Service to Perishable Freight, 332 I.C.C. 136 (144-5)*.

On further investigation in this general revenue proceeding, the Commission found that respondent railroads' cost data, although deficient in certain indicated aspect, is sufficient to meet the burden of proving increases rates and charges just and reasonable. The Commission herein also placed railroads on notice that in any future general revenue proceeding a realistic study on the unit costs of performing transportation services will be necessary to sustain their burden of proof.—Increased Freight Rates, 1967, 332 I.C.C. 280 (285-86)*.

Respondents failed to meet their burden of proving that proposed tariff provisions, which would substantially increase charges on boats moving on multilevel cars, would be just and reasonable when their only evidence, in support thereof, was a study of out-of-pocket costs of transporting boats on railroad-owned cars. Carriers emphasize that the rates would apply for all shippers whether equipment is furnished by carrier or shipper, but record contains little evidence as to traffic of shippers who use railroad-owned cars. Moreover, fact that the proposal was suspended on protest of shippers who use their own specially designed multilevel cars (for which railroads pay per-mile allowances) puts in issue justness and reasonableness of the rates to protestants, as well as other shippers, and protestants' evidence shows that respondents' costs are substantially overstated so far as their boat movements, using their own equipment, are concerned. To discharge carriers' burden of proof, evidence to show reasonableness of a rate increase must be concrete, affirmative, and persuasive; proposed schedules not shown to be just and reasonable.—Boats on Multi-Level Cars, 332 I.C.C. 468 (470-2, 473-6)*.

Inasmuch as respondent railroads propose schedules cancelling specific amounts of wharfage absorption at indicated Gulf and South Atlantic ports which would directly affect charges paid by the public to carriers for transportation of property, the burden of proving any such changes in rates or charges to be just and reasonable is upon the respondents.—Cancellation of Wharfage Absorption, 335 I.C.C. 477 (522).

Where respondent railroads have shown their proposed proportional rates on multiple-car shipments of canned foodstuffs from the Pacific coast to points east of the Rocky Mountains to be just and reasonable from the standpoint of their own revenue requirements, protestant carrier which claims an inherent advantage of cost has the burden of proving the existence of such advantage.—Canned Foodstuffs, Pacific Coast to the East, 335 I.C.C. 612 (631).

Rail carriers failed to sustain their burden of proof when evidence they presented, although considerable, is not convincing that proposed increase in the additive charge on waterborne traffic moving through North Atlantic, Pacific coast, and Canadian ports is just and reasonable. Record indicates that, as performed by respondents, port terminal services associated with waterborne traffic have substantially decreased since an additive charge was authorized in 1958; also, fact that the charge is now incorporated into the base rate before applying three subsequently authorized general increases weakens the justification for respondents' proposal. In the circumstances, therefore, and in absence of clear and precise representative cost evidence demonstrating a need for additional revenues, the proposed increased waterborne charge is not shown to be justified; not approved.—Increased Waterborne Charge, 337 I.C.C. 534 (535, 540-1)*.

Proposed increases in all-rail and lake cargo rates on coal not shown to be just and reasonable inasmuch as respondents introduced no cost evidence whatsoever as to part of all-rail movements and only cost data of one respondent for remainder of involved all-rail movements which cannot be considered representative. Respondents justify increased lake cargo rates to relieve a coal car shortage but do not show to what extent such traffic perpetuates the shortage.—Coal, Ill., Ind., and Western Ky. to Chicago, 339 I.C.C. 493 (498-9).

Respondents who propose increased demurrage charges and changed rules governing car detention must show that proposed rules and charges will promote equipment utilization which is primary purpose of demurrage charges and rules. Record herein does not support such a conclusion but rather indicates that carriers' inefficient service is the basis for much of inadequate car utilization. Schedules ordered canceled.—Demurrage Rules and Charges, Nationwide 399 I.C.C. 655 (667-8).

The basic issue before the Commission was whether the single-car (100 ton) rate on kaolin clay, applied to traffic moving in minimum shipments of 500 tons at one time under the multicar rate, was shown to be just and reasonable. This relational aspect of respondents' burden of proof is implicit in the term "changed rate" as used in §15(7) of the Act. And while respondents' rationale, that there was no competitive necessity for retention of a discount rate and that there were no cost savings experienced by them in the movement of large volumes of clay at one time as proposed to single-car shipments, traditionally has provided a basis for disapproval of multicar rates *when initially filed*, such was not the case here.—Clay, Points in Georgia to Savannah & Port Wentworth, 340 I.C.C. 377 (383-384)*.

Although the evidence supported the respondents' contention that elimination of the multicar rate, with a consequent 50-cent increase in the rate, would not significantly impede the export clay movement, the proposed cancellation was denied, since carriers seeking cancellation must also show the existence of circumstances or conditions by virtue of which they could not reasonably be expected to achieve cost savings normally inherent in multiple-car service. Absent this requirement shippers and others who benefit from and have come to rely upon multicar rates whenever, due to cessation of competitive pressure or other reasons, carriers lose interest in continuing the high degree of operational efficiency required to effect such savings.—Id., pp. 385-86*.

Respondents in general-increase proceeding are advised and forewarned that the Commission's acceptance of annualized costs and other data of type submitted in this and in prior general revenue proceedings is not an irrevocable commitment; and that, in the future, a much more variable data base will be required to support a request for revenue relief. To that end, a rulemaking proceeding regarding prescription of minimum evidentiary requirements in railroad general increase cases, to supplement regulations in 49 CFR Part 1002, will be instituted; however, final determination of such requirements will take time. Therefore, as an interim measure, it is decided to indicate the evidentiary showing which should be made in any rail revenue proceeding that might be begun prior to promulgation of specific procedures; and provisions relevant to such a showing, set forth in appendix B, will be referred to as "interim procedures." At the same time, it is made clear that respondents are not precluded from submitting additional evidence to support their proposals.—Increased Freight Rates and Charges 1972, 341 I.C.C. 288 (312-3)*.

50. Evidence; generally. —[Vols. 3, 7, 11, 15-19, 21].—In suspension proceeding on proposed revisions in fares applicable to interstate passenger service on the New Haven division of the respondent railroad a cost analysis having any probative value is not feasible at present as numerous arbitrary allocations, lacking in factual support, would be required. Lawfulness of proposed fares must be measured by comparisons with fares charged for similar services under substantially same transportation conditions and such other criteria as are pertinent. —Penn Central Fare Revision—1969, 335 I.C.C. 720 (731-32).

Commission prescribed cost evidence rules based on various cost formulae developed by the Commission's Cost Finding Section. Such formulae are valuable tools in estimating carrier costs but should not be given prima facie validity.—Rules to Govern Assembling & Presenting Cost Evidence, 337 I.C.C. 298 (322-7).

The record as submitted supports the division's findings of reasonableness of proposed charge for in-transit inspection of grain, and the addition of self-serving unverified statements directed to events arising after close of the hearing adds nothing of probative value; therefore, conflicting analyses of the reaction of grain interests after proposed charge became effective will not be received in evidence on reconsideration.—Inspection in Transit, Grain and Grain Products, 340 I.C.C. 69 (70)*.

But contrary to protestants' argument, the examiner's receipt in evidence of legislative history showing that improved freight car utilization was a factor in enactment of the Grain Standards Act of 1968, eliminating mandatory requirement for grain inspection, did not provide unjustified support for railroads' position that the in-transit inspection charge is just and reasonable; and reference to such legislative history did not constitute prejudicial error. From a careful review of the record and the division's findings, it is evident that consideration of the legislative history in the prior report was merely one factor supporting the ultimate conclusion that considered schedules were just and reasonable.—Id., pp. 72-3;

Protestants argued that the absence of evidence of the financial and operating results of other participants to the joint rates in issue requires disapproval of the requested increases. However, the Commission held that since the respondents were the predominant carriers in the Alaskan trade under consideration, the operating and financial data shown by them constitute an adequate representation of the entire trade. —Increased Rates and Charges, the Alaska Railroad, 340 I.C.C. 129 (162).

While a showing that most livestock shipments are handled at a financial loss, standing alone, does not justify a discontinuance of the service, it must be accorded substantial weight. See also, §15(7), n. 77.—Cancellation of CRI & P & Soo Line Rates—Livestock, 340 I.C.C. 463 (467)*.

Since the Commission determined in 297 ICC 505 that the competition in the movement of produce traffic and the unstable economic conditions in the industry require consideration of the total transportation cost to the shipper and the effect upon the movement of the traffic in determining whether increases are just and reasonable, respondents' assumption that the consumer rather than the producer would be affected by the proposed increase could not be accepted. Further, respondents failed effectively to rebut protestants' contention that the increased charges would price the western shippers out of the eastern market. Denied.—Mechanical Protective Serv. of Perishables—Nationwide, 340 I.C.C. 470 (500).

The cost evidence was not a clear and precise representation demonstrating a need for additional revenues; the absence of reliable data establishing unit costs and revenue and expense data requires a finding that respondents failed to meet the burden of showing that proposed mechanical protective service charges were just and reasonable.—Id., pp. 501-502.

Particular Justifications for Changes

65. Reasonableness of the proposed rates. —[Vols. 3, 7, 9, 14, 16, 18, 19, 21].—In judging rates for the future, reasonable prognostications as to costs and revenue should be given weight. Respondents' evidence indicating that proposed reduced rates on all freight, minimum 10,000 pounds, in straight or mixed carloads within southern territory and between that territory or St. Louis and intermediate points in Indiana, Illinois, and Missouri, exceed average fully distributed costs for the southern region by substantial amounts is a reasonable representation of costs on that traffic and warrants conclusion that the reduced rates are compensatory;

and, since the proposal is reasonably designed to recapture high-rated merchandise and l.c.l. traffic lost to motor common, contract, and private carriers, the proposed rates are just and reasonable.—Freight, All Kinds, Southern and IFA Territories, 323 I.C.C. 730 (731, 737).

Proposed reduced transcontinental incentive rates on wine, in packages, and in bulk shipments, found just and reasonable when competitively compelled and no lower than necessary to meet the circumstances and conditions attending the movement of wine to the destination territory, would result in improved car utilization, and in improving the net revenue position of the respondents for moving this traffic. The same holds true for certain proposed package rates which are below out-of-pocket cost since, as all proposed rates would alternate with corresponding present rates, even those rates would serve to reduce the burden formerly placed upon the respondents' entire operation and, in contrast to the present rates, also result in improving the net revenue position of the respondents for the movement of this traffic.—Wine, Pacific Coast to East, 326 I.C.C. 119 (156)*.

In the circumstances of record, proposed new or increased per-car charges for each stop, including the first, for inspection of grain are shown to be justified. Railroads' basic responsibility does not require them to provide in-transit service; and fact that they provide such service in the West at line-haul grain rates does not preclude modification of that practice if the circumstances justify some revision. Inspection of grain in transit is not now required by Federal statutes and railroads' service, available in connection therewith, is not essential to the grain marketing process. Grain inspection is an accessorial service for which a separate charge may properly be made; thus, even though applicable line-haul rate plus proposed charge will not exceed the prescribed maximum level of rates on grain, the Commission must determine reasonableness of the separate charge when related to specific service for which it is to be assessed.—Inspection in Transit, Grain and Grain Products, 339 I.C.C. 364 (372-3, 385-8)*.

As most grain inspections occur in western district where current railroad practice is to permit the first inspection at line-haul rates, without additional charge, proposed charges in the West represent an innovation that will have some effect on the future movement of grain; and those charges are vigorously opposed, particularly by grain markets. It is essential, therefore, to carefully consider the different car detention and switching studies submitted and, also, to scrutinize the costs shown to be incurred by railroads in furnishing in-transit service. Studies of the 16 western railroads represent a sound and valid appraisal of the costs incurred and detailed analyses thereof is convincing that, in light of the services rendered, proposed charges are just and reasonable. And proposed increase of separate in-transit charge in eastern traffic is shown to be justified based on costs; southern railroads share the same cost factors and there is very little opposition to proposed charges in the South; therefore, such findings embrace the complete proposal under consideration.—Id., pp. 369, 390-9.

But the issue of lawfulness of the in-transit charges is further complicated by inclusion of equally difficult question relating to the national freight car shortage; thus, while proposed charges are found reasonable on the usual basis of review, effect of such charges on the freight car shortage must also be considered. It is clear from the detention studies that in-transit inspection results in an unwarranted loss of car availability and that eliminating the service, or any significant part of it, will materially increase car utilization. Respondents introduced evidence showing number of car-days delay due to inspection and a reduction in their freight car fleet because of such delay; and while their figures may be somewhat inflated, there is no question but what elimination of in-transit inspection would increase the number of available cars by several thousand annually. Also, another matter not to be ignored is railroads' loss of revenue caused by the reduced car supply due to grain inspections. Accordingly, proposed new or increased in-transit charges for inspection of grain are found just and reasonable and otherwise lawful.—Id., pp. 385, 400-1.

On reconsideration, though protestants urge that railroads' basic reason for imposing the charge is to produce additional carrier revenue and not to increase car utilization, the record is convincing that respondents are more concerned with increasing utilization of their freight cars than with collecting the inspection charge; also, it is clear that revenues to be derived from the greater use of cars substantially exceeds the amount that will result from imposition of proposed charges. However, amount of revenue to be collected as result of the inspection charge cannot now be determined and, as such a determination is a relevant and material factor because of conflicting forecasts of the effect of its imposition, respondents are required to keep records and file 6-month reports setting forth the total of such charges collected by each railroad. In addition, jurisdiction is retained in order to determine upon still further review whether respondent railroads will be required to use funds derived from assessment of considered charge to upgrade freight car fleets which they operate.—Id., 340 I.C.C. 69 (73)*.

The Commission consistently has prescribed that a strike reimbursement should be based on the applicable per diem charge plus an additive to cover incidental expenses resulting from a car being held because of strike interference. The just and reasonable additive was established in 234 ICC 755, 762, as 20 percent. Since the current charge of $3.29 per car-day, increased by 20 percent, provides for a total charge of $3.95, and the present strike rate is $4.00 per day, proposed increased demurrage assessed against cars detained due to strikes was found not shown to be just and reasonable.—Strike Demurrage Charge, Nationwide, 340 I.C.C. 179 (188).

68.—Rate comparisons. —[Vols. 3, 7, 9, 15, 19, 21].—Proposed reduced rates on sulphur from Canadian origins to Streator, Ill., found lawful inasmuch as they are substantially comparable to rates on sulphur from the same origins to Chicago which were found lawful in 326 ICC 288. Cost study in that case is based on data collected later than the data used herein and is thus determinative of cost issues herein. Streator, Ill., is 7 miles from Chicago and so is subject to the same competitive influences.—Sulphur, Canadian Origins to Streator, Ill., 332 I.C.C. 130 (132-34)*.

Proposed tariffs reflected an increase in rates and in waterborne charges on TOFC and COFC movements between inland points and Pacific Coast ports, which was not justified by the rate comparisons of record. Also proposed tariffs encompassed less service than was presently available to shippers in the service under that "outer-container" rule, whereby a shipper with a rail siding may receive free truck delivery of containers and trailers which cannot be loaded and unloaded on flatcars, would be eliminated. A lessening of service cannot support an increase in rates and charges, and since the evidence provided no justification for reductions in service, the reductions themselves could not be permitted.—Containerized Freight, From and To Pacific Coast, 340 I.C.C. 388 (402-03).

69. Compelled rates.—[Vols. 3, 7, 9].—Rail-motor rates proposed by respondent Frisco railroad for indicated movements of motor vehicles are justified, within limits, as an exercise of managerial discretion intended to avert the threatened loss of substantial traffic generating more than a million dollars in annual income due to lower rates on such traffic published by competitor Santa Fe railroad, the protestant herein—Motor Vehicles, Kansas City Mo., to Southwest, 335 I.C.C. 253 (256)*.

70. Cost of service.—[Vols. 3, 7, 9, 16-19, 21].—See also Penn Central Fare Revision—1969, at §15(7), n. 50 *supra*, Transit Charges, Southern Territory, at §1(5), n. 612, and Wine, Pacific Coast to East, at §1(5), n. 80.

Costs developed in respondents' study do not justify proposed tariff provisions, which would substantially increase charges on boats moving on multilevel cars, insofar as they would apply to movements for protesting shippers who use their own specially designed cars. That study (using basic-unit costs taken from public statement No. 7-67 which assumes railroad ownership of all cars used) includes, as a major expense item, the per diem cost of renting multi-level cars; but respondents do not incur per diem rental expenses in moving protestants' boats on their own multilevel cars which are furnished the railroads on a mileage-allowance basis. Protestants' study of costs of moving boats on shipper-owned equipment (using per-mile allowance paid them for furnishing their own cars instead of per diem expense used by carriers) shows that respondents' costs are greatly overstated insofar as their movements are concerned. Costs that include a sizeable expense which respondents do not encounter in moving protestants' boats cannot justify increased rates; proposed schedules not shown to be just and reasonable.—Boats on Multi-Level Cars, 332 I.C.C. 468 (470-4, 475-6)*.

From 33 representative origins to 4 gulf ports proposed export rates on wheat exceed out-of-pocket costs by 5 to 68 percent; and proposed rates on flour in bags exceed out-of-pocket costs for 72 of those 82 movements by 1 to 34 percent; thus the vast preponderance of the proposed rates exceed out-of-pocket costs. While the rates on flour are below cost in a few instances, it is not required that rates between all origins and destinations in an extensive adjustment produce revenue at a level above out-of-pocket costs; the proposed rates on wheat and flour are compensatory on an overall basis. However, the rates on flour are disapproved on other grounds.—Wheat and Flour, Midwest & S.W. to Gulf-Chicago—Export, 322 I.C.C. 581 (603-4); and since average distances from origins on the Burlington to Chicago are less than to the Gulf ports, in view of the compensatory level of the proposed rates to the Gulf ports and the Burlington's substantially higher earnings from the same origins to Chicago the Burlington's proposed export rates on wheat and flour to Chicago are likewise compensatory and may be approved.—Id., p. 604.

While the cost of performing port terminal services has increased since approval of a waterborne additive charge in Ex Parte No. 212, 304 ICC 289, to be applied to rail rates on waterborne traffic at all ports, evidence indicates that the service performed by railroads at some ports has substantially decreased since 1958; at several ports, the carriers have sold or ceased operating their marine terminal facilities. In addition, the waterborne charge was originally established to help offset the cost of certain port services and was to accrue to the carrier providing those services or absorbing costs thereof; however, due to its being incorporated into the base rate before application of authorized general increases, the charge currently provides additional revenue for the line-haul carriers. Therefore, since respondents failed to present clear and precise representative cost evidence showing a need for additional revenues, proposed increases in the waterborne additive on traffic moving through North Atlantic, Pacific coast, and Canadian ports cannot be approved.—Increased Waterborne Charge, 337 I.C.C. 534 (537-8, 540-1)*.

Respondent railroads failed to submit cost evidence to justify proposed new or increased per-car transit charges; because of the lack of such evidence Commission was unable to determine the reasonableness of the proposed charges without consideration of representative overall movements between origin and final destination of various commodities and the total rates and charges assessed.—Transit Charges, USA, 339 I.C.C. 45 (58).

Even assuming that the complainants' cost studies were completely valid in showing that the assailed rates exceed fully distributed costs, it could not thereby be concluded that the rates exceed a maximum reasonable level. The fact that rates substantially exceed the fully distributed cost of service does not establish that they are in excess of maximum reasonable rates. When many rates are established at a level less than full cost to meet competition, other rates, not affected by competition, must return more than full cost if the carriers are to earn sufficient revenue to continue to provide service.—Public Serv. Comm. of N. Dakota v. Great Northern Ry. Co., 340 I.C.C. 739 (750).

77. Reasonableness of regulation or practice proposed; routing privilege; cancellation of rates.—[Vols. 3, 7, 9, 13-17, 19].—See also Demurrage Rules and Charges, Nationwide, at §1(6), n. 261, and Detention of Vehicles & Loading and Unloading Provisions—Investigation, at §1(5), n. 521.

Due to the special circumstances attendant to the fact that there was a constant and apparently irreversible decline in the transportation of livestock handled by respondent, that its limited equipment and facilities are not in good repair and that the cost of acquiring new cars for the dwindling volume of anticipated traffic is unwarranted, the Commission reversed a prior decision finding cancellation herein of carload rates on livestock by respondents to be just and reasonable.—Cancellation of CRI & P § Soo Line Rates—Livestock, 340 I.C.C. 463 (467)*.

77a.—Other practices.—[Vols. 7, 9, 11, 16, 19, 21].—See also Inspection in Transit, Grain and Grain Products case, n. 65, above.

In railroad's action to set aside Commission order disapproving its two proposed tariff rules, the first one providing for application of through single-factor rate on fresh fruits and vegetables to c.l. shipments of potatoes from California origins to Kansas City, Mo., routed over its internal routes which involve backhauls and out-of-line hauls, and the second one authorizing—under the diversion and reconsignment tarrif—holding schedules commensurate with such internal routes, grounds for the Commission's disapproval of those rules are inadequate to support any decision, one way or the other, on justness and reasonableness of the proposal. Plaintiff has a natural disadvantage, compared with competing connecting lines, because it has the shortest direct route; however, opinion of the Commission does not reflect consideration of that disadvantage or of any preference or advantage accruing to competing carriers with longer lines upon disapproval of proposed rules.—Atchison, T. & S.F. Ry. Co. v. United States, 282 F. Supp. 430 (433, 434-5)*.

Though the Commission disapproved plaintiff's first proposed rule because it did not conform to rule 4(k) of Tariff Circular 20 (providing that routes over which rates apply must be definitely ascertainable and how this must be accomplished), its findings are not convincing that proposed rule is per se a violation of the Tariff Circular rule. As to the second proposed rule authorizing holding schedules on c.l. shipments routed over plaintiff's internal circuitous routes, the Commission's reasons, i.e., the rule was (1) preferential of a select class of shippers, (2) authorized unreasonable use of the diversion privilege for a delay in transit, and (3) authorized internal holding already found unlawful, afford no basis for its disapproval thereof. In passing on the second rule, evidence concerning the loss of maximum use of equipment, avoidance of demurrage, and additional switching and icing expense must be weighed against any offsetting consequences of plaintiff's loss of business, both indirectly and directly routed, to other carriers if it cannot provide equivalent delay service. Case remanded to the Commission for further proceedings.—Id., pp. 435-7.

Regulations of the Commission

35 FR 13216, Aug. 19, 1970, Part 1102: Procedures Governing Rail Carrier General Increase Proceedings, new Part 1102 (§§1102.1 - 1102.4) added, effective on date of publication in Federal Register.

Section 15. (8) Hearing; schedule suspension.—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §202, 90 Stat. 37.]

(8) (a) Whenever a schedule is filed with the Commission by a common carrier by railroad stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice. The hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the

Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If such a report is made to the Congress, the final decision shall be made not later than 10 months after the date of the filing of such schedule. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect immediately at the expiration of such time period, or shall remain in effect if it has already become effective. Such rate, fare, charge, classification, regulation, or practice may be set aside thereafter by the Commission if, upon complaint of an interested party, the Commission finds it to be unlawful.

(b) Pending a hearing pursuant to subdivision (a), the schedule may be suspended, pursuant to subdivision (d), for 7 months beyond the time when it would otherwise go into effect, or for 10 months if the Commission makes a report to the Congress pursuant to subdivision (a), except under the following conditions:

(i) in the case of a rate increase, a rate may not be suspended on the ground that it exceeds a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this part or, following promulgation of standards and procedures under section 1(5) (d) of this part, if the carrier is found to have market dominance, within the meaning of section 1(5) (c) (i) of this part, over the service to which such rate increase applies; or

(ii) in the case of a rate decrease, a rate may not be suspended on the ground that it is below a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this part, or for the purposes of investigating such rate change upon a complaint that such rate change constitutes a competitive practice which is unfair, destructive, predatory or otherwise undermines competition which is necessary in the public interest.

(c) The limitations upon the Commission's power to suspend rate changes set forth in subdivisions (b) (i) and (ii) apply only to rate changes which are not of general applicability to all or substantially all classes of traffic and only if—

(i) the rate increase or decrease is filed within 2 years after the date of the enactment of this subdivision;

(ii) the common carrier by railroad notifies the Commission that it wishes to have the rate considered pursuant to this subdivision;

(iii) the aggregate of increases or decreases in any rate filed pursuant to clauses (i) and (ii) of this subdivision within the first 365 days following such date of enactment is not more than 7 per centum of the rate in effect on January 1, 1976; and

(iv) the aggregate of the increases or decreases for any rate filed pursuant to clauses (i) and (ii) of this subdivision within the second 365 day-period following such date of enactment is not more than 7 per centum of the rate in effect on January 1, 1977.

(d) The Commission may not suspend a rate under this paragraph unless it appears from specific facts shown by the verified complaint of any person that—

(i) without suspension the proposed rate change will cause substantial injury to the complainant or the party represented by such complainant; and

(ii) it is likely that such complainant will prevail on the merits.

The burden of proof shall be upon the complainant to establish the matters set forth in clauses (i) and (ii) of this subdivision. Nothing in this paragraph shall be construed as establishing a presumption that any rate increase or decrease in excess of the limits set forth in clauses (iii) or (iv) of subdivision (c) is unlawful or should be suspended.

(e) If a hearing is initiated under this paragraph with respect to a proposed increased rate, fare, or charge, and if the schedule is not suspended pending such hearing and the decision thereon, the Commission shall require the railroads involved to keep an account of all amounts received because of such increase from the date such rate, fare, or charge became effective until the Commission issues an order or until 7 months after such date, whichever first occurs, or, if the hearings are extended pursuant to subdivision (a), until an order issues or until 10 months elapse, whichever first occurs. The account shall specify by whom and on whose behalf the amounts are paid. In its final order, the Commission shall require the common carrier by railroad to refund to the person on whose behalf the amounts were paid that portion of such increased rate, fare, or charge found to be not justified, plus interest at a rate which is equal to the average yield (on the date such schedule is filed) of marketable securities of the United States which have a duration of 90 days. With respect to any proposed decreased rate, fare, or charge which is suspended, if the decrease or any part thereof is ultimately found to be lawful, the common carrier by railroad may refund any part of the portion of such decreased rate, fare, or charge found justified if such carrier makes such a refund available on an equal basis to all shippers who participated in such rate, fare, or charge according to the relative amounts of traffic shipped at such rate, fare, or charge.

(f) In any hearing under this section, the burden of proof is on the common carrier by railroad to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. The Commission shall specifically consider, in any such hearing, proof that such proposed changed rate, fare, charge, classification, rule, regulation, or practice will have a significantly adverse effect (in violation of section 2 or 3 of this part) on the competitive posture of shippers or consignees affected thereby. The Commission shall give such hearing and decision preference over all other matters relating to railroads pending before the Commission and shall make its decision at the earliest practicable time.

Historical Note

For the effect of the amendment made by Pub. L. 94-210, 90 Stat. 37, see the historical note following §15(1).

Section 15. (9) Market dominance; suspension.—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §202, 90 Stat. 36.]

(9) Following promulgation of standards under section 1(5) (d) of this part, whenever a rate of a common carrier by railroad subject to this part is challenged as being unreasonably high, the Commission shall, upon complaint or upon its own initiative and within 90 days after the commencement of a proceeding to investigate the lawfulness of such rate, determine whether the carrier proposing such rate has market dominance, within the meaning of section 1(5) (c) (i) of this part, over the service to which such rate applies. If the Commission finds that such a carrier does not have such market dominance, such finding shall be determinative in all additional or other proceedings under this Act concerning such rate or service, unless (a) such finding is modified or set aside by the Commission, or (b) such finding is set aside by a court of competent jurisdiction. Nothing in this paragraph shall limit the Commission's power to suspend a rate pursuant to this section, except that if the Commission has found that a carrier does not have such market dominance over the service to which a rate applies, the Commission may not suspend any increase in such rate on the ground that such rate as increased exceeds a just or reasonable maximum for such service, unless the Commission specifically modifies or sets aside its prior determination concerning market dominance over the service to which such rate applies.

Historical Note

For the effect of the amendment made by Pub. L. 94-210, 90 Stat. 35, see the historical note following §15(1).

Section 15. (10) Shipper's choice of route to be observed.—[Unchanged; formerly paragraph (8) but redesignated (10) by the act of Feb. 5, 1976, Pub. L. 94-210, §202, 90 Stat. 35. See vol. 9, p. 7689;]

Amendments, see footnotes, vol. 3, p. 2010; historical notes, vol. 3, p. 2010, vol. 21, p. 16921.

Notes of Decisions

Volume 3—p. 2011; Volume 7—p. 5568; Volume 9—p. 7689; Volume 11—p. 9278; Volume 12—p. 10317; Volume 13—p. 11020; Volume 14—p. 11525; Volume 15—p. 12109; Volume 16—p. 12756; Volume 17—p. 13442; Volume 18—p. 14203; Volume 19—p. 15393; Volume 21—P. 16921.

Duty of Carrier to Comply with Shipper's Routing

62. Forwarding by cheapest reasonable available route consistent with instructions. —[Vols. 3, 7, 9, 11, 14-18].—Carrier is justified in using the route which is substantially less circuitous than the lower rated route when shipper's instructions call for expeditious service. It is the duty of the carrier to deal justly with the shipper and ordinarily this requires that shipments be routed over the cheapest route. But when the reasonable interpretation of the shipper's instructions indicates desire for expedition, resort to the more expensive short route is justified. —Peter Kiewit Sons' Co. v. Chicago, B. & Q. R. Co. 329 I.C.C. 239 (242).

68. Conflict between route and rate. —[Vols. 3, 7, 9, 11, 15-19, 21].—Commission has consistently held that where a conflict exists between the rate and route shown in shipper's bill of lading, the carrier's agent must call such conflict to shipper's attention and failure to do so renders the carrier liable for any resulting damages. No such damages were shown herein and the Commission, citing 269 ICC 739, concluded that the shipment of furniture at issue herein moved as routed over the lowest rated available route permitting the stop-off requested by complainant shipper's bill of lading and said shipment was therefore not misrouted.—Futorian Manufacturing Corp. v. S. Louis—S. F. Ry. Co., 335 I.C.C. 156 (158-60).

Section 15. (11), (12) Liability, delivery contrary to routing instructions; direction of unrouted traffic.—[Unchanged; formerly paragraphs (9) and (10) but redesignated (11) and (12) by the act of Feb. 5, 1976, Pub. L. 92-210, §202, 90 Stat. 35. See vol. 9, p. 7695.].

Historical note, see vol. 3, p. 2030.

Notes of Decisions

§15(9): Volume 3—p. 2030; Volume 9—p. 7694; §15(10); Volume 3—P. 2031.

Section 15. (13) Disclosure or solicitation of information concerning shipments unlawful; exceptions.—[Unchanged, formerly paragraph (11) but redesignated (13) by the act of Feb. 5, 1976, Pub. L. 94-210, §202, 90 Stat. 35. See vol. 9, p. 7695.]

Amendments, see footnotes, vol. 3, p. 2032; historical note, p. 2032.

Notes of Decisions

Volume 3—p. 2032; Volume 7—p. 5582; Volume 9—p. 7695; Volume 14—p. 11526; Volume 19—p. 15394.

redesignated (13) by the act of Feb. 5, 1976, Pub. L. 94-210, §202, 90 Stat. 35. See vol. 9, p. 7695.]

Section 15. (14) Penalty.—[Unchanged; formerly paragraph (12) but redesignated (14) by the act of Feb. 5, 1976, Pub. L. 94-210, §202, 90 Stat. 35. See vol. 9, p. 7696.]

Amendments, see footnotes, vol. 3, p. 2035.

Section 15. (15) Allowance for service or facilities furnished by shipper.—[Unchanged; formerly paragraph (13) but redesignated (15) by the act of Feb. 5, 1976, Pub. L. 94-210, §202, 90 Stat. 35. See vol. 11, p. 9279.]

Amendments, see footnotes, vol. 3, p. 2036, vol. 11, p. 9279; historical notes, vol. 3, p. 2036, vol. 16, p. 12758, vol. 17, p. 13444, vol. 21, p. 16922.

Notes of Decisions

Volume 3—p. 2037; Volume 7—p. 5583; Volume 9—p. 7697; Volume 11—p. 9279; Volume 12—p. 10317; Volume 13—p. 11021; Volume 14—p. 11526; Volume 15—p. 12111; Volume 16—p. 12758; Volume 17—p. 13444; Volume 18—p. 14204; Volume 19—p. 15395; Volume 21—p. 16922.

Compensation to Owner of Goods

37.—Allowances to be just and reasonable.—The purpose of classification in setting a multilevel system of allowances is to aggregate tank cars of relatively homogeneous costs within one group so as to apply to them a proper single allowance reflecting such costs. To achieve this purpose there necessarily must be close correlation between the methods used for classification and those used for costing. Thus, there is no undue or unreasonable discrimination in a legal sense, when similar cars of different ages are differently classified and differently compensated, because the owners of such cars experience substantially different costs. It is more appropriate that tank cars should be grouped based on their depreciated, rather than on their undepreciated, values for the setting of multilevel allowances.—Tank Car Allowances, Southern Ry. System, 329 I.C.C. 466 (480)

Contrary to respondent's contention that BVC (base value classification a system for determining reproduction values of tank cars for grouping purposes), inflates car values and, thus, improperly increases capital charges, the record shows that the substitution of BVC for Interchange Rule 112 (a formula for determining the value of a car built in a particular year), produced a slightly downward shift. Hence the adoption of the BVC system of grouping cars under the trilevel proposal would reduce, overall, the allowances payable. The Commission concluded that, in the circumstances of the instant proceedings, the use of reproduction values, as modified by the BVC system, is a just and reasonable method for determining tank car allowances, whereas the use of original costs for that purpose has not been shown to be appropriate.—Id., p. 481.

Respondent carrier's reduction of its annual charge for train-rental when carrier's performance is below the guaranteed minimum average speed stated in its tariff is an unlawful refund. The 25 mile-an-hour minimum speed is not in excess of respondent's speed in normal operation. Since no expedited service is performed and no special charge made, the refund would be made from charges collected for other services. Guaranteed minimum speed and refund provisions ordered canceled.—Grain by Rent-A-Train, IFA Territory to Gulf Ports, 335 I.C.C. 111 (119-20).

38.—Cost of service as measure of allowance.—[Vols. 3, 7, 9, 19, 21].—Actual miles run constitute the best standard for determining actual costs and, therefore, also the allowances based thereon. However, this does not mean that short tariff miles or any other distance may not be properly used as a basis for the payment of allowances. Actual mileages may be easily converted to other constructive distances through the use of an appropriate ratio based upon actual experience.—Tank Car Allowances, Southern Ry. System, 329 I.C.C. 466 (483).

Evidence was found to be persuasive that the payment of allowances on the basis of loaded miles only will encourage more efficient use of equipment in revenue service, to the economic advantage of the carriers as well as the shippers. Such a practice, which the Commission found to be just and reasonable, would also eliminate any necessity for continuing the equalization rule, and consequently, the required detailed recordkeeping. The latter rule has neither prevented circuitous routings, nor has it protected the railroads from excessive empty movement of tank cars in relation to loaded movement. Its effect has been mainly to postpone almost indefinitely any payments to the carriers for the excess empty mileages.—Id., p. 483.

40.—When refusal of allowance or service is not discriminatory.—[Vols. 3, 7].—In ordering the cancellation of the proposed trilevel allowances, the Commission did not mean to require the respondent railroads, nor did it expect them, to revert back to a single-level allowance. All parties concede that a multilevel system is preferable to, and constitutes an advancement and an improvement over, the prior system.—Tank Car Allowances, Southern Ry. System, 329 I.C.C. 466 (483).

Allowances for Particular Instrumentalities or Service

59. Pickup and delivery.—[Vols. 11, 14, 15].—On reconsideration, prior finding that there is no legal duty or holding out on the part of respondents under their line-haul rates on cotton to serve off-line cotton gins and, therefore, any service furnished by the owner in connection with movements from such gins to on rail compresses at transit points was voluntary service for which no allowance could be paid, reversed. Regardless of whether gin is located on or off the rail line, respondents' tariffs provide for payment of allowances in liew of rail movement from the rail origin to transit station; also, though allowances which are paid for railroad's substituted service from off-line gins are fictional in character, the use of fictions in ratemaking is helpful and necessary in certain situations when restrictively applied to prevent abuse. Since considered allowances in every instance for transportation by the shipper in lieu of rail service from a rail origin, they are paid for services that carriers are legally obligated to perform. Allowance provisions in respondents' tariffs are within the purview of §15(13), and are not unlawful.—Allowance for Trucking Baled Cotton—Ark., Okla., Tex., 329 I.C.C. 786 (792-5)*.

Furthermore, certain cotton marketing practices, such as tagging bales at the gin to show grower's name and name and location of the gin, obviate deficiencies enumerated in the prior findings. Those practices would prevent shipper from avoiding the transit charge, collecting more than one allowance, or designating as origin of its shipment a point having a higher allowance than that applicable from actual origin and, thereby, defeating the line-haul rate. Also, the material value of such practices should be considered in determining whether allowances paid under respondents' tariffs exceed a reasonable level.—Id., p. 791.

Publication

65. Publication of allowances required.—[Vols. 3, 7, 9, 11, 12, 14-16, 19].—The publication in tariff form of allowances on shipper-leased tank cars is not a matter of managerial discretion. Rather, it is a statutory commandment. Allowances for instrumentalities, such as tank cars, furnished to the carriers by a shipper for the transportation of the latter's traffic, regardless of whether such equipment is owned or leased by him, are subject to the tariff publication requirements of §15(13) of the Act to which carriers must adhere.—Tank Car Allowances, Southern Ry. System, 329 I.C.C. 466 (476).

Province of Courts and of Commission: Procedure

78. Burden of proof.—[Vols. 3, 13, 18].—See Tank Car Allowances, Southern Ry. System, at §15(13), n. 37 *supra*.

Section 15. (16) Other powers of Commission not excluded.—[Unchanged; formerly paragraph (14) but redesignated (16) by the act of Feb. 5, 1976, Pub. L. 94-210, §202, 90 Stat. 35. See vol. 9, p. 7707.]

Amendments, see footnotes, vol. 3, 2070.

Section 15. (17) Seasonal, regional, peak-period rates; report to Congress.—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §202, 90 Stat. 36.]

(17) Within 1 year after the date of enactment of this paragraph, the Commission shall establish, by rule, standards and expeditious procedures for the establishment of railroad rates based on seasonal, regional, or peak-period demand for rail services. Such standards and procedures shall be designed to (a) provide sufficient incentive to shippers to reduce peak-period shipments, through rescheduling and advance planning; (b) generate additional revenues for the railroads; and (c) improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employment by railroads, and (iv) the financial stability of markets served by railroads. Following the establishment of such standards and procedures, the Commission shall prepare and submit to the Congress annual reports on the implementation of such rates, including recommendations with respect to the need, if any, for additional legislation to facilitate the establishment of such demand-sensitive rates.

Historical Note

For the effect of the amendment made by Pub. L. 94-210, 90 Stat. 36, see the historical note following §15(1).

Section 15. (18) Separate rates, distinct rail services.—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §202, 90 Stat. 36.)]

(18) In order to encourage competition, to promote increased reinvestment by railroads, and to encourage and facilitate increased non-railroad investment in the production of rail services, a carrier by railroad subject to this part may, upon its own initiative or upon the request of any shipper or receiver of freight, file separate rates for distinct rail services. Within 1 year after the date of enactment of this paragraph, the Commis-

sion shall establish, by rule, expeditious procedures for permitting publication of separate rates for distinct rail services in order to (a) encourage the pricing of such services in accordance with the carrier's cash-outlays for such services and the demand therefor, and (b) enable shippers and receivers to evaluate all transportation and related charges and alternatives.

Historical Note

For the effect of the amendment made by Pub. L. 94-210, 90 Stat. 36, see the historical note following §15(1).

Section 15. (19) Filing of schedules; total capital investment.—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §206, 90 Stat. 41.]

(19) Notwithstanding any other provision of law, a common carrier by railroad subject to this part may file with the Commission a notice of intention to file a schedule stating a new rate, fare, charge, classification, regulation, or practice whenever the implementation of the proposed schedule would require a total capital investment of $1,000,000 or more, individually or collectively, by such carrier, or by a shipper, receiver, or agent thereof, or an interested third party. The filing shall be accompanied by a sworn affidavit setting forth in detail the anticipated capital investment upon which such filing is based. Any interested person may request the Commission to investigate the schedule proposed to be filed, and upon such request the Commission shall hold a hearing with respect to such schedule. Such hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Unless, prior to the 180-day period following the filing of such notice of intention, the Commission determines, after a hearing, that the proposed schedule, or any part thereof, would be unlawful, such carrier may file the schedule at any time within 180 days thereafter to become effective after 30 days' notice. Such a schedule may not, for a period of 5 years after its effective date, be suspended or set aside as unlawful under section 2, 3, or 4 of this part, except that the Commission may at any time order such schedule to be revised to a level equaling the variable costs of providing the service, if the rate stated therein is found to reduce the going concern value of the carrier.

Section 15a. (1) Fair return—"Rates defined.—[Unchanged. See vol. 9, p. 7707.]

Amendments, see footnote, vol. 9, p. 7707; historical notes, vol. 3, p. 2071, vol. 7, p. 5589.

Section 15a. (2) Rule of rate-making.—[Unchanged, except by the act of Feb. 5, 1976, Pub. L. 94-210, §205, 90 Stat. 41, the new sentence, as set forth below, is added to the end of the section. See vol. 11, p. 9281.]

***This paragraph shall not apply to common carriers by railroad subject to this part.

Amendments, see footnotes, vol. 3, p. 2077, vol. 11, p. 9282; historical notes, vol. 3, p. 2071, vol. 7, p. 5589; vol. 11, p. 9281, vol. 12, p. 10319, vol. 13, p. 11015, vol. 21, p. 16925.

Notes of Decisions

Volume 3—p. 2077; Volume 7—p. 5590; Vol. 9—p. 7708; Volume 11—p. 9282; Volume 12—p. 10320; Volume 13—p. 11024; Volume 14—p. 11528; Volume 15—p. 12112; Volume 16—p. 12760; Volume 17—p. 13446; Volume 18—p. 14206; Volume 19—p. 15399; Volume 21—p. 16925.

1. Purpose and construction.[Vols. 9, 11, 13-19, 21].—The district court held that the Commission's order authorizing but not requiring railroads to put into effect a rate increase on a number of commodities, without prescribing a particular rate on a particular commodity, was within the Commission's power in view of the impracticability of dealing with specific rates in a proceeding in which hundreds of commodities were involved.—Atlantic City Electric Company v. United States, 306 F. Supp. 338 (342).

A discussion of the rail cost evidence of record (appendix B hereto) shows that the proposed proportional rate of 9 cents exceeds the adjusted out-of-pocket costs of 6.6 cents. Thus, the evidence clearly establishes that the proposed rate is reasonably compensatory for movements from origins on the New York Central R. Co. to Kankakee, Ill. Further, reshipping rates beyond Kankakee have been in effect and unchanged for many years. Record shows ton mile and car-mile revenues under through rates compare favorably with system average revenues and protestants rebut neither this evidence nor the presumption of reasonableness of reshipping rates. Commission finds the combination of rates into and out of Kankakee produce reasonably compensatory through rates.—Corn and Corn Products, Illinois to Official Territory, 332 I.C.C. 485 (487)*.

In light of the standards of §15A(2), Commission concludes that the proposed rates, previously found necessary to offset increased operating expenses, are not so unreasonably high as to be self-defeating nor would they have a materially adverse effect on the movement of traffic. Generally, they are within a zone of reasonableness where management is accorded substantial freedom in service pricing. There is no statutory standard requiring the making of rates to yield a certain rate of return on investment. Also, certain contentions of protestant regarding respondents' net investments are without substantial basis for the reasons given.—Increased Freight Rates, 1968, 332 I.C.C. 590 (602-08)*.

Proposed rates herein, if approved, would result in diversion of traffic from protestant which record shows will assuredly invite further rate reductions by protestant, an intramodal competitor of respondent railroad. The result would be a useless waste of badly needed carrier revenues and therefore, the proposal constitutes a destructive competitive practice.—Motor Vehicles, Kansas City, Mo., to Southwest, 332 I.C.C. 615 (624-26).

2. Effect of rates on movement of traffic.—[Vols. 9, 11-19, 21].—See Wine, Pacific Coast to the East, at §15a(3), n. 2.

3. Adequate and efficient transportation service.—[Vols. 9, 11, 13, 14, 16, 18, 19, 21].—See also Increased Freight Rates, 1970 and 1971, at §6(3), n. 12.

Commission ordered carriers herein to undertake steps to cure the numerous service deficiencies complained of on the record, especially including failure to meet schedules, terminal delays, erratic delivery, bunching of deliveries, and placing of cars unfit for use, and to conform their service to the adequacy and efficiency required by §15a. Periodic reports on the progress of such curative steps are to be made by carriers.—Increased Freight Rates, 1970 and 1971, 339 I.C.C. 125 (136-156).

Proceeding herein was undertaken to determine whether Arkansas intrastate freight rates fail to contribute their fair share to revenues required by respondents to enable them to provide adequate and efficient transportation service at lowest cost consistent with furnishing of such service.—Arkansas Intrastate Freight Rates and Charges, 1970, 341 I.C.C. 872 (875).

5. Earnings of carriers; carrier credit.—[Vols. 9, 11-18].—On further investigation in this general revenue proceeding, the Commission found that in considering reasonableness of increased freight rates substantial weight should be accorded to the need for such increases to help recover and supplement a standard credit position on investments of about 4 percent for respondent railroads, long accepted as a proper rate of return.—Increased Freight Rates, 1967, 332 I.C.C. 280 (289-290)*.

Section 15a. (3) Competitive rate-making.—[Unchanged, except by the act of Feb. 5, 1976, Pub. L. 94-210, §205, 90 Stat. 41, the new sentence, as set forth below, is added to the end of the section. See vol. 18, p. 14209.]

***This paragraph shall not apply to common carriers by railroad subject to this part.

Notes of Decisions

Volume 18—p. 14209; Volume 19—p. 15400; Volume 21—p. 16927.

2. Construction and interpretation.—[Vols. 18, 19, 21].—See also Sea-Land Service, Inc. v. Baltimore & O. R. Co., at NTP, n. 5, destructive.

While appellee railroads contend they should be permitted to maintain proposed compensatory rate on ingot molds, reduced to meet barge-truck competition, on the ground that any rate which exceeds out-of-pocket cost would enable them to make a profit on the traffic, the fact that §15a(3) was not enacted to enable railroads to price their services so as to obtain maximum revenue therefrom is made clear by the statutory language regarding protection of traffic of each transportation mode; if Congress had intended only to prevent noncompensatory pricing by regulated carriers, clearer language could easily have been used. District court erred in reading the national transportation policy and §15a(3) and accompanying legislative history as reflecting Congressional intent that inherent advantage should be determined in most cases by a comparison of out-of-pocket costs and, therefore, railroads should generally be permitted to set any individual rate so long as it was compensatory for the service. —American Commercial Lines, Inc. v. Louisville & N. R. Co., 392 U.S. 571 (575-8, 589)*.

Enactment of §15a(3) was due primarily to complaints by rail carriers that the Commission held their rates at artificially high levels in order to protect competing modes from being driven out of business by rail competition; however, original language therein which required consideration of only the effect of a rate reduction on the carrier proposing it, in cases involving intermodal competition, was rejected by Congress. And, as stated in 372 US 744, principal reason for reference to the national transportation policy in §15a(3) was to emphasize the Commission's power to prevent railroads from destroying or impairing inherent advantages of other modes by establishing a compensatory rate below their fully distributed cost and thereby force a competing lower cost transport mode to go below its own fully distributed cost and thus perhaps go out of business. Nothing in that opinion indicates a preference for either out-of-pocket or fully distributed costs as a measure of inherent advantage; rather, all that is said is that the appropriate measure "may be" neither.—Id., pp. 580-4.

And, since reference to inherent advantage was inserted in §15a(3) at the insistence of carriers that were demanding that fully distributed cost be the sole measure of that advantage, clear import of the Supreme Court's decision is that the Commission could, after due consideration, decide that some other measure of comparative cost might be more satisfactory in cases involving intermodal competition than the one it had traditionally used. However, initial determination of the question is for the Commission, operating within the statutory limits set by Congress, and the district court's action (reversing Commission disapproval of considered reduced rate) prevents the Commission from exercising its judgment in pending rulemaking proceeding which would provide a more adequate record for initial resolution of the issues. Also, while the district court objected to the Commission's failure to explain why it permitted out-of-pocket costs where competing carrier was unregulated and not where competitor was regulated, §15a(3) by its own terms applies only to regulated carriers; thus, any arbitrariness in such distinction between regulated and unregulated carriers is the creation of Congress, not the Commission.—Id., pp. 583-6, 590-3.

Therefore, district court erroneously set aside and remanded the Commission's disapproval of proposed reduced rail rate which (while below fully distributed costs of both the railroads and competing barge-truck carriers) exceeded the rail out-of-pocket cost, on the grounds that (1) the order was based on misinterpretation or misapplication of relevant statutes and (2) the Commission failed to adequately explain its reasons for disallowing the rate. The Commission adequately stated its reasons for finding that appellee railroads' rate would impair the inherent advantage enjoyed by the barge-truck service; and the lower court erred in its reading of both decision in 372 US 744 and the extent of Congress' intent to foster intermodal competition shown in legislative history of the statutes, in concluding that the Commission's comparison of fully distributed costs in determining which of the competing modes was the lower cost one contravened the objectives and purposes of §15a(3) and that, in such cases, the Commission must justify a departure from the use of out-of-pocket cost as a measure of inherent cost advantage. Reversed and remanded to the district court with instructions to affirm the Commission's order.—Id., pp. 574-6, 578-83, 593-4.

As pointed out in 372 US 744, the principal reason for Congress' reference to the national transportation policy in §15a(3) was to emphasize the power of the Commission to prevent railroads from destroying inherent advantages of other transportation modes. However, rationale, and principles stated, in that decision relate solely to intermodal competitive rate adjustments; thus, since proposed reduced rate adjustment was not prompted or established for intermodal competitive reasons, but to improve shippers' competitive position in the destination area, the decision is not applicable.—Wine, Pacific Coast to East, 326 I.C.C. 119 (154-5)*.

Moreover, the inescapable conclusion to be drawn from the court's comments in the cited case, that "something more than even hard competition must be shown before a particular rate can be deemed unfair or destructive" and that all reduced rates which force the competitive low-cost mode to go below its fully distributed costs might "not unduly impair that advantage," is that the court did not intend to prescribe a mechanical formula for the Commission to apply whenever the issue of destructive competition is presented.—Id., 329 I.C.C. 167 (173)*.

Though proposed reduced rail rates fall below Sea-Land's fully distributed costs, in some instances, they are considerably above its out-of-pocket costs; and, since its participation in considered traffic is limited and it has already reduced its rates to meet rail competition, evidence is convincing that Sea-Land will continue to operate and participate in the traffic on a profitable basis as rates which, while well above its out-of-pocket costs, are differentially below the rail rates. Proposed rail rates are compelled by a market situation already out of adjustment due to unregulated water carriage, are generally compensative, and shown to be just and reasonable from respondents' revenue requirements; therefore, any ensuing competition would not be destructive in nature but, rather, would constitute the same "hard competition" which was recognized as lawful in 372 US 744. Thus, where nonregulated carriage is a major source of competition, regulated carriers may lawfully reduce their rates below the fully distributed cost level of another regulated carrier which competes to some extent for the traffic.—Id., pp. 173-5.

As stated by the Supreme Court in 372 US 744, §15a(3) makes it clear that something more than even hard competition must be shown before a particular rate can be deemed unfair or destructive, and Congress did not regard the setting of a rate at a certain level to constitute a destructive competitive practice simply because that rate would divert some or all traffic from a competing mode. Measured by such criteria, reduced rail rates which are compensatory cannot be found to constitute a destructive competitive practice when the record does not show that they genuinely threaten continued existence of a transportation service that is uniquely capable of filling a transcendent national defense or other public need.—Grain from Idaho, Oreg. & Wash. to Ports in Oreg. & Wash., 326 I.C.C. 358 (362, 368)*.

In a case involving intermodal competition, the more particularized mandates of the national transportation policy or the clear congressional intent embodied in §15a(3) should govern lawfulness of proposed rates. And, as stated in 372 US 744, those factors should not be overridden except under extraordinary circumstances; to justify such a result, it must be shown that the proposed rates in themselves genuinely threatened the continued existence of a transportation service that is uniquely capable of filling a transcendent national defense or other public need. Protestant water carrier made no such showing with respect to proposed rail TOFC rate.—Canned or Preserved Foodstuffs from Fla. To N.Y. & N.J., 326 I.C.C. 776 (782)*.

Any rate reduction will have competitive ramifications and alter previously existing relationships. This fact is insufficient to condemn an adjustment. Those protesting the proposed Baltimore rates have shown only that the proposed rates would be inimical to their interests. Without more, and bearing in mind the large amount of paper traffic moving through New York, the Commission views this adjustment rather as a step in restoring healthy carrier competition. Changes in rates are not unlawful merely because of possible, or even probable, additional rate changes.—Paper, Central Territory to North Atlantic Ports, 329 I.C.C. 281 (290).

Complainant Sea-Land urged that it is the low-cost carrier, that its rate is below the fully distributed costs of the "Sea-Land route," and that it has been forced to publish a less-than-profitable rate in order to compete. However, even if the Commission were to determine that complainant is the low cost carrier on a fully distributed basis (which is impossible since the underlying data are not of record), its rate of 75 cents per 100 pounds is not below fully-distributed costs but rather exceeds those costs. Complainant's present rate, inasmuch as it exceeds fully-distributed costs, is not "unprofitable" in any sense of the word and the evidence shows Sea-Land has successfuly participated in the traffic at this rate. Therefore, complainant has not shown any violation of §15a(3) in this proceeding.—Sea-Land Service, Inc., v. New York Central R. Co., 329 I.C.C. 589 (597).

The undisputed facts of record show that the proposed proportional rate is competitively necessitated. Although protestant barge lines are the low-cost mode, proposed rate exceeds both barge rates and barge fully distributed costs and the effect of the proposed rate upon barge traffic is not shown to be imminently destructive or to go beyond the hard competition sanctioned in 372 US 744. Rail rates here in issue not found to constitute a destructive competitive practice.—Corn and Corn Products, Illinois to Official Territory, 332 I.C.C. 485 (487-88)*.

The Commission will not, in this investigation proceeding, consider the effect of "public cost" (the cost incurred by governmental agencies in providing transportation facilities) on intermodal competition and the rail freight rate structure. Since no carrier could establish the hypothetical costs assignable to its operations or those of its competitors, the "public cost" issue would emasculate §15a(3) and repeal the inherent advantages clause of the national transportation policy. We also have this issue in certain respects before us in another docket. —Investigation of Railroad Freight Rate Structure, 340 I.C.C. 868 (874-75).

Section 15a. (4) Revenue levels, railroads.—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §205, 90 Stat. 41.]

(4) With respect to common carriers by railroad, the Commission shall, within 24 months after the date of enactment of this paragraph, after notice and an opportunity for a hearing, develop and promulgate (and thereafter revise and maintain) reasonable standards and procedures for the establishment of revenue levels adequate under honest, economical, and efficient management to cover total operating expenses, including depreciation and obsolescence, plus a fair, reasonable, and economic profit or return (or both) on capital employed in the business. Such revenue levels should (a) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation and (b) insure retention and attraction of capital in amounts adequate to provide a sound transportation system in the United States. The Commission shall make an adequate and continuing effort to assist such carriers in attaining such revenue levels. No rate of a common carrier by railroad shall be held up to a particular level to protect the traffic of any other carrier or mode of transportation, unless the Commission finds that such rate reduces or would reduce the going concern value of the carrier charging the rate.

Section 15a. (5) Rate relationships; shippers' competition.—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §203, 90 Stat. 39.]

(5) The Commission shall, in any proceeding which involves a proposed increase or decrease in railroad rates, specifically consider allegations that such increase or decrease would change the rate relationships between commodities, ports, points, regions, territories, or other particular descriptions of traffic (whether or not such relationships were previously considered or approved by the Commission) and allegations that such increase or decrease would have a significantly adverse effect on the competitive position of shippers or consignees served by the railroad proposing such increase or decrease. If the Commission finds that such allegations as to change or effect are substantially supported on the record, it shall take such steps as are necessary, either before or after such pro-

posed increase or decrease becomes effective and either within or outside such proceeding, to investigate the lawfulness of such change or effect.

Section 15a. (6) Increase in rates (Railroad Rate Adjustment Act of 1973).—[Formerly paragraph (4) which was added by Public Law 93-69, July 10, 1973, 87 Stat. 162, but redesignated (6) by the act of Feb. 5, 1976, Public Law 94-210, 90 Stat. 41.]

(a) The Commission shall by rule, on or before August 1, 1973, establish requirements for petitions for adjustment of interstate rates of common carriers subject to this part based upon increases in expenses of such carriers resulting from any increases in taxes under the Railroad Retirement Tax Act, as amended, occurring on or before January 1, 1975, or as a result of the enactment of the Railroad Retirement Amendments of 1973. Such requirements, established pursuant to section 553 of title 5 of the United States Code (with time for comment limited so as to meet the required date for establishment and subject to future amendment or revocation, shall be designed to facilitate fair and expeditious action on any such petition as required in subparagraph (b) of this paragraph by disclosing such information as the amount needed in rate increases to offset such increases in expenses and the availability of means other than a rate increase by which the carrier might absorb or offset such increases in expenses.

(b) Notwithstanding any other provision of law, the Commission shall, within thirty days of the filing of a verified petition in accordance with rules promulgated under subparagraph (a) of this paragraph, by any carrier or group of carriers subject to this part, permit the establishment of increases in the general level of the interstate rates of said carrier or carriers in an amount approximating that needed to offset increases in expenses theretofore experienced or demonstrably certain to occur commencing on or before the effective date of the increased rates, as a result of any increases in taxes under the Railroad Retirement Tax Act, as amended, occurring on or before January 1, 1975, or as a result of the enactment of the Railroad Retirement Amendments of 1973. Such increases in rates may be made effective on not more than thirty nor less than ten days' notice to the public, notwithstanding any outstanding orders of the Commission. To the extent necessary to effectuate their establishment, rates so increased shall be relieved from the provisions of section 4 of this part and may be published in tariff supplements of the kind ordinarily authorized in general increase proceedings.

(c) The Commission shall within sixty days from the date of establishment of interim rates under paragraph (4) (b) of this section commence hearings for the purpose of making the final rate determination. The Commission shall then proceed to make such final rate determination with the carrier having the burden of proof. In making such determination, the

Commission may take into account all factors appropriate to ratemaking generally under part I of this Act and shall determine such final rates under the standards and limitations applicable to ratemaking generally under part I of this Act. If the increases in rates finally authorized by the Commission are less than the increases in rates initially made effective, the carrier or carriers shall, subject to such tariff provisions as the Commission shall deem sufficient, make such refunds (in the amount by which the initially increased rate collected exceeds the finally authorized increased rate) as may be ordered by the Commission, plus a reasonable rate of interest as determined by the Commission. Nothing contained in this paragraph shall limit or otherwise affect the authority of the Commission to authorize or to permit to become effective any increase in rates other than the increases herein specified.

(d) (A) The State authority having jurisdiction over petitions for intrastate rate increases by any carrier or group of carriers subject to part I of this Act shall, within 60 days of the filing of a verified petition for such increases based upon increases in expenses of such carriers as a result of any increases in taxes under the Railroad Retirement Tax Act, as amended, occurring on or before January 1, 1975, or as a result of the enactment of the Railroad Retirement Amendments of 1973, act upon said petition. Such State authority may grant an interim rate increase or a final rate increase. If such State authority grants any interim rate increases, it shall thereafter investigate and determine the reasonableness of such increases and modify them to the extent required by applicable law. To the extent that any such interim increases are reduced as a result of the action of a State authority, the carrier or carriers shall make such refunds (in the amount by which the initially increased rate collected exceeds the finally authorized increased rate) as may be ordered by such State authority, plus a reasonable rate of interest as determined by the State authority.

(B) If a State authority denies in toto such a petition filed with it by such carrier or group of carriers seeking relief regarding such intrastate rate increases or does not act finally on such petition within 60 days from the presentation thereof, the Commission shall, within 30 days of the filing of a verified petition by such carrier or group of carriers relating to such intrastate rates, act upon such petition by applying the ratemaking criteria of subparagraph (4) (c) of this paragraph. If the Commission grants, in whole or in part, such petition by any carrier or group of carriers, the increase authorized shall be considered as an interim rate increase as provided in subparagraph (A) above and shall be subject to final determination by the State authority in accordance with the procedures prescribed for interim intrastate rate increases as provided above, including the ordering of refunds by such State authority.

(C) If a State authority denies in part such a petition filed with it by such carrier or group of carriers, within 60 days from the presentation thereof, the Commission shall, within 30 days of the filing of a verified petition by such carrier or group of carriers relating to the intrastate rates involved, act upon such petition by applying the criteria of section 13(4) of this part.

(D) Nothing in subparagraph (A) or (B) shall be construed to abrogate the authority of the Commission under section 13(4) of this part and in the event a carrier or group of carriers subject to a refund requirement under subparagraph (A) or (B) files a petition under section 13(3), the refund requirement shall be stayed pending final order of the Commission under section 13(4) of this part.

(E) Any increased freight rates authorized shall not exceed a reasonable level by types of traffic, commodities, or commodity groups and shall preserve existing market patterns and relationships and present port relationships by increase limitations within and between the major districts to the extent possible without authorizing unreasonable increases in any district."

Regulations of the Commission

38 FR 20623, Aug. 2, 1973, Part 1107: Requirements and Procedures Relating to Railroad Rate Adjustment Act of 1973, sets forth procedures for petitions for adjustment of interstate freight rates because of increased expenses due to increased taxes, effective Aug. 1, 1973.

38 FR 22125, Aug. 16, 1973, Part 1107: Requirements and Procedures Relating to Railroad Rate Adjustment Act of 1973, a correction to rules promulgating at 38 FR 20623.

Section 16. Orders of commission and enforcement thereof—(1) Award of damages.—[Unchanged. See vol. 9, p. 7718.]

Amendments, see footnotes, vol. 3, p. 2129; historical note, p. 2129.

Notes of Decisions

Volume 3—p. 2129; Volume 7—p. 5611; Volume 9—p. 7718; Volume 11—p. 9287; Volume 12—p. 10321; Volume 14—p. 11531; Volume 15—p. 12115; Volume 16—p. 12765; Volume 17—p. 13450; Volume 18—p. 14209.

1. Reparation orders, generally.—[Vols. 3, 7, 9, 18].—There is no merit to argument that §16(1) grants an absolute right of cross-examination; that section, which does not mention cross-examination, must be interpreted in connection with §13, to which it refers, and §13(1) states that it is the Commission's duty to investigate the matters complained of "in such manner and by such means as it shall deem proper."—Steel, Inc. v. Chicago, B. & Q. R. Co., 323 I.C.C. 509 (515-6).

Section 16. (2) Proceedings in courts to enforce orders; costs, attorney's fees.—[Unchanged. See vol. 11, p. 9287.]

Amendments, see footnotes, vol. 3, p. 2135; vol. 11, pp. 9287-9288; historical note, vol. 3, p. 2135.

Notes of Decisions

Volume 3—p. 2136; Volume 7—p. 5613; Volume 9—p. 7720; Volume 11—p. 9288; Volume 12—p. 10321; Volume 13—p. 11026; Volume 14—p. 11531; Volume 15—p. 12115; Volume 16—p. 12766; Volume 17—p. 13450; Volume 18—p. 14210; Volume 19—p. 15404; Volume 21—p. 16933.

2. Enforcement of reparation orders by courts, in general.—[Vols. 3, 7, 9, 11, 15, 17-19, 21].—Suit by shipper to enforce payment of reparations award by the Commission against defendant railroads, arising from alleged overcharges, requires interpretation of certain tariffs and, in particular, the application of so-called intermediate point rule in tariff publishing rate claimed to be applicable on plaintiff's shipments. As is well settled, construction of language in a tariff presents a question of law; and for purposes of instant case, a tariff is not essentially different from any other written document. Also, it is settled law that a tariff must be construed to avoid unjust, absurd, or improbable results. Thus, it is the court's task to review the Commission's decision that, under tariff intermediate-point rule, the applicable rate on fruits and vegetables actually shipped from central California points to Philadelphia. Pa., was the claimed lower rate published from El Centro to Philadelphia; and if that interpretation is found contrary to law, the court must set it aside. —Samuel P. Mandell Co. v. Pennsylvania R. Co., 336 F. Supp. 565 (568-9)*.

The court rejects the Commission interpretation of the tariff because, as held in 212 F. 2d 812, a route for "intermediate point" rate purposes must not be unreasonable; however, El Centro-Philadelphia route sanctioned by the Commission is unreasonable in the way it constructs routes by piecing together rail lines without any semblance of relation to actual use or commercial reality. In addition, the Commission erred in its application of the intermediate-point rule so as to make rates from El Centro, rather than those from actual origin points, applicable on considered shipments; and since it also erred in its interpretation of provisions of the tariff, rate charged by the carriers from actual central California origins to Philadelphia was the proper one. Accordingly, since the court finds the hypothetically constructed El Centro route to be arbitrary, unreasonable and contrary to law, it will not enforce the Commission's reparations award; judgment entered in favor of defendants. —Id., pp. 569, 571-5.

8. Findings and order of Commission prima facie evidence.—[Vols. 3, 7, 9, 11, 12, 15, 18, 19, 21].—In shipper's suits against motor carriers to recover refunds of freight charges, claimed on basis of the Commission's order in rate-increase investigation which postponed hearing therein on condition that respondent carriers refund to shippers any increases not ultimately found just and reasonable, initial issue presented by plaintiff's motions for summary judgment is the propriety and validity of the refund order. Defendants argue that the Commission order was void for numerous reasons; however, that issue has been resolved against them by the Colorado three-judge court which, after reviewing their contentions, dismissed the complaint in Admiral-Merchants Motor Frt., Inc. v. U.S., 321 F. Supp. 353, aff'd 404 US 802, wherein carriers involved in the Commission proceeding sought to have the refund order overturned. And though, unlike instant case, *Admiral-Merchants* was not an enforcement proceeding but merely an attack on the refund order, that distinction is not relevant to the issue of propriety of the order.—Aluminum Co. of America v. Admiral Merchants Motor Frt., Inc., 337 F. Supp. 674 (677-8).

And in shipper's later suits against other motor carriers for recovery of refunds, based on the same Commission refund order, defendants' initial grounds for opposing plaintiff's summary judgment motions are the same as offered in the earlier case, 337 F. Supp. 647, which decision is incorporated herein by reference; those arguments were considered in the court's prior opinions and, as there outlined, are not found to be meritorious. In addition thereto, defendants now argue that plaintiff seeks to have the court give greater vitality and effect to contested refund order; also that, in view of suggested theory of restitution asserted in the Commission's brief submitted to that three-judge court, the Colorado court's decision upholding the order was not intended to foreclose carriers from later challenging it. Clearly, such contentions are of no merit because (1) the Colorado court rested its decision on a basis wholly apart from that suggested by the Commission and (2) instant suits are not, in any event, restitution suits.—Aluminum Co. of America v. Burlington Truck Lines, Inc., 342 F. Supp. 166 (168-70).

Also, contrary to defendants' continued description, plaintiff's cause of action is not based on a theory of reparations. Such persistent characterization of plaintiff's suits can be nothing more than a smoke screen to hide the fact that the Supreme Court has affirmed a decision which states that all carriers who participated in the Commission rate investigation, and who withdrew their objections to the refund order, are estopped from contesting and have waived their right to challenge validity of that order. While that that decision is not *res adjudicata* as to those defendants who were not parties in the Colorado court proceeding, it is not suggested that they were not part of the group of carriers in the Commission proceeding who withdrew objections to the refund order. Therefore, those carriers also are estopped from contesting the order's validity because, under the doctrine of *stare decisis*, the court must accept the Supreme Court's holding that all carriers involved with the Commission rate-increase proceedings are estopped from contesting the validity of the refund order entered therein.—Id., pp. 170-2.

Defendants also contend that the Colorado court did not affirm the Commission order, but merely refused complainant carriers the relief sought therein; such myopic reading of that opinion is belied by the statement of issues set forth by the court and the question presented on appeal to the Supreme Court which clearly indicate that both those courts were affirming validity of the refund order. In addition, under established review procedures, an affirmance of a Commission order results from a three-judge court's refusal to enjoin; thus, apart from the "presented" issues, when the three-judge court refused to enjoin or set aside the order, and the Supreme Court affirmed, those courts in fact affirmed the validity of the Commission refund order. And under the doctrine of *res judicata*, defendants are precluded from attacking that order and the court is likewise bound to accept the validity thereof in instant proceeding. Therefore, plaintiff is granted summary judgment in the amount of refunds specified in its stipulation with each defendant carrier.—Id., 678-9, 686-7, 682, 688; shipper entitled to refunds sought.—Land O'Lakes, Inc. v. United—Buckingham Frt. Lines, Inc., 351 F. Supp. 103 (109-10, 113).

And the court rejects defendants' added argument that they can now challenge Commission finding, which is only prima facie evidence in instant suits, that carriers had not met their burden of proving that proposed rates were just and reasonable, since they failed to submit evidentiary affidavits to support the claim that they did meet that burden of proof; their failure to submit supporting affidavits is peculiarily important because of the court's limited scope of review over that Commission conclusion in a §16(2) proceeding. See 383 US 576. Moreover, carriers waived any objections to that underlying finding when, as a condition for delay of the hearing on proposed increased rates, they agreed to refund any increases not ultimately approved by the Commission; also, having contested refund portion of the order before a three-judge court, they cannot now urge as invalid an aspect different than the one urged in that court. Defendants waived the right to contest validity of the order as it relates to the finding on burden of proof because of their failure to raise that underlying ground for invalidity when they challenged the refund portion before the reviewing court.—Id., pp. 172-6; Proctor and Gamble Co. v. Byers Transp. Co., Inc., 355 F. Supp. 547 (556-8).

22. Interest.—[Vols. 3, 7, 9, 11, 14].—Although final order in Commission rate investigation, on which shipper based its suits for refund of rate increases not ultimately approved, does not provide for collection of interest from the time of its entry, plaintiff's request for interest on refunds due from each defendant from date of first effective refund order is not beyond scope of the order relied on. While the order does not state that interest shall accrue if respondent carriers refuse to comply with its terms, it is nevertheless clear that §16(2), the statute on which plaintiff relies, represents Congress' policy to encourage prompt payment of moneys which the Commission orders to be paid; and denial of interest accruing from the date of an ignored commission order would tend to discourage the prompt payment of such money, in direct contradiction of Congressional policy. Accordingly, pursuant to Commission order in question, shippers are entitled to 6-percent interest on the refunds due from each carrier from date of the first effective refund order.—Aluminum Co. of America v. Burlington Truck Lines, Inc., 342 F. Supp. 166 (176-7).

26.—Attorney's fees.—[Vols. 3, 7, 9, 11, 12, 14].—Inasmuch as §16(2) was incorporated into part II of the act by §205(g), and shipper's motion for summary judgment is granted, plaintiff is entitled to allowance of a reasonable attorneys' fee as part of the costs in its suits against motor carriers for enforcement of refund order entered by the Commission in its investigation of increased motor-carrier rates.—Aluminum Co. of America v. Admiral Merchants Motor Frt., Inc., 337 F. Supp. 674 (682, 683); contrary to defendants' argument, the court concluded in its earlier opinions that §16(2) was incorporated in its entirety, rather than selectively, by §205(g). Also, the mere fact that amount of plaintiff's requested attorneys' fees almost equals amount of its underlying refund claims does not render such fees invalid. However, reasonable attorneys' fees cannot be awarded in instant suits without a breakdown of costs, attorney hours, and rates as provided in shipper's earlier suits for enforcement of the same refund order.—Aluminum Co. of America v. Burlington Truck Lines, Inc., 342 F. Supp. 166 (177-8); sum of $2500 awarded as reasonable attorneys' fees.—Proctor and Gamble Co. v. Byers Transp. Co., Inc:, 355 F. Supp. 547 (563).

Section 16. (3) Limitation of actions.—[Unchanged. See vol. 18, p. 14210.]

Historical notes, vol. 3, p. 2149, vol. 13, p. 11058.

Notes of Decisions

Volume 3—p. 2151; Volume 7—p. 5620; Volume 9—p. 7727; Volume 11—p. 9291; Volume 12—p. 10322; Volume 13—p. 11026; Volume 14—p. 11532; Volume 15—p. 12116; Volume 16—p. 12766; Volume 17—p. 13451; Volume 18—p. 14212; Volume 19—p. 15405; Volume 21—p. 16935.

In General

10. Claims of and against Federal Government.—[Vols. 3, 9, 11, 15-19].—Railroad's suit against government to recover additional freight charges allegedly due on shipments on which charges were prepaid by commercial shipper, who was reimbursed by the Government, was not barred by statute of limitations. Though brought more than three years after all prepayments, the action was timely as to all claims in issue when it was filed within three years after General Accounting Office denied payment of railroad's supplemental bills and, also, made deductions from other moneys owed the carrier. Intent of §16(3)(i) was to extend periods of limitation as to government traffic to three years from date of (1) payment of charges, (2) refund for overpayment, or (3) deduction under §66, whichever is later; and, contrary to defendant's argument, railroad is not limited to recovering only the amounts deducted. Defendant's motion for summary judgment is denied but it is granted leave to file a counterclaim for overcharges alleged to be due the Government; case remanded to Court of Claims for disposition on the merits.—Erie Lackawanna Ry. Co. v. United States, 439 F. 2d 194 (196-9, 200).

Actions for Overcharges—Subparagraph (c)

98. Complaints within six months after declination.—[Vols. 3, 7, 9, 11-19.—Complainant's letters written within 6 months of the Commission's first letter notifying it of declination of informal complaint are merely repetitive of the original submission and do not constitute a resubmission on an additional-fact basis as required by rule 1.25(f) of Rules of Practice; therefore, formal complaint filed more than 6 months after denial of the informal complaint is barred.—Atlantic Creosoting Co., Inc. v. Southern Ry. Co., 323 I.C.C. 533 (535).

Accrual of Cause of Action—Subparagraph (e)

106. Time of accrual of cause of action, in general.—[Vols. 3, 7, 12, 21].—Statute relating to limitations on suits by carriers to recover for charges was intended to make the cause of action accrue at time of delivery; but with respect to transportation for the Government, §16(3)(i) was intended to extend the periods of limitation to three years from date of specific events, i.e., (1) payment of charges, (2) refund for overpayment, or (3) deduction under §66, whichever occurs later. Thus, railroad's action against the Government to recover additional charges allegedly due under applicable tariffs—a cause of action which accrued on delivery—was not barred when, though brought more than three years after prepayment of charges by commercial shipper who was reimbursed by the Government, it was filed within three years of date that General Accounting Office denied payment of carrier's supplemental bills and made deductions from other moneys owed the railroad. Defendant's motion for summary judgment because, except as to amounts deducted, railroad's claims are barred by the statute, denied; case remanded to Court of Claims for disposition on the merits.—Erie Lackawanna Ry. Co. v. United States, 439 F. 2d 194 (196-200).

As §16(3)(e) provides that the cause of action in respect of a shipment of property accrues upon delivery or tender of delivery by the carrier, date of delivery to final destination of a transited shipment, not date of delivery to the transit point, is controlling. Since rates applicable on considered shipments were single-factor transit rates, the fiction of continuous through movement is established, and the 2-year statute of limitations did not begin to run until delivery to final destination.—Atlantic Creosoting Co., Inc. v. Southern Ry. Co., 323 I.C.C. 533 (539-40).

Enforcement of Orders—Subparagraph (f)

120. Suits for enforcement of orders.—[Vols. 3, 9, 19].—Shipper's claims for enforcement of Commission order, asserted in its motions for summary judgment, were not barred by one year statute of limitation in §16(3)(f) when they arose from matters and events alleged in original complaints in its suits to recover certain freight charges, pursuant to final order in Commission rate investigation, which were filed within one year after entry of the order. By virtue of Rule 15 of Federal Rules of Civil Procedure, issues raised in the summary judgment motions must be treated as if raised in the pleadings because they were argued by the parties on those motions and, since plaintiff's "new" theory of recovery clearly arose out of transactions and occurrences alleged in its original complaints, the new issues relate back to the date of timely filed original pleadings. Therefore, though the summary judgment motions were filed more than a year after entry of the Commission order, plaintiff's claims for enforcement are not barred by the statute.—Aluminum Co. of America v. Admiral Merchants Motor Frt., Inc., 337 F. Supp. 674 (683-4); Land O'Lakes, Inc. v. United Buckingham Frgt. Lines, Inc., 351 F. Supp. 103 (111-12); Proctor and Gamble Co. v. Byers Transp. Co., Inc., 355 F. Supp. 547 (562).

Section 16.(4),(5).—[Unchanged. See vol. 9, p. 7739, vol. 11, p. 9293, vol. 15, p. 12120.]

Amendments, see footnotes, vol. 3, p. 2177; historical note, vol. 3, p. 2135; 16(5), vol. 3, p. 2178, vol. 12, p. 10324, vol. 14, p. 11533.

Notes of Decisions

Volume 3—p. 2177; Volume 7—p. 5645.

§16(5): Volume 3—p. 2178; Volume 7—p. 5646; Volume 17—p. 13454.

Section 16.(6)-(11).—[Unchanged. See vol. 9, p. 7740.]

Amendments, see footnotes, vol. 3, p. 2179; vol. 3, pp. 2182-2185; historical notes, vol. 3, pp. 2183, 2185, 2186.

Notes of Decisions

Volume 3—p. 2179; Volume 7—p. 5647; Volume 9—p. 7740; Volume 11—p. 9293; Volume 16—p. 12768.

§16(8): Vol. 3—p. 2183; §16(6): Vol. 18—p. 14216; Volume 19—p. 15408; Volume 21—p. 16938.

§16(6). 4. Modification of order.—[Vols. 3, 9, 11, 16, 19].—Although it is alleged that the ICA and the Commission's Rules of Practice preclude reconsideration by the entire Commission on its own motion of a decision of an appellate division, the limitation in the statute and the rules issued pursuant thereto is only a limitation upon the right of a party to seek reconsideration and in no way runs to the power of the Commission to reconsider. The right of an administrative body to reconsider at any time is inherent in its power to decide and is a necessary procedure in order to permit it to carry out properly its functions under the enabling statutes. If the Commission were precluded from correcting an error promulgated in a prior report, justice would be thwarted and would only result in imposing a totally unnecessary burden on a reviewing court to remand the proceeding to the Commission for reconsideration.—Eazor Exp., Inc.—Purchase—Fleet Highway Freight, 101 M.C.C. 719 (720)*.

Section 16. (12) Proceedings to enforce orders other than for payment of money.—[Unchanged. See vol. 11, p. 9294.]

Amendments, see footnotes, vol. 3, p. 2186, vol. 11, p. 9294; historical note, p. 2186.

Notes of Decisions

Volume 3—p. 9192; Volume 9—p. 7743; Volume 11—p. 9295; Volume 13—p. 11027; Volume 14—p. 11533; Volume 15—p. 12121; Volume 17—p. 13455; Volume 19—p. 15409; Volume 21—p. 16939.

10. Jurisdiction of Federal courts.—[Vols. 3, 14, 17, 21].—A carrier that has been included in a merger pursuant to a Commission order can seek relief in the district courts; however, on the facts presented, plaintiff railroad is not entitled to a court order requiring defendant to engage in good faith negotiations with plaintiff on terms and conditions of its inclusion in the Penn-Central merger (which was approved by the Commission) and an order requiring immediate physical merger with terms and conditions to be worked out later. The Commission's order provided for the parties' negotiation of terms and conditions and that, if they could not agree, they could request the Commission to establish such terms and conditions; it did not prescribe any pattern or procedure for the negotiation, much less require that the parties reach agreement. Preliminary relief sought by plaintiff cannot be granted because sharp issues are raised by conflicting affidavits as to whether the Commission's order has been disobeyed; plaintiff's remedy is to ask the Commission to fix terms and conditions for its inclusion in the merger.—New York, S. & W. R. Co. v. Penn Central Co., 287 F. Supp. 704 (705-6).

14. Right of parties injured to sue.—[Vols. 3, 15].—See Nemitz v. Norfolk & W. Ry., at §5(2), n. 70.

Section 16. (13) Copies of schedules, tariffs, contracts, etc., kept as public records; evidence.—[Unchanged. See vol. 9, p. 7744.]

Amendments, see footnotes, vol. 3, p. 2202; historical note, p. 2186.

Notes of Decisions

Volume 3—p. 2202; Volume 6—p. 12769; Volume 17—p. 13455; Volume 21—p. 16940.

Section 17. Commission procedure; delegation of duties; rehearings—(1) Divisions of Commission; organization; composition.—[Unchanged. See vol. 11, p. 9295.]

Amendments, see footnotes, vol. 3, p. 2213, vol. 11, p. 9295-9296; historical notes, vol. 3, p. 2213.

Historical Note

By §305 of the act of Feb. 5, 1976, 90 Stat. 53, the Commission is required, within 360 days after the date of enactment of the act, to submit to Congress an initial proposal setting forth rules of practice for the conduct of all adjudicatory and rulemaking proceedings involving railroads. After comment by the Administrative Conference of the United States, the Commission shall submit a final proposal, which shall take effect if not disapproved by either house. Not less than every 3 years, the Commission shall review the rules so adopted and shall revise such rules as it considers necessary.

Section 17. (2) Reference of matters to divisions, individual commissioners, or boards.—[Unchanged. See vol. 11, p. 9296.]

Amendments, see footnotes, vol. 11, p. 9296; historical notes, vol. 3, p. 2213, vol. 11, p. 2927, vol. 15, p. 12121, vol. 16, p. 12769, vol. 17, p. 13456, vol. 19, p. 15410, vol. 21, p. 16940.

Notes of Decisions

Volume 18—p. 14216; Volume 19—p. 15410; Volume 21—p. 16940.

1. In general.—[Vols. 18, 19, 21].—The Commission has broad statutory power to delegate its functions to a division or an individual Commissioner; item 6.4 in its Organization Minutes (26 FR 4773) refers procedural matters in a formal case to the chairman of the division assigned subject matter of the case, and Division 2 has been assigned the subject matter of complaint assailing rail rates charged; thus, according to published rules of the agency, the Chairman of Div. 2 was duly authorized to pass on defendants' requests for oral hearing and to issue appropriate orders. Also, defendants had a statutory right (not pursued) to appeal the orders denying oral hearing by a petition to Appellate Div. 2 for reconsideration, in accordance with Commission rules; but neither the examiner nor Review Board had authority to consider such appeals. Procedures set forth do not conflict with §7(b) of Administrative Procedure Act that authorizes officers who preside at hearings to dispose of procedural requests or similar matters, subject to published rules of the agency; and having failed to pursue proper Commission procedures, defendants may not now claim error in that respect.—Mode-O-Day Corp. v. Atchison, T. & S. F. Ry. Co., 325 I.C.C. 390 (391-2)*.

Regulations of the Commission

33 FR 16543, Nov. 13, 1968; Organization Minutes, in order to implement P.L. 90-586 adding a new §323, paragraph (m) of Item 4.4 amended, effective Nov. 1, 1968.

33 FR 16543, Nov. 13, 1968: Organization Minutes, paragraph (c) of Item 3.2 amended to provide for Commission approval of appointment of the Legislative Liaison Officer and Legislative Counsel, effective Nov. 5, 1968.

34 FR 488, January 11, 1969: Organization Minutes, in consolidating the Temporary Authorities Board and the Transfer Board into the Motor Carrier Board, Item 7.4 is revised, Item 7.5 is deleted, and necessary relevant changes are made in Items 4.2, 4.3, 4.4, 8.4, and 8.6, effective Jan. 21, 1969.

35 FR 4353, March 11, 1970: ICC Central and Field Organization (32 FR 8690, as amended 32 FR 10955) further amended, with respect to the Office of Proceedings, as set forth in amendment dated March 6, 1970.

35 FR 10477, June 26, 1970: Organization Minutes, concurrent with creation of a Tariff Rules Board, assignment to that Board of initial jurisdiction over regulations governing form and manner of publishing, filing, and posting tariffs or schedules, which do not involve taking testimony at a hearing or submitting evidence in affidavit form, and the designation of Division 2 as an appellate division to reconsider decisions, orders, or requirements of that Board, Item 4.3(e) is revised, new Item 7.14 Tariff Rules Board is added, and Item 8.5 is revised, effective July 1, 1970.

36 FR 16614, Aug. 24, 1971: ICC Central and Field Organization, revised current description of central and field organization, which is supplemental to the Commission's Organization Minutes, published.

37 FR 7374, May 9, 1972: Organization Minutes, in order to expedite unopposed applications under §1(18)-(20) for authority to abandon railroad lines, or the operation thereof, Items 6.5 and 7.12(f) are amended, effective on date of order.

Section 17. (3) Conduct of proceedings; seal, oaths; quorum; rules.—[Unchanged. See vol. 11, p. 9297.]

Amendments, see footnotes, vol. 3, p. 2208, vol. 11, pp. 9297 9298; historical notes, vol. 3, p. 2208, vol. 11, p. 9298, vol. 15, p. 12121.

Notes of Decisions

Volume 7—p. 5657; Volume 12—p. 10324; Volume 14—p. 11534; Volume 15—p. 12122; Volume 16—p. 12770; Volume 17—p. 13456; Volume 18—p. 14217; Volume 19—p. 15411; Volume 21—p. 16942.

1. Authority of Commission to control procedure before it.—[Vols. 3, 7, 9, 14-16, 19, 21].—See also Greyhound Corp.—Control—Tex., N. Mex. & Okla. Coaches, at §5(2), n. 111, and HC & D Moving & Storage Co., Inc. v. United States, at APA, 5 USC, Procedure.

Federal Reports Act of 1942 is not bar to Commission order to produce detailed data, including evidence about affiliates, in substantiation of operating ratios when carriers seek rate increase. That act was designed to limit the duplication of the collection of information by government agencies. The data is sought here under the Commission's authority in §17(3) of the Interstate Commerce Act to implement §406(e) relating to the regulation of freight forwarders, and is sought in connection with a specific proceeding in which a substantive determination is to be made. The Federal Reports Act is a housekeeping-type of legislation, directed only to the actions of Government agencies in the discharge of their functions as they affect each other; the third-party freight forwarders have no standing to invoke its provisions as a defense in regulatory litigation.—Freight Forwarder Increase, Transcontinental Terr., 326 I.C.C. 437 (438-9, 445).

Petition of Motor Carrier Lawyers Association for informal changes in the Commission's handling of rulemaking proceedings of general interest to the public, denied. Procedures to be instituted within the Commission in rulemaking proceedings of general interest to the public wherein written statements are to be filed in place of oral hearing, announced informally. Such procedures, aimed at discouraging those persons not intending to file statements in such proceedings from stating an intent to participate, include (1) publication of the Notice of Proposed Rulemaking and Order with a general invitation to the public including a request that a person submitting a letter of intent state, with particularity, the extent of his interest, and (2) preparation by the Commission of a notice fixing dates for filing initial and reply Statements and containing a list of parties upon whom a copy of each statement must be served, including a further statement of the Commission reemphasizing the desire of the Commission to pare the service list and stressing that any person having no further interest in receiving or filing pleadings in the proceeding should notify the Commission immediately so that a supplemental notice can be timely issued.—Petition to Amend Commission's Procedure for Rulemaking, 340 I.C.C. 190 (192).

The right of the Commission to consider an application for authority separately or in combination with other applications is a well established matter of administrative discretion based on the concept of fairness to all parties involved, the effective procedures of the Commission, and the public interest. The Commission is fully aware of the relationships between applicant's two applications and those of two protesting carriers, and comparative aspects of the several applications will be considered in evaluations made in applicant's proceedings; however, since good cause is not shown warranting consolidation of applicant's proceedings with those of protestants, applicant's request therefor is denied by concurrently issued order.—M. R. & R. Trucking Co., Extension, 105 M.C.C. 69 (72)*.

1a.—To correct errors.—[Vols. 18, 21.]—See also Carl Subler Trucking, Inc., Modification of Certificate, at §212(a), n. 10.

The Commission clearly has the statutory power—and the duty—to modify motor carrier certificates issued improperly through inadvertent errors on the part of its staff. Thus, its action in discontinuing investigation proceeding (instituted on its own motion to determine whether respondent carrier was conducting operations not authorized by the certificate in question) without determining whether the certificate could be modified on the basis of inadvertent issuance, or otherwise, cannot be sustained. Order of the Commission set aside and the case remanded for further proceedings in accordance with the court's instructions.—Akers Motor Lines, Inc. v. United States, 286 F. Supp. 213 (222-3, 226)*.

In motor carrier's action to annul, enjoin, and set aside an order of the Commission which was issued to correct its admitted error, the Commission has the power to correct its manifest error by cancelling plaintiff's outstanding incorrect certificate and reissuing a corrected certificate to it. It is undisputed that, through error, plaintiff's certificate granted interstate authority that was greater and different in scope than that applied for, and likewise greater than that indicated in the notice of application published in the Federal Register. Therefore, in issuing considered order cancelling plaintiff's outstanding certificate and reissuing to it a modified certificate granting the operating authority which it originally applied for, the Commission properly exercised its power to correct its admitted error. Commission order appealed from should be affirmed; complaint dismissed and temporary restraining order heretofore granted vacated.—May

Trucking Co. v. United States, 290 F. Supp. 38 (39)*.

It is well established, see 358 US 133, that the Commission can rectify inadvertent ministerial error. The language of respondent's certificate, authorized in its motor carrier conversion proceeding, insofar as the disputed comma is concerned merely corrects a prior inadvertent error and reflects the operations substantively authorized to be performed by it as a contract carrier; the certificate is framed in precisely the same language as would have been utilized had the error never been made, or had it previously been discovered and rectified. That the error came to light in a conversion proceeding, in no way impairs the ability of the Commission to correct it.—Zuzich Truck Line, Inc., Investigation of Permit, 96 M.C.C. 160 (163)*.

Regulations of the Commission

35 FR 13216, Aug. 19, 1970, Part 1102: Procedures Governing Rail Carrier General Increase Proceedings, new Part 1102 (§§1102.1 - 1102.4) added, effective on date of publication in Federal Register.

36 FR 8211, May 1, 1971, Part 1124: Adequacy of Passenger Service, new Part 1124 adopting certain regulations prescribed by the Federal Railroad Administration, Department of Transportation, under rail safety statutes, added, effective May 1, 1971.

38 FR 12744, May 15, 1973, Part 1123: Determination of Avoidable Losses (Rail Passenger Service Act of 1970), new Part 1123 governing procedure to be followed in applying for Commission determination of avoidable loss, §§1123.1 1123.6, added, effective 35 days after service of order.

Section 17. (4) Powers of divisions, boards, etc.; effect of orders, etc.—[Unchanged. See vol. 11, p. 9298.]

Amendments, see footnotes, vol. 3, p. 2218, vol. 11, pp. 9298-9299; historical note, vol. 3, p. 2213.

Notes of Decisions

Volume 11—p. 9299; Volume 12—p. 10325; Volume 14—p. 11535; Volume 15—p. 12123; Volume 17—p. 13457; Volume 18—p. 14218.

Section 17. (5) Findings, etc., of commissioner or board; accompanying statement and recommended order; copies to parties; exceptions; recommended order as commission's order.—[Unchanged. See vol. 11, p. 9299, vol. 19, p. 15414.]

Amendment, see footnote, vol. 11, p. 9299; historical note, p. 9300.

Notes of Decisions

Volume 11—p. 9300; Volume 12—p. 10325; Volume 13—p. 11028; Volume 14—p. 11535; Volume 15—p. 12123; Volume 16—p. 12771; Volume 17—p. 13457; Volume 18—p. 14218; Volume 19—p. 15414; Volume 21—p. 16944.

10. Reopening on Commission's own motion.—[Vols. 11-15, 17, 21].—Although examiner's recommended grant of authority sought by application heard on consolidated record with investigation into lawfulness of applicant's operations became effective by operation of law in absence of exceptions thereto, in view of finding in the investigation proceeding that applicant-respondent is in willful violation of the Act and the Commission's regulations the application proceeding is reopened on the Commission's own motion for reconsideration and concurrent disposition with the investigation.—S & C Transport Co., Inc., Investigation and Revocation, 96 M.C.C. 642 (645, 646).

Applicant in instant case instituted a civil action (C.A. No. 70-397) in Oregon district court claiming, in essence, that denial of its application was due to the fact that its application was erroneously considered under the wrong standard, i.e., those developed in 103 MCC 318. Therefore, Commission reopened this proceeding on our own motion for further processing under modified procedure, for purpose of according the parties a further opportunity to introduce additional evidence and for consideration and disposition on the record as made after the expiration of the time period for filing of verified statements. No additional evidence was submitted by the parties. Commission shall reconsider the application, anew.—Empire Fuel & Transfer Co., Common Carrier Applic., 113 M.C.C. 38 (39)*.

15. Recommended order; effect; stay.—[Vols. 12-16, 18, 19, 21].—Plaintiffs argue the Commission adopted the examiner's discussion and conclusions as the Commission's findings of fact. Judicial decisions prior to this case indicate that when the Commission refers to the examiner's statement of facts the Commission is referring to the examiner's summary of the evidence and not to the examiner's discussion and conclusions.—United Trucking Service, Inc. v. United States, 359 F. Supp. 100 (104-105).

Section 17. (6) Rehearing, reargument, or reconsideration of decisions, orders, and requirements.—[Unchanged. See vol. 11, p. 9301.]

Amendments, see footnotes, vol. 11, p. 9301; historical notes, vol. 3, p. 2204, vol. 9, p. 7745, vol. 11, p. 9302.

Notes of Decisions

Volume 11—p. 9302; Volume 12—p. 10326; Volume 13—p. 11029; Volume 14—p. 11536; Volume 15—p. 12124; Volume 16—p. 12771; Volume 17—p. 13458; Volume 18—p. 14219; Volume 19—p. 15414; Volume 21—p. 16945.

10. Rehearing; reconsideration.—[Vols. 11-19, 21].—See also Bell Lines, Inc. v. United States, case, APA, 5 USC, *Judicial Review*, below.

The Commission's broad power under §17(6) to grant rehearing, reargument, or reconsideration, and its §17(7) power to reverse, change, or modify an original decision or order, are plainly adequate to add to its findings or firm them up as it deems desirable, absent any collusion or interference with the district court. Thus, when petitions for reconsideration of the order granting temporary authority to appellant were filed and, before they could be passed on, other carriers filed suit and a single judge temporarily stayed operation of that order, the Commission was not without jurisdiction to grant the pending petitions and reopen the record to receive additional evidence (on which its second order was based) before the case was argued to the three-judge court and before the record was filed with it. In multi-party proceedings, such as instant one, some may seek judicial review and others may seek administrative reconsideration; also, in making the additional findings after its first order was stayed, the Commission did not act inconsistently with what the court had done.—American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (536, 539-41)*.

Power of the Commission to reconsider a prior decision does not necessarily collide with the judicial power of review because, while the court properly could provide temporary relief against a Commission order, that does not mean that the agency loses all jurisdiction to complete the administrative process. The Commission's action was not inconsistent with what the court had done, did not interfere in the slightest with the protective restraining order, and came before the court was ready to hear arguments on the merits. Since by the Act the Commission never lost jurisdiction to pass on petitions for rehearing, and the court's stay order did not forbid its acting on the pending petitions, it was not necessary to seek permission of the court to make those rulings. The administrative record was reopened merely to remedy a deficiency therein before any judicial review on the merits and, since the Commission fully honored the district court stay order, it acted in full harmony with the court's jurisdiction. Holding of the district court, that pendency of the review proceedings deprived the Commission of jurisdiction to reopen the administrative record, reversed.—Id., pp. 541-2.

The Commission's refusal to reopen a case to consider an argument raised for the first time after the decision is rendered will not be overturned by the court unless its action is a clear abuse of discretion. In action to set aside Commission orders approving motor carrier control applications, plaintiff's (protestant) argument that deposit receipts issued by control applicant constitute securities within §20a, and that issuance thereof without prior Commission approval voids the acquisition transactions, was not raised until after the Commission had rendered its decision; also, the Commission's refusal was clearly justified by plaintiff's failure timely to raise the issue, the dubious merit of its claim, and the complete absence of any prejudice to plaintiff. Nor is it surprising, considering the lateness of plaintiff's petition for reconsideration, that the Commission set forth no reasons for denying it. Sustained.—Interstate Investors, Inc. v. United States, 287 F. Supp. 374 (386-7, 393)*.

The granting or denying of a petition for reconsideration rests within the sound discretion of the agency and denial of such a petition will only be reversed for clear abuse of discretion. As stated in 322 US 503, rehearings are not matters of right, but are pleas to discretion; and the discretion to be invoked is that of the body making the order, not that of the reviewing body. Summary denial of a petition for reconsideration is appropriate, and further findings and conclusions are unnecessary, if it is clear that such petition was given due consideration. Therefore, when the Commission's order denying plaintiff's petition for reconsideration stated that "no sufficient or proper cause appears for reopening the proceedings for reconsideration or to receive additional evidence," and plaintiffs failed to show wherein or in what way the grounds for their motion would require the Commission to reconsider its order in contract-carrier application proceeding, the court cannot say that the Commission abused its discretion; sustained.—National Trailer Convoy, Inc. v. United States, 293 F. Supp. 630 (633)*.

The grant or denial of petitions for rehearing or reconsideration rests in the Commission's sound discretion; in instant case, its refusal to order a rehearing and reopen application proceedings, requested by plaintiffs (protestants) in order to present evidence opposing certain proposed tacking, was not a clear abuse of that discretion. Plaintiffs were clearly aware of tacking aspect of considered application well before oral hearings in the consolidated proceedings were concluded, yet they made no effort to introduce evidence with respect thereto or to obtain a continuance for that purpose. Moreover, plaintiffs' petitions did not explain, as required by Rule 101(b) of the Commission's Rules of Practice, why the evidence they sought to present was not or could not have been presented at the hearing and one failed to summarize such evidence (admittedly available at that time); also, none of them explained why continuance of original oral hearing, in order to present the evidence, had not been sought. In such circumstances, denial of the petitions was clearly within the Commission's sound discretion; sustained.—Midwest Emery Freight System, Inc. v. United States, 295 F. Supp. 112 (115, 117-8)*.

Since requests for reopening of Commission proceedings are directed to its sound discretion, reversal of its refusal to reopen is permissible only on a showing of clear abuse of that discretion. The Commission's refusal to reopen the hearing on plaintiff's motor carrier application, requested to present evidence of protesting carrier's inadequate single-line service, was not arbitrary or an abuse of discretion when plaintiff had ample opportunity to present such evidence during the 21 days of hearings which extended over a six-month period. Furthermore, the reported decision indicates that the Commission in fact considered the material which plaintiff wishes to present.—Jerry Lipps, Inc. v. Interstate Commerce Commission, 299 F. Supp. 942 (945)*.

Whether to grant or deny petition for rehearing is left to the Commission's discretion and a court is justified in interfering only upon a showing of the clearest abuse of that discretion. No abuse of discretion can be found in the Commission's denial of plaintiffs' (protestants) petition for rehearing in motor carrier application proceeding when the record shows that its order granting irregular-route authority to applicant (intervenor) was based on substantial evidence and a correct application of the law. Nor did the Commission abuse its discretion in refusing a rehearing on the question of new and additional evidence relating to the applicant's trafficking in certificates; the allegation of trafficking was raised at the hearing and considered by the Commission, and the authority ultimately granted was subject to a nonseverable restriction. Commission decision and order sustained.—Garrett Freightlines, Inc. v. United States, 305 F. Supp. 149 (152-3)*.

On review of the procedures employed and the Commission rules relating thereto, the court finds no merit in allegation of plaintiffs (protestants in temporary authority proceeding) that the Commission acted arbitrarily, capriciously, and unlawfully by not rejecting or striking applicant's Petition for Receipt of Additional Evidence and Reconsideration of Order (denying the application), on grounds that under the Commission's rules no such petition would lie. Inner-agency consideration and reconsideration constitute essential elements of the administrative process and provide ways of testing and retesting, and weighing and reweighing, the various factors which ultimately contribute to shaping the final agency decision; also, inner-agency findings and rulings may be reconsideration be revised, modified, or reversed by the Commission. Moreover, though particularly referring to Commission rule relating to inner-agency action prior to issuance of an order, plaintiffs' arguments and brief on the point are not convincing. Commission orders on reconsideration, granting temporary authority to defendant carrier, are supported by the record; complaint dismissed.—Bell Lines, Inc. v. United States, 306 F. Supp. 209 (217, 218)*.

A request for additional hearings is addressed to the sound discretion of the Commission and the denial of a petition for rehearing based on a claim that the record is stale does not constitute an abuse of administrative discretion. Although the record would be considered stale, and plaintiffs through proper exercise of their rights contributed to delay in the decision, all the procedures in the Commission proceeding, and the court action, take time and no criticism of any person for exercising legal rights is implied; thus, as a practical matter there seems to be no way to avoid a so-called stale record in a case of such long complex nature. However, decisions must be made and the Commission denied motions for further hearings and entered its decision and order; and in so doing there was no abuse of discretion. Commission's decision affirmed.—Carolina Freight Carriers Corp. v. United States, 323 F. Supp. 1290 (1297-8)*.

It has been consistently held that rehearings in administrative proceedings are not matters of right, but pleas to discretion; and likewise, that the discretion to be invoked is that of the body making the order, and not that of a reviewing body. However, as the decisions in 327 US 515 and 396 US 491 make clear, that does not mean that a reviewing court may not remand for a refusal to reopen when the wide discretion accorded an administrative agency has been abused. On the special facts in considered motor carrier application case, the Commission abused its discretion in donning "complete blinders" to a new situation that it had itself created; therefore, because of the denial of plaintiff's timely request for a further hearing the order is vacated and the cause remanded for further consideration on a reopened record.—Blue Bird Coach Lines, Inc. v. United States, 328 F. Supp. 1331 (1332, 1337-8)*.

When acting within the scope of its discretion to grant motor carrier temporary authority, the Commission has the continuing right and probably the duty to reopen and reconsider its action in order to exercise proper discretion in determining needs and regulating such authorities. However, since Commission determinations may be made in absence of any hearings, the mere reopening or reconsideration *per se* cannot manifest an abuse of regulatory discretion—it must be the ultimate conclusion and action taken on reconsideration that can be the cutting sword of arbitrary and abusive discretionary action. The Commission did not abuse its discretion, nor act arbitrarily and unlawfully, in reopening defendant carrier's temporary authority proceeding and issuing the temporary authority sought; complaint dismissed.—Braswell Motor Freight, Inc. v. United States, 336 F. Supp. 709 (712-3)*.

A petition for reopening or rehearing is addressed to the Commission's sound discretion and only a showing of the clearest abuse of discretion is sufficient to overturn its denial thereof; also, it is the Commission's concern that there be a point of finality in each of its proceedings. On the other hand, the Commission has full authority to reopen its proceedings and correct any order shown to have been issued through inadvertence or mistake. Under the peculiar circumstances in considered contract carrier application case, protestant's (plaintiff's) petition to reopen the record and modify authority granted, though filed more than two years later, sufficiently stated a prima facie claim and raised many factual issues that required determination, after evidentiary hearing, before a judicious decision could be made to reopen or not reopen the proceeding. Thus, the Commission's denial of plaintiff's petition to reopen, without a hearing, is reversed; case remanded to the Commission for purpose of conducting an evidentiary hearing on the factual issues raised by the petition.—Mercury Motor Exp., Inc. v. United States, 343 F. Supp. 516 (518-9)*.

Although investigation of proposed flat increases in intraterminal, interterminal, and intraplant switching charges was discontinued when western and southern railroads, in compliance with the Commission's orders in 315 ICC 199 and 318 ICC 485, canceled the flat increases and established the authorized percentage increases and maxima, and there are thus no outstanding orders, the issues are not thereby rendered moot, since lawfulness of their proposal is put in issue by their petition for reconsideration, and the prior reports ruled thereon.—Increased Switching Charges, 322 I.C.C. 560 (561)*.

Defendant's request that complaint proceeding be reopened for further hearing if official notice is not taken of motor carrier competition as justification for the lower rates at the alleged preferred point, denied. Rule 1.101(b) of Rules of Practice provides that an explanation must accompany a request for further hearing, stating why such evidence was not previously adduced; no satisfactory explanation has been made, and no reason appears why the additional evidence was not adduced earlier.—Matthiessen & Hegeler Zinc Co. v. Baltimore & O. R. Co., 323 I.C.C. 601 (603).

The usual rule on remand is that the agency involved is free to adopt whatever procedures may be necessary to correct deficiencies exposed in a prior order (see 344 US 17) and Supreme Court's decision imposed no requirements for any further hearings to receive additional evidence and record herein warrants no further hearings but only adjustments in those cost items found inadequate by the court.—Official—Southern Divisions, 337 I.C.C. 74 (80-84)*.

Although a decision of an appellate division is final for purpose of judicial review, the entire Commission on its own motion may reconsider it. There is a definite distinction between administrative finality for purpose of judicial review and statutory authority granting the Commission continuing jurisdiction over its orders. The two are not synonymous. In amending §17(6) Congress has provided a procedure to permit more expeditious handling of Commission cases; and because the Commission sought to achieve expedition by prescribing rules limiting the right of parties to apply for reconsideration, thus permitting compliance with the requirement that all administrative remedies be exhausted before judicial review could be obtained, does not mean that the Commission is foreclosed from taking further administrative action. The ICA gives the Commission continuing jurisdiction over its orders and empowers it to reconsider, rescind, change or modify them on its own motion at any time. Had Congress intended to limit reconsideration by the entire Commission, it would have so provided in explicit language.—Eazor Exp., Inc.—Purchase—Fleet Highway Freight, 101 M.C.C. 719 (721-1)*.

Commission reopened instant proceeding as it is well settled that Commission has continuing jurisdiction over its orders and is empowered to reconsider and to rescind or modify its orders at any time, even if, as herein, they are administratively final as defined by rule 101(a)(2) of General Rules of Practice, for purpose of correcting an error or injustice. However, an administratively final proceeding is ripe for court review, and the aggrieved party has such recourse if it chooses.—Braswell Motor Freight Lines, Inc., Extension, 112 M.C.C. 558 (566-7)*.

The prior report misconstrued the nature of the application and considered it as one seeking Kingpak-type authority. Applicant contended on petition and before the court that the application was not based upon past services for exempt freight forwarders. Commission (Appellate Division 1) reopened the matter to apply the usual standards of public convenience and necessity.—Empire Fuel & Transfer Co., Common Carrier Applic., 113 M.C.C. 38 (43)*.

15. Reopening; scope.—[Vols. 13-16, 19, 21].—Petitions for reopening and rehearing are addressed to the Commission's discretion and an exception to that rule can be sustained only on a showing of "the clearest abuse of discretion." The Commission did not abuse its discretion when it denied petition to reopen control proceeding to receive evidence of applicant's new transactions in acquired railroad's securities; since effectiveness of an "independent voting trust" had been established, it was not an abuse of discretion to find that subsequent purchases of securities which were immediately poured into that trust would have no impact on the result in the case. Nor was it an abuse of discretion to deny reopening for purpose of receiving evidence of acquired carrier's improved financial condition; while the record is unquestionably stale, that fact alone is insufficient to justify an order compelling the Commission to reopen the proceeding.—Illinois Central R. Co. v. United States, 263 F. Supp. 421 (431-4)*.

A request that proceedings be reopened for presentation of additional evidence is necessarily addressed to the discretion of the Commission. In instant case, the basic and controlling facts are clear enough, and the record is sufficient to exclude possibility that additional evidence would have altered the facts or resulted in a different decision; thus, it cannot be said that the Commission failed to exercise a reasonable discretion in denying plaintiff's motion to reopen its rail abandonment proceeding so it could present more specific evidence.—Brooklyn Eastern District Terminal v. United States, 302 F. Supp. 1095 (1105)*.

Order reopening investigation of divisions of official-southern interterritorial rates was not so restricted in scope as to preclude reconsideration of the issue of proper dividing points. To accept that contention would also preclude consideration of divisions on Canadian-northern Maine traffic which are brought in issue for the first time in the reopened proceeding.—Official-Southern Divisions, 325 I.C.C. 1 (30)*.

Decisions in 284 US 248 and 322 US 503 provide basis for denial of protestant's petition to reopen record for purpose of presenting new evidence described as showing substantially changed conditions and plans of merged railroads as there would be little hope of consummating an order if litigants might demand rehearings because some new circumstance had arisen or some new trend observed. Also, factual matter in proferred evidence, a copy of speech by applicants' president, is in same vein as that already of record, would be cumulative of previous testimony, and to extent it counters protestant's arguments, would be to protestant's disadvantage.—Pennsylvania R. Co.—Merger—New York Central R. Co., 327 I.C.C. 475 (484-6).

Furthermore, reopening such proceedings whenever applicants exercise managerial discretion in handling and routing traffic would present an almost impossible administrative burden. It would be unrealistic to conclude that a merger would be carried out in detail exactly as proposed in hearing. Commission would hesitate to approve proposed mergers at all if we were not convinced that applicants recognize their responsibility to direct much of the savings realized into continuous improvement of operations and service to the public.—Id., p. 485-6

When, in remanding the Commission's supplemental report and order in control proceeding (finding condition (e) previously imposed in 1923 order, 76 ICC 508, not shown to be unjust, unreasonable or contrary to the public interest, but declining to pass on legality of railroads' 1924 agreement reciting all conditions of the 1923 order and the activities of the parties thereunder), the court held that there was but one general issue before the Commission and that the Commission should have disposed of the entire matter and should have passed on validity of the 1924 agreement and the actions thereunder, all evidence and issues are considered as within the scope of the reopened proceeding, including those pertaining to condition (e) and §5(2) and those relating to the 1924 agreement and the parties' actions thereunder.—Central Pac. Ry. Co. Control, 328 I.C.C. 245 (346-7)*.

Protestant Strickland's petition to reopen this proceeding for further hearing in order to show that it has terminated the lease of its authority to Burks and has begun to institute operations over involved route denied. To warrant further hearing petitioner must show, among other things, that the new evidence presented is likely to produce a different result and satisfactorily explain its failure to produce such evidence at original hearing. And since no relevant new evidence would alter results in this proceeding, applicant is correct that under these circumstances termination of the lease does not have the effect of disproving applicant's showing of need for proposed service. In addition, should Strickland suffer any loss in connection with disputed lease, adequate legal remedies exist outside of Commission to resolve the equities now in litigation between it and Burks.—Red Line Transfer & Storage, Inc., Extension, 102 M.C.C. 486 (489-90).

20. Reversal, change or modification.—[Vols. 16, 17, 21].—On reconsideration, the Commission adjusted three cost items involved in divisions of joint interterritorial rates which were found deficient by the Supreme Court and prescribed new, just, reasonable, and equitable divisions of such rates.—Official—Southern Divisions, 337 I.C.C. 74 (85-96)*.

Section 17. (7) Reversal or modification after rehearing, etc.—[Unchanged. See vol. 11, p. 9304.]

Amendment, see footnote, vol. 11, p. 9304; historical notes, vol. 3, p. 2204, vol. 9, p. 7745.

Notes of Decisions

Volume 12—p. 10328; Volume 13—p. 11030; Volume 14—p. 11539; Volume 15—p. 12126; Volume 16—p. 12773; Volume 17—p. 13460; Volume 18—p. 14220; Volume 19—p. 15417; Volume 21—p. 16955.

10. Modification, reversal of orders by appellate division or full Commission.—[Vols. 12-19, 21].—See American Farm Lines v. Black Ball Freight Service, and Eazor Exp., Inc.—Purchase—Fleet Highway Freight, at §17(6), n. 10.

Section 17. (8) Stay of decisions, etc., not effective at time of application for rehearing, etc.—[Unchanged. See vol. 11, p. 9304.]

Amendment, see footnote, vol. 11, p. 9304; historical note, vol. 11, p. 9304.

Notes of Decisions

Volume 17—p. 13460; Volume 19—p. 15418; Volume 21—p. 16956.

2. Construction and interpretation.—[Vols. 17, 19, 21].—Plaintiffs allege the Commission acted arbitrarily, in violation of §17(8), when it did not stay order granting temporary authority to defendant carrier until after their petitions for reconsideration were acted on; however, provision in the Commission's temporary authority regulations, that filing a petition for reconsideration of order of the Temporary Authorities Board does not automatically have effect of staying such order, in effect carries out the mandate of §210a(a) and carves out an explicit exception to §17(8).—Superior Trucking Co. v. United States, 302 F. Supp. 257 (265-6)*.

Respondent's routing of traffic under the suspended tariffs on ground that filing of their petitions for reconsideration stayed the effectiveness of the suspension order is unlawful. An application for reconsideration stays an order of a board where that order has not yet become effective. The suspension order herein considered became effective on the date of its issuance and cannot be stayed under §17(8) except by a special order of the Commission, and no such special order has been issued.—Routing Via Oak Island Jct., New Jersey, 341 I.C.C. 129 (151-53).

Section 17. (9) Hearing and appellate procedure.—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §303, 90 Stat. 48.]

(9)(a) Whenever the term 'hearing' is used in this part, such term shall be construed to include an opportunity for the submission of all evidence in written form, followed by an opportunity for briefs, written statements, or conferences of the parties, such conferences to be chaired by a division, an individual Commissioner, an administrative law judge, an employee board, or any other designated employee of the Commission.

(b) With respect to any matter involving a common carrier by railroad subject to this part, whenever the Commission assigns the initial disposition to any of such matter before the Commission to an administrative law judge, individual Commissioner, employee board, or division or panel of the Commission, such judge, Commissioner, board, division, or panel shall—

(i) complete all evidentiary proceedings with respect to such matter within 180 days after its assignment; and

(ii) with respect to any matter so assigned which involves written submissions or the taking of testimony at a public hearing, submit it in writing to the Commission, within 120 days after the completion of all evidentiary proceedings, an initial decision, report, or order containing—

(A) specific findings of fact;

(B) specific and separate conclusions of law;

(C) a recommended order; and

(D) any justification in support of such findings of fact, conclusions of law and order.

The Commission, or a duly designated division thereof, may, in its discretion, void any requirement for an initial decision, report, or order, and, in appropriate cases, may direct that any matter shall be considered forthwith by the Commission or such division, if it concludes that the matter involves a question of agency policy, a new or novel issue of law, or an issue of general transportation importance, or if the due and timely execution of its functions so requires. Whenever an initial decision, report, or order is submitted, copies thereof shall be served upon interested parties. Any such party may file an appeal with the Commission, with respect to such initial decision or report. If no such appeal is filed within 20 days after such service, or within such further period (not to exceed 20 days) as the Commission, or a duly designated division thereof, may authorize, the order set forth in such initial decision or report shall become the order of the Commission and shall become effective unless, within such period, the order shall have been stayed or postponed by the Commission pursuant to subdivision (d) or (e).

(c) The Commission, or a duly designated division thereof, may, upon its own initiative, and shall, in any case in which an appeal is filed under subdivision (b), review the matter upon the same record or upon the basis of a further hearing. Any such appeal shall be considered and acted upon by the Commission, or a duly designated division thereof, within 180 days after the date on which such appeal is filed. Any such decision, report, or order shall be stayed pending the determination of such appeal. Such a review shall be conducted in accordance with section 557 of title 5, United States Code, and such rules (limiting and defining the issues and pleadings upon review) as the Commission may adopt in conformance with section 557(b) of such title 5. The Commission may, in its discretion and on such terms and conditions as it may prescribe, authorize duly designated employee boards to perform functions under this paragraph of the same character as those which may be performed by a duly designated division of the Commission (other than the decision of any appeal under this paragraph which may be further appealed to the Commission).

(d) Any decision, order, or requirement of the Commission, or of a duly designated division thereof, shall become effective 30 days after it is served on the parties thereto, unless the Commission provides for such decision, order, or requirement, or any applicable rule, to become effective at an earlier date. Any interested party to a decision, order or requirement of a duly designated division of the Commission may petition the Commission for rehearing, reargument, or other reconsideration, subject to such rules and limitations as the Commission may establish. If the Commission finds that a decision, order, or requirement presents a matter of general transportation importance, or if it finds that clear and convincing new evidence has been presented or that changed circumstances exist which would materially affect such decision, order, or requirement, the Commission may reconsider such decision, order, or requirement, and it may, in its discretion, stay the effective date of such decision, order, or requirement. If the Commission reconsiders a decision, order, or requirement, it must complete the process and issue its final order not more than 120 days after the date on which it grants the application for reconsideration.

(e) The Commission may, in its discretion, extend any time period set forth in this section for a period of not more than 90 days, if a majority of the Commissioners, by public vote, agree to such extension. The Commission shall submit an annual report in writing to each House of Congress setting forth each extension granted pursuant to his subdivision (classified by the type of proceeding involved), and stating the reasons for each such extension and the duration thereof.

(f) In extraordinary situations in which an extension granted pursuant to subdivision (e) is not sufficient to allow for completion of necessary proceedings, the Commission may, in its discretion, grant a further extension if—

(i) not less than 7 of the Commissioners, by public vote, agree to such further extension; and

(ii) not less than 15 days prior to expiration of the extension granted pursuant to subdivision (e), the Commission reports in writing to the Congress that such further extension has been granted together, with—

(A) a full explanation of the reasons for such further extension;

(B) the anticipated duration of such further extension;

(C) the issues involved in the matter before the Commission; and

(D) the names of personnel of the Commission working on such matter.

(g) The Commission may, at any time upon its own initiative, on grounds of material error, new evidence, or substantially changed circumstances—

(i) reopen any proceeding;

(ii) grant rehearing, reargument, or reconsideration with respect to any decision, order, or requirement; and

(iii) reverse, modify, or change any decision, order, or requirement.

The Commission may establish rules allowing interested parties to petition for leave to request reopening and reconsideration based upon material error, new evidence, or substantially changed circumstances.

(h) Notwithstanding any other provision of this Act, any decision, order, or requirement of the Commission, or of a duly designated division thereof, shall be final on the date on which it is served. A civil action to enforce, enjoin, suspend, or set aside such a decision, order, or requirement, in whole or in part, may be brought after such date in a court of the United States pursuant to the provisions of law which are applicable to suits to enforce, enjoin, suspend, or set aside orders of the Commission.

(i) Notwithstanding the provisions of paragraphs (5), (6), (7), and (8), the provisions of this paragraph shall govern the disposition of, and shall apply only to, any matter before the Commission which involves a common carrier by railroad subject to this part, except that the provisions of other sections of this part pertaining to deadlines in Commission proceedings shall govern to the extent that they are inconsistent with the provisions pertaining to deadlines contained in this paragraph.

(j) Reports in writing and other written statement (including, but not limited to, any report, order, decision and order, vote, notice, letter, policy statement, rule, or regulation) of any official action of the Commission (whether such action is taken by the Commission, a division thereof, any other group of Commissioners, a single Commissioner, an employee board, an administrative law judge, or any other individual or group of individuals who are authorized to take any official action on behalf of the Commission) shall indicate (i) the official designation of the individual or group taking such action (ii) the name of each individual taking, or participating in taking, such action, and (iii) the vote or position of each such participating individual. If any individual who is officially designated as a member of a group which takes any such action does not participate in such action, the written statement of such action shall indicate that such individual did not participate. Each individual who participates in taking any such action shall have the right to express his individual views as part of the written statement of such action. The written statement of any such action shall be made available to the public in accordance with Federal law.

Section 17. (10) Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing, etc.—[Unchanged; formerly paragraph (9) but redesignated (10) by the act of Feb. 5, 1976, Pub. L. 94-210, §303, 90 Stat. 48. See vol. 11, p. 9305.]

Historical note, see vol. 11, p. 9305.

Notes of Decisions

Volume 14—p. 11539; Volume 15—p. 12126; Volume 16—p. 12774; Volume 17—p. 13461; Volume 18—p. 14220; Volume 19—p. 15418; Volume 21—p. 16957.

2. Construction and interpretation.—[Vols. 14-19, 21].—While the 1964 amendments of the Judicial Code (28 USC §§1336 and 1398), relating to jurisdiction and venue of actions to enforce, enjoin, set aside or annul orders of the Commission in cases referred to it by a district court or the Court of Claims for preliminary determination, provided more streamlined procedure for judicial review of questions that involve the Commission's primary jurisdiction, those amendments made no changes in the substantive law other than fixing venue and jurisdiction in the referring court; therefore, the prerequisites of judicial review remain the same. Once an issue has been referred to the Commission, the matter must be prosecuted there until a final order is issued; and only after administrative remedies have been exhausted may the case proceed to judgment in the court.—McLean Trucking Co. v. United States, 387 F. 2d 657 (659-60)*.

The Commission's denial of petition of plaintiff (applicant in Commission case) for reconsideration of the decision and order in control proceeding, which found that proposed control was only a portion of a single §5(2) transaction involving acquisition of control of two carriers by applicant, and denied the application, disposed of that proceeding with administrative finality and exhausted plaintiff's administrative remedies before the Commission. And the Commission's holding that the denial was without prejudice to a later application for approval of acquisition of control of the two carriers in no way affects the finality of its action on the petition for reconsideration of its denial of the application for authority to acquire control of one of those carriers. Therefore, plaintiff has standing under the statute and the APA to bring action in the court to set aside the Commission's orders.—Smyth v. United States, 293 F. Supp. 387 (389)*.

In reviewing an order by the Commission, court must decide whether the Commission reached a rational conclusion, based on substantial evidence. The evidence herein, even detracting all contrary evidence, was substantial and the increases approved by Commission in demurrage charges were rational on the record before the Commission. Accordingly, the court affirms Commission's order approving said increases.—General Mills, Inc. v. United States, 364 F. Supp. 1278 (1282-84)*.

Section 17. (11) Reference of administrative matters to examiners.—[Unchanged; formerly paragraph (10) but redesignated (11) by the act of Feb. 5, 1976, Pub. L. 94-210, §303, 90 Stat. 48. See vol. 11, p. 9305.]

Section 17. (12) Intervention of representatives of employees.—[Unchanged; formerly paragraph (11) but redesignated (12) by the act of Feb. 5, 1976, Pub. L. 94-210, §303, 90 Stat. 48. See vol. 14, p. 11540.]

Notes of Decisions

Volume 14—p. 11540; Volume 17—p. 13462; Volume 18—p. 14221; Volume 21—p. 16961.

Section 17. (13) Admission to practice before Commission.—[Unchanged; formerly paragraph (12) but redesignated (13) by the act of Feb. 5, 1976, Pub. L. 94-210, §303, 90 Stat. 48. See vol. 11, p. 9305.]

Historical notes, see vol. 11, p. 9306, vol. 12, p. 10328, vol. 13, p. 11031, vol. 14, p. 11541. vol. 15, p. 12128, vol. 16, p. 12775, vol. 17, p. 13462, vol. 21, p. 16961.

Notes of Decisions

Volume 11—p. 9306; Volume 12—p. 10329; Volume 14—p. 11541; Volume 16—p. 12776; Volume 17—p. 13642; Volume 19—p. 15419; Volume 21—p. 16962.

Section 17. (14) Time limit of proceedings.—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §303, 90 Stat. 50.]

(14)(a) Any formal investigative proceeding with respect to a common carrier by railroad which is instituted by the Commission after the date of enactment of this subdivision shall be concluded by the Commission with administrative finality within 3 years after the date on which such proceeding is instituted. Any such proceeding which is not so concluded by such date shall automatically be dismissed.

(b) Within 1 year after the date of enactment of this subdivision, the Commission shall conclude or terminate, with administrative finality, any formal investigative proceeding with respect to a common carrier by railroad which was instituted by the Commission on its own initiative and which has been pending before the Commission for a period of 3 or more years following the date of the order which instituted such proceeding.

Section 17. (15) Access to information by Congressional committees.—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §301, 90 Stat. 47.]

(15) Whenever the Committee on Interstate and Foreign Commerce of the House of Representatives or the Committee on Commerce of the Senate makes a written request for documents which are in the possession or under the control of the Commission and which relate to any matter involving a common carrier by railroad subject to this part, the Commission shall, within 10 days after the date of receipt of such request, submit such documents (or copies thereof) to such Committee, or submit a report in writing to such committee stating the reason why such documents have not been so submitted, and the anticipated date on which they will be submitted. If the Commission transfers any document in its possession or under its control to any other agency or to any person, it shall condition such transfer on the guaranteed return by the transferee of such document to the Commission for purposes of complying with the preceding sentence. This paragraph shall not apply to documents which have been obtained by the Commission from persons subject to regulation by the Commission, and which contain trade secrets or commercial or financial information of a privileged or condidential nature. This paragraph shall not be deemed to restrict any other authority of either House of Congress, or any committee or subcommittee thereof, to obtain documents. For purposes of this paragraph, the term 'document' means any book, paper, correspondence, memorandum, or other record, or any copy thereof.

Section 18. (1), (2). Employees; expenses, of commission.—[Unchanged. See vol. 9, p. 7756, p. 7757.]

Historical notes, see vol. 21, p. 16965.

Historical Notes

Reorganization Plan No. 1 of 1969, see Historical Note, §11, above.

By §311 of Pub. L. 94-210, 90 Stat. 60, §201 of the Budget and Accounting Act, 1921 (31 U.S.C. 11), is amended by the addition of a new subsection (j), which provides that whenever the Commission submits any budget estmate or request, other budget information (including manpower needs), legislative recommendation, prepared testimony for congressional hearings, or comments on legislation to the President or to the Office of Management and Budget, it shall concurrently transmit a copy of such estimate or request to Congress; and that no officer or agency shall have authority to impair the free communication by the Commission with Congress with respect to any budget estimate or request of the Commission.

Effective Dec. 16, 1967, compensation of members of the Commission is determined under Chapter 11, Title 2, USC, through the Commission on Executive, Legislative, and Judicial Salaries. Upon recommendation of the President of the United States, the annual rate of basic compensation of the Commissioners after Feb. 14, 1969, is $38,000, and that of the Chairman of the Commission is $40,000. See note following section 358 of Title 2, USC.

Executive Order 11598, dated June 16, 1971, To Provide for the Listing of Certain Job Vacancies by Federal Agencies and Government Contractors and Subcontractors; 36 FR 11711, June 18, 1971.

Notes of Decisions

§18(2): Volume 3—p. 2222; Volume 9—p. 7757.

Section 19. Office and sessions.—[Unchanged. See vol. 9, p. 7757.]

Notes of Decisions

Volume 19—p. 15420.

Section 19a. Valuation of property of carriers.—[Unchanged. See vol. 9, p. 7758.]

Amendments, see footnotes, vol. 3, pp. 2224-2228, vol. 7, pp. 5669-5670; historical notes, vol. 3, p. 2228, vol. 7, p. 5671, vol. 15, p. 12129, vol. 16, p. 12777, vol. 21, p. 16965.

Notes of Decisions

Volume 3—p. 2232; Volume 7—p. 5671; Volume 9—p. 7762; Volume 11—p. 9307; Volume 12—p. 10329; Volume 13—p. 11032; Volume 14—p. 11542; Volume 15—p. 12129; Volume 16—p. 12777; Volume 17—p. 13463; Volume 21—p. 16966.

Section 20. Reports, records, and accounts of carriers; mandamus; liability of initial carrier for loss, etc.—(1) Reports from carriers, lessors, and associations.—[Unchanged. See vol. 15, p. 12130.]

Amendments, see footnotes, vol. 3, p. 2511, vol. 11, p. 9309, vol. 15, p. 12130; historical notes; vol. 3, p. 2512, vol. 9, p. 7776, vol. 11, p. 9309, vol. 12, p. 10330, vol. 13, p. 11032, vol. 14, p. 11543.

Notes of Decisions

Volume 13—p. 11033; Volume 15—p. 12130; Volume 16—p. 12777; Volume 17—p. 13465; Volume 21—p. 16967.

3.Periodical and special reports.—[Vol. 16].—Since data concerning piggyback service are essential to the proper discharge of the Commission's regulatory responsibilities, all class I railroads, other than switching and terminal companies, and all class I intercity motor carriers of property are required to file quarterly reports with respect to such traffic, in accordance with the forms and instructions set forth at 49 CFR §1252.—Piggyback Traffic Statistics, 340 I.C.C. 856 (859).

11. Annual reports; contents.—[Vols. 16, 17].—Railroads' suit to enjoin, annul and set aside Commission report and orders, to extent it attacks the formula adopted as a guide for assessing adequacy of each railroad's car ownership and the requirement that certain roads file annual reports (using the formula) concerning their respective ownership of general purpose freight cars, dismissed for lack of ripeness. Carriers now suffer no "immediate and practical impact" from the orders apart from being required to file reports within the scope of the Commission's statutory authority; and, it being admitted that formula changes may be required to meet carrier objections, present formula may never be the basis of a Commission order requiring actual purchase of freight cars. The court should not decide cases where Commission orders have no present impact on the carrier, or where further agency action might completely avoid the predicted dispute; therefore, since the agency action lacks the degree of finality prerequisite to judicial review, plaintiffs' action is dismissed, insofar as it relates to the car ownership formula, without prejudice to the right to seek relief in the court at such time as an actual controversy has ripened.—Florida East Coast Ry. Co. v. United States, 327 F. Supp. 1076 (1078-80, 1082-3)*.

Commission revised regulations governing annual reports of class I railroads (49 CFR §1241.11) to require submission of information relating to the relationship of respondent with affiliated companies and transactions with affiliates; a statement of changes in financial position; compensation of officers, directors, etc.; payment for services by other than employees and affiliates; contracts and agreements; pension plan funds; and income taxes. (But see dissents). —Annual Reports of Class I Railroad Companies, 341 I.C.C. 205 (212-15).

However, Commission will not require at this time a report from an independent accountant attesting to conformity of certain schedules in the annual report with Commission's accounting regulations because the benefits to be gained by such a requirement is outweighed by the additional financial burden of unknown proportions that such an attestation requirement would place on respondents.—Id., p. 215.

Regulations of the Commission

33 FR 16410, Nov. 8, 1968, Part 1241: Annual, Special or Periodic Reports; Carriers Subject to Part I of the Interstate Commerce Act, §1241.61 Annual report of carriers by pipe line, Annual Report Form P (Carriers by Pipeline) prescribed, effective on date of publication.

36 FR 24059, Dec. 18, 1971, Part 1241: Annual, Special or Periodic Reports; Carriers Subject to Part I of the Interstate Commerce Act, §1241.14 Report of Incentive per diem items—Railroads, Form IPD prescribed for use by railroads in reporting incentive per diem items commencing with reports for year ended Dec. 31, 1970.

36 FR 24117, Dec. 21, 1971, Part 1241: Annual, Special or Periodic Reports; Carriers Subject to Part I of the Interstate Commerce Act, §1241.14 Report of incentive per diem items—Railroads, order of Nov. 22, 1971 (36 FR 24059) corrected by addition of inadvertently omitted amendments to Part 1241.

37 FR 5502, March 16, 1972, Part 1243: Quarterly Operating Reports—Railroads, §1243.1 Revenues, expenses and income, and §1243.2 Condensed balance sheet, revised, effective with reports for quarter beginning Jan. 1, 1972.

37 FR 7328, Apr. 13, 1972, Part 1252: Piggyback Traffic Statistics, §1252.1 Rail carriers, Form PTR-R (Rev), and §1252.2 Motor Carriers, Form PTR-M (Rev.), prescribed for quarterly reports beginning with July 1, 1972.

38 FR 32919, Nov. 29, 1973, Part 1241: Annual, Special, or Periodic Reports Carriers Subject to Part I of the Interstate Commerce Act; Rules promulgated for annual reports of Class 1 Railroad Companies, effective Dec. 31, 1973.

39 FR 33533, Sept. 18, 1974, Part 1243: Quarterly Operating Reports—Railroads. Regulations promulgated as to quarterly report of freight loss and damage claims, effective with reports beginning Jan. 1, 1975.

Section 20. (2) Period covered by and time for making reports; oaths for reports.—[Unchanged. See vol. 11, p. 9310.]

Amendments, see footnotes, vol. 3, p. 2528; vol. 11, p. 9310; historical notes, vol. 3, p. 2529, vol. 9, p. 7781, vol. 12, p. 10330, vol. 21, p. 16968.

Notes of Decisions

Volume 3—p. 2529.

Section 20. (3) Uniform system of accounts.—[Amended to read as set forth below by the act of Feb. 5, 1976, Pub. L. 94-210, §307, 90 Stat. 55. See vol. 11, p. 9311.]

(a) The Commission shall, not later than June 30, 1977, issue regulations and procedures prescribing a uniform cost and revenue accounting and reporting system for all common carriers by railroad subject to this part. Such regulations and procedures shall become effective not later than January 1, 1978. Before promulgating such regulations and procedures, the Commission shall consult with and solicit the views of other agencies and departments of the Federal Government, representatives of carriers, shippers, and their employees, and the general public.

(b) In order to assure that the most accurate cost and revenue data can be obtained with respect to light density lines, main line operations, factors relevant in establishing fair and reasonable rates, and other regulatory areas of responsibility, the Commission shall identify and define the following items as they pertain to each facet of rail operations:

(i) operating and nonoperating revenue accounts;

(ii) direct cost accounts for determining fixed and variable cost for materials, labor, and overhead components of operating expenses and the assignment of such costs to various functions, services, or activities, including maintenance-of-way, maintenance of equipment (locomotive and car), transportation (train, yard and station, and accessorial services), and general and administrative expenses; and

(iii) indirect cost accounts for determining fixed, common, joint, and constant costs, including the cost of capital, and the method for the assignment of such costs to various functions, services, or activities.

(c) The accounting system established pursuant to this paragraph shall be in accordance with generally accepted accounting principles uniformly applied to all common carriers by railroad subject to this part, and all reports shall include any disclosure considered appropriate under generally accepted accounting principles or the requirements of the Commission or of the Securities and Exchange Commission. The Commission shall, notwithstanding any other provision of this section, to the extent possible, devise the system of accounts to be cost effective, nonduplicative, and compatible with the present and desired managerial and responsibility accounting requirements of the carriers, and to give due consideration to appropriate economic principles. The Commission should attempt, to the extent possible, to require that such data be reported or otherwise disclosed only for essential regulatory purposes, including rate change requests, abandonment of facilities requests, responsibility for peaks in demand, cost of service, and issuance of securities.

(d) In order that the accounting system established pursuant to this paragraph continue to conform to generally accepted accounting principles, compatible with the managerial responsibility accounting requirements of carriers, and in compliance with other objectives set forth in this section, the Commission shall periodically, but not less than once every 5 years, review such accounting system and revise it as necessary.

(e) There are authorized to be appropriated to the Commission for purposes of carrying out the provisions of this paragraph such sums as may be necessary, not to exceed $1,000,000, to be available for—

(i) procuring temporary and intermittent services as authorized by section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed $250 per day plus expenses; and

(ii) entering into contracts or cooperative agreements with any public agency or instrumentality or with any person, firm, association, corporation, or institution, without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. 5).

Historical notes, vol. 21, p. 16968.

Notes of Decisions

Volume 3—p. 2512; Volume 7—p. 5793; Volume 9—p. 7777; Volume 11—p. 9311; Volume 12—p. 10331; Volume 13—p. 11033; Volume 14—p. 11543; Volume 15—p. 12131; Volume 16—p. 12778; Volume 17—p. 13465; Volume 18—p. 14223; Volume 19—p. 15422; Volume 21—p. 16968.

18. Adjustment of accounts.—[Vols. 3, 7, 15].—On further consideration of control proceeding the Commission found it necessary to revise the balance sheet of one of two carriers seeking to redeem part of their stock. In so doing it noted: (1) that its Account Regulations for Class I and II motor carriers (49 CFR 182.01-16) provide that amounts paid in excess of the redeemed stock's aggregate par value are to be debited primarily to earned surplus, since there is no unearned surplus; (2) that subscriptions receivable, arising from applicant's proposal to invest an additional $40,000 in this carrier, and the subscriptions accounts, since no securities have been issued, should neither be considered as a capitalizable asset nor capitalization; and (3) that the $65,000 paid for vendor stockholder's agreement not to compete should not be treated as an intangible asset. The Commission also noted with respect to the other carrier that since its unearned surplus was insufficient to cover amounts in excess of the aggregate par value of its redeemed stock, these accounts also were to be debited primarily to earned surplus.—LaCasse-Control—Interstate Exp., Inc., 101 M.C.C. 567 (572)*.

Although liquidating carrier's book values prior to the write-down by surviving carrier under the control transaction exceeded actual cost and were in violation of provisions of the Uniform System of Accounts for Motor Carriers of Property, the write-down to appraised value was not proper under the circumstances. While adjustments of book values of operating equipment at fair market value on the basis of independent appraisals is permitted in a merger or purchase transaction under §5 of the Act, there is no such provision in the Commission's accounting rules pertaining to a control transactions.—Yellow Transit, Inv.—Merger—Wilson, Inc., 104 M.C.C. 737 (757).

24. Depreciation accounting.—[Vols. 3, 7, 11, 13-15].—On reconsideration, Commission concludes that, for depreciation purposes, the purchaser of a pipeline system or facility should be permitted to record in its carrier property accounts the cost of property acquired to the extent that it represents fair market value at the date of acquisition.—Uniform System of Accounts for Pipeline Companies, 337 I.C.C. 518 (522-3)*.

Regulations of the Commission

34 FR 15483, Oct. 4, 1969, Part 1204: Pipeline Companies; Uniform System of Accounts, miscellaneous amendments to regulations, effective Nov. 10, 1969.

34 FR 18307, Nov. 15, 1969, Part 1204: Pipeline Companies; Uniform System of Accounts, effective date of order of Oct. 30, 1969 (34 FR 15483) postponed until further order.

34 FR 19907, Dec. 19, 1969, Part 1203: Express Companies, regulations governing uniform system of accounts for express companies, waived and suspended for one year effective Jan. 1, 1970; and system of accounts submitted by REA in rulemaking proceeding under Doc. No. 35029 may be used by REA for one year, effective Jan. 1, 1970, with such permitted use not to be construed as formal adoption of REA's submitted system of accounts.

35 FR 13991, Sept. 3, 1970, Part 1204: Pipeline Companies; Uniform System of Accounts for Pipeline Companies, miscellaneous revisions and modifications, effective Oct. 15, 1970.

35 FR 16803, Oct. 30, 1970, Part 1203: Uniform System of Accounts for Express Companies, order of Nov. 28, 1969 (34 FR 19907) modified so as to waive and suspend regulations governing uniform system of accounts, and to permit REA to use the system it submitted in Doc. No. 35029, for an additional year, effective Jan. 1, 1971.

36 FR 64, Jan. 5, 1971, Part 1201: Uniform System of Accounts for Railroad Companies, miscellaneous amendments pertraining to accounting treatment of terminals and highway equipment used in piggyback service, effective Jan. 1, 1971.

36 FR 17847, Sept. 4, 1971, Part 1201: Uniform System of Accounts for Railroad Companies, regulations amended by addition, under the caption "General Instructions," of general instruction 1-10 *Transactions with affiliated companies*, effective Jan. 1, 1971.

37 FR 866, Jan. 20, 1972, Part 1203: Uniform System of Accounts for Express Companies, order of Nov. 28, 1969 (34 FR 19907), as modified (35 FR 16803), further modified so as to waive and suspend regulations, and to permit REA to use system it submitted in Doc. No. 35029, for an additional year, effective Jan. 1, 1972.

37 FR 17713, Aug. 31, 1972, Part 1204: Pipeline Companies; Uniform System of Accounts, miscellaneous amendments to regulations, effective upon publication in Federal Register.

37 FR 20695, Oct. 3, 1972, Part 1201—Railroad Companies; Part 1202—Electric Railways; Part 1204—Pipeline Companies; and Part 1208—Maritime Carriers, accounting regulations, insofar as they apply to the investment tax credit, amended to bring them into compliance with the Revenue Act of 1971 (Pub. Law 92-178), effective on publication in the Federal Register.

37 FR 25845, Dec. 5, 1972, Part 1201: Railroad Companies, Uniform System of Accounts, miscellaneous amendments of accounting regulations, effective Jan. 1, 1972.

37 FR 25919, Dec. 6, 1972, Part 1201—Railroad Companies; Part 1202—Electric Railways; Part 1204—Pipeline Companies; and Part 1208—Maritime Carriers, accounting regulations. Order of Sept. 12, 1972 (37 FR 20695) amending regulations to comply with Revenue Act of 1971, corrected effective on date of order.

38 FR 2761, Jan. 30, 1973, Part 1201: Railroad Companies, Uniform System of Accounts; in Instructions for Property Accounts, instruction 2-2 *Minimum rule applicable to additions to property*, and instruction 2-9 *Additions and retirements of other than units of property*, amended to read as set forth, effective Jan. 1, 1973.

38 FR 21746, Aug. 13, 1973, Part 1203: Express Companies, Uniform System of Accounts; sets forth revised system of accounts including General Instructions, Balance Sheet Accounts; Property Accounts; Income Accounts; Operating Expense Accounts; and Balance Sheet Classification; effective Sept. 25, 1973.

Section 20. (4) Depreciation charges.—[Unchanged. See vol. 11, p. 9313.]

Amendments, see footnotes, p. 9313.

Notes of Decisions

Volume 3—p. 2534; Volume 7—p. 5807; Volume 9—p. 7786; Volume 11—p. 9314; Volume 13—p. 11035; Volume 15—p. 12132; Volume 16—p. 12779; Volume 18—p. 14224; Volume 19—p. 15423.

Section 20. (5) Forms of accounts, records, and memoranda; access to records, etc., by commission or agents.—[Unchanged. See vol. 11, p. 9315, vol. 15, p. 12133.]

Amendments, see footnotes, vol. 3, p. 2533, vol. 11, pp. 9315-9316; historical note, vol. 3, p. 2534.

Historical Note

On August 9, 1973, the Commission submitted a draft bill to Congress to amend §20(5) of the Interstate Commerce Act to clarify the power of the Commission to inspect and copy records of carriers regulated by it, including such items as carriers' financial forecasts. (S. 2459). Annual Report, 1974, p. 83.

Notes of Decisions

Volume 3—p. 2541.

Access to Accounts, Records, and Memoranda

31. In general.—[Vol. 3).—In view of interpretation of §20, as it then stood, in 236 US 318, legislative history surrounding subsequent amendments thereto, and general context of the section, the court concludes that amendment of §20(5) did not expand the Commission's inspection powers to categories of documents not related to prescribed or authorized accounting and corporate records of a carrier, and that "other documents" therein means other documents which would assist an auditor to understand an entry on records prescribed by the Commission. Therefore, since rail carrier's budget forecast materials sought to be inspected clearly are not accounts, books, records, etc., and cannot be deemed "other documents" within meaning of §20(5), the statute does not authorize the Commission to inspect the budget forecast materials described in its Formal Demand For Examination of Records. Plaintiff's motion for summary judgment granted.—Burlington Northern, Inc. v. I.C.C., 323 F. Supp. 273 (277-9).

33. Accounts, records, and other papers subject to inspection.—[Vol. 3].—To bring budget forecast materials described in "Formal Demand for Examination of Records," which was served on plaintiff railroad by auditors acting for the Commission, within the scope of amended §20(5), they would have to be deemed "other documents" within the meaning thereof, such materials clearly not being "accounts, books, records, memoranda [or] correspondence." However, since the amendment of §20(5) did not expand the Commission's inspection powers to categories of documents not related to the prescribed or authorized accounting and corporate records of a carrier, and the term "other documents" therein means other documents providing background material which would assist an auditor to understand an entry on records prescribed by the Commission, the budget forecast materials

in issue are not subject to inspection by the Commission under §20(5). Plaintiff's motion for summary judgment granted.—Burlington Northern, Inc. v. I.C.C., 323 F. Supp. 273 (277-9).

Section 20. (6) Persons furnishing cars or protection against elements; access to and forms of records, etc.; reports.—[Unchanged. See vol. 11, p. 9317.]

Historical notes, vol. 12, p. 10332, vol. 14, p. 11545, vol. 15, p. 12133, vol. 16, p. 12780, vol. 17, p. 13466.

Regulations of the Commission

34 FR 3568, Feb. 27, 1969: Record Retention Guide, XXIV Interstate Commerce Commission [Revised] 1.7 Persons furnishing cars to railroads, 49 CFR Part 1225.

35 FR 3620, Feb. 21, 1970: Record Retention Guide, XXIV Interstate Commerce Commission ; 1.7 Persons furnishing cars to railroads, 49 CFR Part 1225.

36 FR 3772, Feb. 26, 1971: Record Retention Guide, XXIV Interstate Commerce Commission; 1.7 Persons furnishing cars to railroads, 49 CFR Part 1225.

37 FR 4671, March 3, 1972: Record Retention Guide, XXX Interstate Commerce Commission; 1.7 Persons furnishing cars to railroads, 49 CFR Part 1225.

37 FR 20695, Oct. 3, 1972, Part 1205: Refrigerator Car Lines, accounting regulations, insofar as they apply to the investment tax credit, amended to bring them into compliance with the Revenue Act of 1971 (Pub. Law 92-178), effective on publication in the Federal Register.

37 FR 25919, Dec. 6, 1972, Part 1205: Refrigerator Car Lines, accounting regulations. Order of Sept. 12, 1972 (37 FR 20695) amending regulations to comply with Revenue Act of 1971, effective on date of order.

38 FR 1870, Jan. 18, 1973: Record Retention Guide, XXX Interstate Commerce Commission; 1.7 Persons furnishing cars to railroads, 49 CFR Part 1225.

Section 20. (7)-(10) Penalties; false entries; Persons furnishing cars, etc.—[Unchanged.]

Notes of Decisions

§20(9): Volume 3—p. 2548; Volume 21—p. 16971.

Regulations of the Commission

§20(7): 34 FR 3568, Feb. 27, 1969: Record Retention Guide, XXIV Interstate Commerce Commission [Revised] 1.1 Refrigerator car lines, and 1.2 Railroad companies, 49 CFR Part 1222; 1.5 Express companies, 49 CFR Part 1223; and 1.6 Pipeline companies, 49 CFR Part 1224.

34 FR 16873, Oct. 18, 1969, Part 1222: Sleeping Car Companies, Destruction of Records, due to Pullman's cessation of operations, Part 1222 is deleted, effective Oct. 3, 1969.

35 FR 3620, Feb. 21, 1970: Record Retention Guide, XXIV Interstate Commerce Commission; 1.1 Refrigerator car lines, and 1.2 Railroad companies, 49 CFR Part 1220; 1.3 Electric railway companies, 49 CFR Part 1221; 1.4 [Deleted]; 1.5 Express companies, 49 CFR Part 1223; and 1.6 Pipeline companies, 49 CFR Part 1224.

36 FR 3772, Feb. 26, 1971: Record Retention Guide, XXIV Interstate Commerce Commission; 1.1 Refrigerator car lines, and 1.2 Railroad companies, 49 CFR Part 1220; 1.3 Electric railway companies, 49 CFR Part 1221; 1.4 [Reserved]; 1.5 Express companies, 49 CFR Part 1223; and 1.6 Pipeline companies, 49 CFR 1224.

37 FR 4671, March 3, 1972: Record Retention Guide, XXX Interstate Commerce Commission; 1.1 Refrigerator car lines, and 1.2 Railroad companies, 49 CFR Part 1220; 1.3 Electric railway companies, 49 CFR Part 1221; 1.4 [Reserved]; 1.5 Express companies, 49 CFR Part 1223; and 1.6 Pipeline companies, 49 CFR Part 1224.

38 FR 1870, Jan. 18, 1973: Record Retention Guide, XXX Interstate Commerce Commission; 1.1 Refrigerator car lines, and 1.2 Railroad companies, 49 CFR Part 1220; 1.3 Electric railway companies, 49 CFR Part 1221; 1.4 [Reserved]; 1.5 Express companies, 49 CFR Part 1223; and 1.6 Pipeline companies, 49 CFR Part 1224.

Section 20. (11) Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim.—[Unchanged. See vol. 9, p. 7794, and vol. 11, p. 9322.]

Amendments see footnotes, vol. 3, p. 2552; historical note, p. 2555.

Historical Notes

On July 10, 1973, the Commission recommended to Congress legislation (S. 2250) which would amend the Interstate Commerce Act and the Harter Act to authorize the Commission to adjudicate unresolved loss and damage claims. Annual Report, 1974, p. 83.

The Commission notes that its recommendations (340 ICC 515) that the Commission be given jurisdiction to adjudicate loss and damage claims on their merits have not been accorded favorable action in Congress. Annual Report, 1975, p. 42.

Notes of Decisions

Volume 3—p. 2559; Volume 7—p. 5818; Volume 9—p. 7796; Volume 11—p. 9323; Volume 12—p. 10333; Volume 13—p. 11036; Volume 14—p.11546; Volume 15—p. 12134; Volume 16—p. 12780; Volume 17—p. 13467; Volume 18—p. 14225; Volume 19—p. 15424; Volume 21—p. 16971.

3. Purpose.—[Vols. 3, 21].—In shipper's suit in Colorado against a rail and a motor carrier for damage to its fresh meat shipments, there is no merit in railroad's contention that it was not subject to the court's jurisdiction because the Carmack Amendment has preempted other substantive law in the field and, under provisions thereof, it is not subject to process in Colorado since it does not operate a line of railroad in that state. By its very terms, §20(11) did not intend to preempt every cause of action by a shipper against a carrier for damage to its interstate shipment; rather, it sets forth the rights of a legal holder of a receipt or bill of lading issued by a carrier and the responsibilities of a carrier to such holder. Moreover, as held in 333 F. 2d 488, the Carmack Amendment does not change, but continues in effect, the common law applicable to the liability of carriers.—Litvak Meat Co. v. Baker, 446 F. 2d 329 (334-6).

In addition to codifying the common-law rule of carrier liability, the statute was enacted to eliminate from shipper's burden of proof the difficult problem of showing damage at the hands of a specific carrier; thus, it permits a shipper to bring suit against a carrier for damages to goods shipped whether such damages occurred while shipment was in possession of defendant or connecting carriers. However, shipper is not compelled to avail himself of provisions of the Carmack Amendment; he may also bring a common-law action in negligence. Therefore, since defendant railroad met appropriate tests of "doing business" in Colorado to make it there amenable to service of process in a diversity action based on negligence, order of the district court dismissing claims against that carrier is reversed.—Id., pp. 331-2, 336-7.

4. Effect.—[Vols. 3, 21].—Effect of the Carmack amendment is that, despite any contrary stipulation, a receiving carrier, when it receives property in one State to be transported to a point in another involving the use of a connecting carrier for some part of the way, is deemed to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route, with a right to reimbursement for a loss not due to its own negligence. [Citing 219 US 186.] Thus, though defendant railroad claims it is not doing business in Massachusetts, when it received shipment of tomatoes in Florida for movement to Boston on a straight bill of lading covered by the Carmack amendment, it had contracted to supply services in destination State; and damage to the goods of which shipper complains presents a cause of action arising from that contract. Railroad's motion to dismiss denied.—Sarno v. Florida East Coast Ry. Co., 327 F. Supp. 506 (507).

6.—State laws superseded.—[Vols. 3, 15, 17].—General character of the Carmack Amendment clearly shows that Congress intended to take control of the subject of a carrier's liability under a bill of lading which it must issue, and to supersede all state regulation with reference thereto; and when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist. [226 US 491.] Thus, in shipper's suit against railroads (filed in State court and removed to U.S. court) alleging liability for loss of cotton shipment, destroyed by fire, in two counts—the first a common law count and the second a statutory count under the Carmack Amendment—the federal law had preempted common-law suits of the nature stated in the first count. Accordingly, since both counts in plaintiff's suit state a cause of action for damages for violation of railroads' contract for interstate carriage of goods, the lower court should have dismissed the common law count as to both railroads.—W. D. Lawson & Co. v. Penn Central Co., 456 F. 2d 419 (421-4).

Application of Paragraph

8. Carriers, transportation, subject to paragraph.—[Vols. 3, 7, 9, 16-18, 21].—Before the absolute liability of a common carrier attaches, shipper must have delivered the goods into carrier's exclusive possession, for immediate transportation, and must have given carrier shipping instructions. However, all necessary elements to comply with the law and effect delivery are absent in shipper's suit against railroad to recover damages, due to spoilage, on TOFC shipment of fresh meat. Facts show that plaintiff loaded and sealed trailer furnished by carrier and moved it to packing plant lot on Saturday—knowing defendant could not pick it up until following Monday—and that carrier had no connection with or knowledge of such loading operations; trailer remained in shipper's exclusive possession without shipping instructions being issued, bill of lading being delivered to carrier, or notice being given that the trailer had been loaded. Therefore, contrary to plaintiff's contention, there was no delivery of the goods to carrier, and no liability can attach to defendant on that ground.—Dugdale Packing Co. v. Atchison, T. & S. F. Ry. Co., 347 F. Supp. 1276 (1280-1).

Case also presents a question of precedent carrier liability for furnishing what shipper claims was a defective trailer, which resulted in damage to the shipment still in shipper's possession. The carrier must provide cars or other vehicles suitable for transporting any goods which it holds itself out to carry; defendant knew the type of equipment necessary to protect plaintiff's products from spoilage in transit; and a carrier is liable to the shipper for loss of perishable goods, where the loss is attributable to unsafe or unfit conditions of vehicle furnished. Railroad furnished a refrigerated trailer suitable for carrying fresh meat; shipper loaded and placed it on the plant lot, with refrigerator unit set for desired temperature; and the next day, shipper's mechanic found it to be running in good order, maintaining proper temperature, and to have an adequate supply of fuel. Thus, it is reasonable to assume that trailer was suitable and not defective when delivered to plaintiff. Accordingly, burden is on plaintiff to show that trailer was unsuitable for its intended purpose; plaintiff did not meet that burden. Judgment for defendant.—Id., pp. 1281-2.

Bills of Lading

16. Duty of carrier to issue.—[Vols. 3, 7, 9].—Issuance of the bill of lading is carrier's responsibility, not shipper's, and to regard inclusion of specific information on that document as an indispensable condition to shipper's recovery of any excess charges is improper, as it would render form superior to substance.—United States v. Southern Pac. Co., 325 I.C.C. 200 (209).

Liability of Carriers

30. In general.—[Vols, 3, 7, 9, 13-19, 21].—See also Condakes v. Southern Pac. Co., at n. 115 below, and Johnson v. Chicago, M., St. P. & P. R. Co., at §1(4), n. 1.

Railroads which delivered carloads of steers, shipped on order bills of lading stating that there was no right of inspection prior to surrender, to consignee without surrender of the order bills and which instead accepted consignee's blanket indemnity bond (pursuant to Uniform Freight Classification 6, §3) did not breach a carrier duty; thus, carriers are not liable to plaintiff (shipper) for damages which consignee collected from it because the steers were unsatisfactory. Under the statute, a carrier issuing an order bill of lading does not assume a risk of liability for all possible losses from failure to demand surrender thereof; as held in 226 US 491, carrier's liability is limited to "any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered," which plainly implies liability for some default in its common law duty as a common carrier. Defendants violated no common law duty by delivering considered shipments prior to surrender of bills of lading; therefore, plaintiff does not have a cause of action under §20(11).—Iowa Beef Packers, Inc. v. Chicago G. W. Ry. Co., 402 F. 2d 930 (933-5).

In suit against railroad for damages for delivering car to wrong destination, defendant is liable to shipper for breach of contract by virtue of its misdelivery. Railroad employee re-routed carload of "air-entrained" cement, which move on shipper's bill of lading directing shipment to consignee's Concrete Pipe Div. plant at correc address (but showing incorrect routing), and directed it to consignee's ready-mix concrete plant where the cement was processed and delivered to customers for work for which that cement was unsuitable, thereby causing heavy expenditures for testing, and replacing, unsuitable concrete delivered; thus, railroad is liable for breach of its duty to deliver under the contract of carriage. Damages claimed are composed of (1) value of the cement, (2) freight charges, and (3) expenses for testing and replacing the unsuitable concrete; however, since latter expenses were special damages not within contemplation of the parties when shipment was made, railroad is not liable therefor. Shipper is entitled to damages in amount of value of shipment plus freight charges.—Marquette Cement Mfg. Co. v. Louisville & N. R. Co., 406 F. 2d 731 (732)*.

Interstate carrier, although not an absolute insurer, is liable for loss and damage to goods transported by it unless it can show that the damage was due to an act of God, the public enemy, act of shipper, public authority, or the inherent vice or nature of the goods shipped. However, in consignor's action to recover damages on rail shipments of grapes from California to New Jersey for transportation by water to South America, defendant railroad had no legal duty to separate undamaged boxes of grapes in the shipments from damaged boxes thereof; rather, duty was on the water-carrier consignee in New Jersey to accept tender of partially damaged shipments and thereafter to mitigate the damages.—F. J. McCarty Co. v. Southern Pac. Co., 289 F. Supp. 875 (881)*.

Inasmuch as the duty to transport goods with reasonable dispatch is an integral part of a railroad's normal undertaking, a party injured by such carrier's breach of that duty is entitled to recover damages not only under the well-settled common law rule, but also under the Carmack Amendment. Additionally, the court, in an action to recover damages allegedly caused by railroad's late delivery of shipments, should look at the particular segment of transportation involved, not the entire trip as a whole, in determining whether railroad failed to discharge its duty to transport the cars with reasonable dispatch; and, in absence of more persuasive evidence to the contrary, railroad's own schedules are sufficient evidence of what length of time constitutes reasonable dispatch.—Condakes v. Southern Pac. Co., 295 F. Supp. 121 (123-4).

Plaintiff consignee established a prima facie case that initial-carrier railroad breached its duty to transport c.l. shipments of lettuce from Salinas, Calif., to Boston with reasonable dispatch by showing that the cars (which reached Chicago ahead of schedule) took 16-1/4 hours longer than the 35-1/2 hours scheduled by connecting line to travel from Chicago to Boston. Burden then shifted to defendant to come foward with evidence tending to show that the delay was justified or reasonable under the circumstances; however, defendant presented no such evidence. And fact that the unjustified and unreasonable delay, which resulted in the damages claimed, occurred while shipments were being transported by a connecting line does not absolve defendant of its liability under the statute. Plaintiff is entitled to recover damages in the amount stipulated.—Id., pp. 124-5.

However, in another action by consignee to recover damages because of alleged late delivery of a carload of peaches from Sanger, Calif., to Boston Market Terminal, evidence showed that the delay occurred in moving the car from railroad's yard to the market after it arrived at Boston; moreover, the actual delay was only about three hours and was due solely to the difficulty of handling on that date a larger number of cars of perishable commodities than the normal capacity of the railroad yards. Accordingly, the court finds that considered car was transported with reasonable dispatch, and that there was no unreasonable delay which would entitle plaintiff to recover the damages claimed. Judgment for defendant.—Id., 295 F. Supp. 119 (120-1).

In suit against a railroad to recover for loss or damage to shipment, a shipper makes out a prima facie case of negligence against the carrier when it shows that the goods were delivered to carrier in good condition and that they were delivered by carrier to consignee in damaged condition. Carrier is ordinarily not liable, however, for acts or default of shipper in loading the car in an improper manner; therefore, when evidence shows that flat car (on which shipment was being moved) was derailed when heavy marine engine part fell from the front end and that the car had been negligently loaded by plaintiff shipper's agent, carrier cannot be held liable for act of shipper in improperly loading the car in the absence of evidence that the defect was patent and apparent by ordinary observation. Even though carrier's local agent knew of shipper's negligent loading of the car, and cursory inspection was made by railroad employees during the trip, responsibility for negligence in loading was not thereby transferred to carrier.—Association of Maryland Pilots v. Baltimore & O. R. Co., 304 F. Supp. 548 (551-3).

However, a common carrier's liability does not cease until delivery of the shipment to consignee; and, in view of showing that, except for a missing cylinder head and a few other minor parts, shipment of marine engine parts loaded on the flat car was undamaged in car derailment, was in carrier's possession at that time, and was delivered to consignee (about a month later in a gondola car) in a damaged and dirty condition, shipper made out its prima facie case of negligence and burden was then on carrier to prove that it was not negligent. That burden was not met by carrier's generalized evidence as to the reloading, reason for the delayed delivery, or why cylinder head that fell along railroad track was not picked up and delivered. Therefore, since defendant carrier failed to prove its freedom from negligence, it is liable to plaintiff shipper for damage and other loss to considered shipment even though shipper's negligence in loading the goods was cause of the derailment.—Id., pp. 554-5.

In meat packer's action to recover for damage to fresh hams shipped under a rail bill of lading containing notation that goods were received in "apparent good order," such recital in the bill of lading establishes a prima facie case that the goods were delivered to carrier in good condition when, upon delivery to carrier, contents of the shipment are open to visible inspection; however, where merchandise is sealed in a trailer, and the contents are not open and visible, plaintiff must establish by direct evidence that its goods were delivered to the carrier in good order. Therefore, when plaintiff loaded the loose hams on racks on top of each other, about five or six layers high, inside a "piggyback" trailer which was delivered sealed to the railroad, and contents of trailer were not open and visible to the carrier. the "apparent good order" bill of lading notation did not meet shipper's burden of showing that the hams were delivered to the railroad in good condition. Judgment for defendant.—Blue Bird Food Products Co. v. Baltimore & O. R. Co., 329 F. Supp. 1116 (1117-8).

Plan I TOFC operations are valid through-route and joint-rate arrangements between connecting carriers and it necessarily follows that the respective liabilities of the participating carriers are to be governed by §§20(11) and 20(12). Under §20(11), the initial carrier is liable to the shipper for all damage or loss, whether caused by it or not, on the theory that in accepting the shipment under the through joint rate it becomes a principal and all its connecting carriers agents for the transportation; and §20(12) provides a "right over" in order to insure that the ultimate burden falls upon the carrier responsible for the loss. Nor can the Commission accept as seriously made the contentions of the freight forwarders to the effect that a railroad cannot assume responsibility to an unknown shipper. Prior to enactment of part IV, shippers by freight forwarder had for many years been allowed to sue the underlying carriers for loss or damage occasioned by the latter.—Substituted Service—Piggyback, 322 I.C.C. 301 (346)*.

The specific concealed loss and damage claim rules, as set forth in appendix C hereto, are unlawful inasmuch as they attempt to limit carrier liability for loss and damage to 50 percent of the net monetary loss in violation of §20(11).—Loss and Damage Claims, 340 I.C.C. 515 (536).

Proposed rule providing for a constructive schedule arrived at on the basis of published times (the actual operating schedules) plus 24 hours held inconsistent with present law of carrier liability, and therefore contrary to §20(11), since the actual operating schedules reflect the time usually required for the transportation in question (and not the constructive schedule), and courts have disallowed such a "grace period".—Provisions on Vegetables & Melons, Transcontinental, 340 I.C.C. 807 (815).

31. Initial carrier.—[Vols, 3, 7, 9, 11, 14, 15, 17, 19, 21].—In suit by consignee's insurer, as subrogee, against initiating railroad for loss of 165 cases of liquor which disappeared from trailer-load shipment from Louisville, Ky., to Minneapolis, Minn., moved in plan II piggyback service under a through bill of lading, defendant was liable for loss sustained anywhere en route without consignee being required to prove that the loss occurred while shipment was in initial carrier's possession. Special arrangements between shipper and railroad concerning rates, routings, or charges do not bar shipper or consignee from relying on the Carmack Amendment for proof of claim against initial carrier; that statute reconciled carrier's interest in use of varied and connecting forms of transshipment and shipper's resulting inability to determine exactly where his freight was lost or damaged by placing liability for loss or damage to cargo on the initiating or delivering carrier.—Phoenix Insurance Co. v. Monon Railroad, 438 F. 2d 1403 (1406).

Bill of lading executed by initial-railroad defendant provided for piggyback movement of shipper's loaded trailer, partly by rail and partly by motor carrier, from Louisville to the consignee at the destination designated therein; therefore, it was a "through bill of lading" covering a through shipment even though motor transportation requested by shipper necessitated interchange of cargo between initial and delivering railroads at Chicago. The railroads provided one continuous shipment from origin to destination, although using truck transportation pursuant to instructions of Illinois Trailer on Flatcar Association in the Chicago area; moreover, defendant railroad was well aware of the nature of ITOFCA's services. Accordingly, initial rail carrier is liable for loss sustained anywhere en route and the lower court's judgment in favor of plaintiff is affirmed. —Id., pp. 1406-7.

33. Delivering carrier.—[Vols. 3, 16, 19, 21].—Under provisions of §20(11), a suit to recover for loss and damage to rail shipment may be brought against the delivering carrier by a shipper suffering loss which occurs during an interstate shipment.—Association of Maryland Pilots v. Baltimore & O. R. Co., 304 F. Supp. 548 (550).

35. Lawful holder of bill of lading.—[Vols. 3, 9, 13, 18].—See Litvak Meat Co. v. Baker, n. 3, above.

38. [Negligence]—Other causes.—Carriers have a common-law obligation to transport goods with reasonable diligence and to make delivery thereof within a reasonable time; and commensurate with such obligation is the right of action by shipper for delay, though delays due to causes that could not reasonably have been anticipated are excusable. It follows that, when goods are tendered for shipment, a carrier is bound to advise shipper as to any cause likely to delay the transportation which is within its knowledge, or its fair and reasonable means of knowledge, and not within shipper's knowledge. Defendant knew the date plaintiff wanted its shipment of meat to reach the destination, and knew when it received the shipment that it was tendered too late for loading on fast train that would arrive on that date; therefore, railroad had a duty to advise shipper that its desired shipping schedule (noted on bill of lading) could not be met and, having failed to so advise shipper, carrier was liable for loss sustained by shipper as a result of delayed arrival of the shipment.—Gold Star Meat Co. v. Union Pac. R. Co., 438 F. 2d 1270 (1271-3).

40. Measure of damages.—[Vols. 15-19, 21].—The measure of damages in delay cases is actual damages, and the market value rule has been adopted as a proper method to ascertain actual damages. On the facts of record, defendant railroad defaulted on its duty to advise shipper of impending delay in transportation of its goods and, consequently, was liable for the resulting loss. Accordingly, there being no merit in railroad's argument that it should not be held liable for special damages when it did not know any special damages were incurred, the proper measure of damages was the difference in market value of the goods on the date and in the condition they were contracted to arrive at their destination and the market value after the delayed arrival. Trial court's judgment affirmed.—Gold Star Meat Co. v. Union Pac. R. Co., 438 F. 2d 1270 (1273).

Since Hinsch's Mileage Tariff applies only to the authorized use of rail cars, it is not an appropriate measure of the damages to which the Government is entitled as compensation for railroad's unauthorized use of government-owned flatcar which was tendered to carrier for shipment to an army depot and, instead of being delivered as provided in the bill of lading, was used in an entirely unauthorized manner. [Citing 271 Fed. 668.]—Burlington Northern, Inc. v. United States, 462 F. 2d 526 (529).

In action against railroad for damages arising from delivery of carload of cement to wrong plant of consignee, there is no doubt that defendant is liable for breach of contract by virtue of its misdelivery. As to measure of damages for such breach of contract, the rule is that damages recoverable are (1) such as may fairly and reasonably be considered as arising in usual course of events from the breach itself or (2) such as may reasonably be supposed to have been in contemplation of the parties when the contract was made. Thus, since consignee's heavy expenses for testing and replacing unsuitable concrete, which was processed from considered cement shipment and delivered to customers, constituted special damages not within the parties' contemplation when the shipment was made, railroad is not liable therefor. However, since defendant breached its duty to deliver under the contract of carriage, shipper is entitled to recover damages in the amount of value of the cement plus the freight charges.—Marquette Cement Mfg. Co. v. Louisville & N. R. Co., 281 F. Supp. 944 (947-51)*.

In a suit against interstate carrier to recover for damage to part of goods shipped, general rule for measure of damages is the market value of undamaged goods at destination point less the market value of the damaged goods; however, if another standard better measures the actual loss, market value test should be discarded and the standard which best measures the damages should be adopted. Thus, where plaintiff-consignor had contracted to sell California grapes in South America, and first part of rail shipment was damaged when it arrived in New Jersey (for transshipment by water) so that the grapes could not be shipped to South America and plaintiff was required to have them sold at auction at a loss, plaintiff was entitled to damages in the amount it would have received under its contract for grapes in South America, less the amount received at the auction and less the amount it would have had to pay for water transportation of the goods from New Jersey to South America.—F. J. McCarty Co. v. Southern Pac. Co., 289 F. Supp. 875 (883-4)*.

In shipper's suit against railroad to recover for damage to shipment of engine parts, damages claimed for repairs or replacements may not exceed fair value of the goods before injury, unless the property has some special value to the owner greater than its value to others; further, plaintiff claiming damages must present sufficient evidence from which the damage can be ascertained on some rational basis other than by speculation or conjecture. Evidence shows that plaintiff purchased a used marine engine (for dismantling in order to obtain engine parts) for $8,500, parts shipped 3 months later were insured for $12,000 and were to be used in a vessel nearing the end of its useful life, and that other parts were readily available for replacements when those shipped sustained loss and damage in transit. Therefore, the court finds that market value of the shipment was the price paid for the engine; and shipper is entitled to recover that amount from the carrier but, as it failed to show any "special value" of the engine parts, it is not entitled to recover damages in excess of market value on the ground of special value to it.—Association of Maryland Pilots v. Baltimore & O. R. Co., 304 F. Supp. 548 (557-8)*.

Measure of damages under §20(11), which was applicable on question of defendant forwarder's liability, if any, for damages to plaintiff's shipment of electric fans and stands, is the actual loss, damage or injury caused by carrier to the goods in its possession and being transported. Generally, such damages are to be computed at the difference between sound market value of the goods at destination and the value as damaged, and that rule is a proper measure where, as in instant case, consignee buys the goods for resale. The evidence shows that shipment left shipper's loading platform in good condition; moved under straight bill of lading, which had a "shippers load and count" notation, by rail TOFC plan; and was damaged in transit by leakage of water through plastic-lined canvas top of trailer furnished by defendant when an enclosed trailer was not available; therefore, all damage to the cargo is attributable to defendant. Plaintiff found entitled to recover the difference between value of its shipment, if delivered in good condition on schedule, and the salvage value thereof; amount of damages computed accordingly.—Federated Department Stores, Inc. v. Brinke, 316 F. Supp. 1402 (1404-5).

Actions

115. In general; time for.—[Vols. 3, 9, 13-19, 21].—In suit against railroad to recover damages which occurred when it delivered to terminal line (that served plaintiff's plant) a car of ethylene oxide, instead of carload of butadiene it should have delivered, damages complained of occurred in March 1966; and record shows that railroad officials visited plaintiff's plant less than a month later, were then made aware that damages were being claimed but extent thereof had not been ascertained, and examined two business-records documents concerning the railroad's misdelivery, which they then returned to plaintiff's representative. While §2(b) of the bill of lading requires that written claim of damage be filed with the carrier within 9 months, the documents need not be in a particular form; the courts have held such requirement to be satisfied where carrier had actual knowledge of the damage. Though plaintiff's "Memorandum of Facts," outlining the extent of damages, was not submitted to defendant until Jan. 20, 1967, documents presented to its officials, viewed in light of all the circumstances, constitute an adequate statement of claim within bill of lading requirements. Trial court erred in ruling that appellants' notice of claim was insufficient; affirmed in part and reversed in part.—American Synthetic Rubber Corp. v. Louisville & N.R. Co., 422 F. 2d 462 (464, 468-9)*.

While shipper alluded to §20(11) in its complaint for recovery of damages to large and expensive electron tube transported by defendant motor carrier, no party objected to failure of the trial judge to instruct the jury on the Carmack Amendment, though requested by plaintiff to do so; moreover, on appeal from lower court judgment for carrier notwithstanding the jury's verdict awarding damages, both parties rely solely on Texas authorities on the issue of plaintiff's damages. Under such circumstances, and in the absence of any authorities to the contrary, the Court of Appeals would give effect to Texas tort law on the particular issue of damages.—Continental Electronics Mfg. Co. v. Navajo Freight Lines, Inc., 447 F. 2d 1174 (1176, Note).

On appeal from district court judgment against the two defendants in shipper's suit against initial and delivering railroads, originally brought in Tennessee court, alleging liability for loss of cotton shipment (destroyed by a fire in Ohio) in two counts—the first a common law count and the second a statutory count under the Carmack Amendment—service of process upon both defendants was valid under Tennessee statute providing for service on foreign corporations and associations which have offices and agents within the state. Although neither corporate defendant operates a line of railroad in Tennessee, both have offices and agents available for service in Memphis, as does corporate shipper; and under the state law, shipper could validly sue nonresident defendant railroads in Tennessee court for damages to considerd shipment which occurred outside the state boundaries.—W. D. Lawson & Co. v. Penn Central Co., 456 F. 2d 419 (420-1).

As the Supreme Court held in 226 US 491, however, the Carmack Amendment preempted the field of law relating to carriers' bill-of-lading liability for interstate shipments. Thus, since the common law count in shipper's original state court complaint is a suit for damages for violation of railroads' contract for interstate carriage of goods—there being no apparent distinction between nature of that count, or relief sought thereunder, and that stated or sought under the federal statute—the Carmack Amendment preempted the common-law action; and the district court erred in not dismissing the common law count as to both defendants. Accordingly, since the court properly dismissed the statutory count against delivering railroad on ground that a receiving carrier could not be sued under §20(11) in a state where it did not operate a line of railroad, the complaint should be dismissed as to that carrier.—Id., pp. 421-4.

District court had jurisdiction, however, in shipper's action under §20(11) against initial railroad who issued its bill of lading for the interstate shipment; and in view of the practical identity of the two counts, its error in submitting the common-law count to the jury was harmless. Furthermore, contrary to railroads' argument, maintenance of the suit in Tennessee did not impose an unreasonable burden on interstate commerce; all the parties had offices in the state and county where suit was filed and, under the Carmack Amendment, suit could have been brought in many jurisdictions where convenience of the parties would be no better served than they were in Tennessee. Lower court's judgment vacated as to delivering carrier and affirmed as to defendant initial railroad.—Id., p. 424.

In shipper's suit against railroad to recover for damage to returned shipment of cherries in barrels which was received by plaintiff in damaged condition, defendant's theory that some of the cherries were damaged when loaded, and plaintiff's consignee failed to properly load returned shipment, is not supported by conclusive evidence; also, there is substantial evidence by plaintiff that the cherry barrels were in good condition when originally loaded and that the loading method used was adequate to prevent any damage in normal transit. Therefore, under the principles set forth in 377 US 134, the Court of Appeals finds that the evidence is conflicting on the essential issues and that decision of the trier of fact should not be disturbed. The trial court properly instructed the jury; and obviously, the jury rejected defendant's theory of the case. Judgment in favor of plaintiff, affirmed.—Schuler Chocolates, Inc. v. Chicago & N. W. Ry. Co., 468 F. 2d 119.

In action against railroad for damage to goods transported by it, defendant had no legal duty to separate the undamaged from damaged boxes of grapes in shipments from California to New Jersey (for water transportation to South America) and, since water carrier-consignee's wrongful refusal to accept delivery of first partially damaged shipment and thereafter mitigate the damages, standing alone, does not prohibit consignor's recovery of damages from the railroad, consignor can recover only if a different reasonable action by its agents or by consignee could have mitigated the damages. However, defendant railroad must show how plaintiff-consignor or consignee might have mitigated losses claimed to be due to railroad's delivery of the partially damaged shipment.—F. J. McCarty Co. v. Southern Pac. Co., 289 F. Supp. 875 (881)*.

Therefore, defendant is liable for consignor's damages on the first shipment when 10 to 15 percent thereof was damaged upon arrival in New Jersey and, since neither consignor nor consignee (that was to provide water movement therefrom) had space, facilities, time, or personnel to separate the damaged from the undamaged boxes, consignor had to sell the grapes at auction at a loss. However, when only a small portion of the second shipment was damaged upon arrival, consignee refused to accept delivery of partially damaged shipment, and consignor had the goods sold at auction at a loss, consignor could not recover damages from the railroad because consignee's refusal to accept delivery was not reasonable.—Id., pp. 882-3.

In wholesale/distributor's suit against railroad to recover loss allegedly resulting from damage to carload of peaches, plaintiff sustains his burden of proof when he shows (1) delivery of goods to carrier in good condition, (2) arrival in damaged condition, and (3) the amount of damages; burden is then upon carrier to show both (1) it was free from negligence and (2) damage to cargo was due to one of the excepted causes relieving it from liability. Fact that the peaches were given a lower grade at destination than at origin does not show they were damaged en route, particularly since difference between the two grades relates only to color which stops developing after fruit is picked. Therefore, as the crucial evidence was the inspection certificate issued (pursuant to the Agricultural Marketing Act) at origin of shipment, and there is no evidence that condition of the fruit was different at destination than it was at origin, plaintiff has not made out a *prima facie* case in that he has failed to show any damage to the goods while in transit. Judgment for defendant, with costs.—Condakes v. Southern Pac. Co., 303 F. Supp. 369 (371-3).

Defendant railroad, as a common carrier, owed a duty to plaintiff to exercise reasonable care in handling considered shipment of grapes and to perform all required transportation services without negligence. Under §20(11), a carrier, although not an absolute insurer, is liable for full actual loss, damage or injury to goods it transports unless it can show its freedom from negligence and that damage was caused by one of the excepted causes relieving it from liability. Therefore, when plaintiff consignee established a *prima facie* case by showing delivery of shipment to carrier in good condition, arrival in damaged condition (shown by the record to have been caused by rough handling during transit), and the actual amount of its damages, and defendant railroad failed to show by a preponderance of credible evidence either its freedom from negligence or that the damage was due to one of the excepted causes relieving it from liability, plaintiff is entitled to recover its actual damages in the amount specified.—Condakes v. Southern Pac. Co., 303 F. Supp. 1158 (1159-60, 1161-2).

Defendant railroad was not liable to shipper for damage to shipment of canned goods which occurred when train was derailed and car containing plaintiff's goods was overturned, when the derailment was caused by sudden heavy rain and flooding that undermined the roadbed and tracks over which defendant's employees were operating the train in a careful and prudent manner. The Uniform Bill of Lading, under which the shipment moved, provided that carriers were not liable for loss or damage caused by an act of God; and record showed that the rainfall of five or more inches in a 4-hour period was extraordinary, unusual, and had not happened for 20 years prior to that time. The cause of the derailment and consequent damage to plaintiff's goods was an act of God, which was unforeseeable, i.e., the unusual and unprecedented rainfall; therefore, under the bill of lading, defendant carrier was absolved from liability for the damages claimed by plaintiff. Action dismissed.—Marriott Corporation v. Norfolk & W. Ry. Co., 319 F. Supp. 646 (647-8).

To establish a *prima facie* case in suit to recover from the carrier for damages to its shipment, the shipper must show delivery of goods to carrier in good condition, arrival in damaged condition, and amount of the damages. Plaintiff did not show delivery of cantaloupes in good condition by placing in evidence a certificate of inspection issued by Department of Agriculture 27 hours before the car was delivered to carrier. The inspection certificate in itself is not conclusive proof that commodity was in good condition on delivery; it is only prima facie evidence of truth of statements therein; and, while it may warrant, it does not compel a finding of good condition at the time of shipment, particularly when other evidence permits a different conclusion to be drawn. Other evidence of record shows that the cantaloupes were not sufficiently cooled at time of delivery to prevent natural development of soft fungus rot, and hence, when shipped, were not in a condition to assure against deterioration under normal transportation conditions. Delivery to carrier in good condition not proved; judgment for defendant.—S. Strock & Co. v. Southern Pac. Co., 326 F. Supp. 695 (696-7).

In suit by meat packer against railroad to recover damages on TOFC shipment of meat, found to be badly spoiled after shipper had loaded it into carrier-furnished refrigerated trailer but before railroad could pick trailer up, plaintiff bases its right to recover on two theories: (1) that delivery of shipment into carrier's possession had been completed when the loss occurred, and (2) that the trailer furnished was defective and, thus, carrier breached its legal duty to provide suitable equipment for carriage of the particular goods. However, based on stipulated facts relating to customs and arrangements of the parties for delivering trailers to packing plant, shipper's loading and placing them on the plant lot, and pickup of shipments therefrom by carrier, there was no delivery of considered shipment into railroad's exclusive possession for immediate transportation prior to the time it was discovered that the meat was spoiled; therefore, no liability for loss can attach to defendant on that ground.—Dugdale Packing Co. v. Atchison, T. & S.F. Ry. Co., 347 F. Supp. 1276 (1280-1).

As to plaintiff's further contention that defendant failed to furnish a safe and suitable trailer for carriage of the product to be shipped, a common carrier is liable to the shipper for loss of perishable goods when the loss is attributable to unsafe or unfit condition of vehicle furnished. Defendant furnished shipper a refrigerated trailer suitable for transportation of fresh meats; and based on undisputed facts of record, it is reasonable to assume that the trailer was not defective when delivered to plaintiff. Accordingly, burden is on plaintiff to show that trailer furnished was not suitable for the intended purpose, and it failed to sustain that burden. Judgment for defendant.—Id., pp. 1281-2.

116. Venue.—[Vols. 3, 18, 21].—While neither of nonresident defendants operates a line of railroad in Tennessee, both have offices and agents in Memphis, as does plaintiff shipper; and under Tennessee law providing for service of process on foreign corporations and associations which have offices in the State, shipper could bring a valid action in state court against initial and delivering railroads to recover damages for loss of cotton shipment that was destroyed by fire outside that State. Therefore, defendants having removed the case to federal court in Tennessee, while reserving their objections to venue, shipper's Carmack Amendment could be maintained there against initial carrier who issued the bill of lading; however, the district court properly dismissed the statutory count against delivering railroad on the ground that, under specific language of the Carmack Amendment, a receiving carrier could not be sued in a state where it did not operate a line of railroad.—W. D. Lawson & Co. v. Penn Central Co., 456 F. 2d 419 (420-1, 423).

117. Jurisdiction.—[Vols. 3, 7, 11, 15, 18, 19, 21].—Federal court, to which defendant railroad had removed suit originally brought in a state court, had jurisdiction of shipper's action to recover damages that occurred when defendant received carload of butadiene from another railroad for delivery to Kentucky & I. Term. R. which served plaintiff's plant and delivered to K&I a carload of ethylene oxide which was mixed with other raw materials in manufacturing process at the plant, resulting in considerable damage. Though the complaint does not rely on any federal law, facts stated therein clearly show that gravamen of the action is within scope of the Carmack Amendment. Defendant was attempting to fulfill terms of uniform bill of lading contract for delivery when it transferred the wrong car to K&I; it intended to deliver a car of butadiene and its mistaken delivery of another chemical constituted a breach of a duty incurred by contract with shipper. Since the action is one for breach of the bill of lading contract, and is removable to federal court, it must be governed by terms of the Carmack Amendment.—American Synthetic Rubber Corp. v. Louisville & N. R. Co., 291 F. Supp. 723 (725-6)*.

In shipper's action against railroad for damage to goods while in transit from Florida to Boston, defendant claims it is not subject to jurisdiction of the Massachusetts court because it is not doing business in the State, has no agent for service of process there, and does not fall within provisions of the state long-arm statute. However, the transportation involved is covered by the Carmack amendment; and under that law, when carrier receives goods in one State for movement to a point in another that involves use of a connecting carrier for any part of the way, receiving carrier is deemed to have adopted such other carrier as its agent, and to incur carrier liability over the entire route. Inasmuch as carrier received in Florida a shipment to be transported to Boston on a straight bill of lading, it follows that defendant had contracted to supply services in the commonwealth; damage complained of presents a cause of action arising from that contract; thus, the Massachusetts "Long-Arm" statute is applicable. Defendant's motion to dismiss for lack of jurisdiction, denied.—Sarno v. Florida East Coast Ry. Co., 327 F. Supp. 506 (507).

Regulations of the Commission

37 FR 4257, March 1, 1972, Part 1005: Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, new Part 1005, §§1005.1 - 1005.6, added to become effective April 20, 1972.

37 FR 9027, May 4, 1972, Part 1005: Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, effective date of prescribed regulations postponed until July 1, 1972, effective on date of order.

37 FR 20943, Oct. 5, 1972, Part 1005: Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, §1005.3(b) and §1005.4(c) modified, effective Oct. 16, 1972.

37 FR 23908, Nov. 10, 1972, Part 1005: Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, second paragraph of §1005.3 and §1005.4(c) revised, effective Oct. 16, 1972.

Section 20. (12) Recovery by initial or delivering carrier from connecting carrier.—[Unchanged. See vol. 14, p. 11548.]

Amendments, see footnotes, vol. 3, p. 2614, vol. 14, p. 11548; historical note, p. 2614.

Notes of Decisions

Volume 3—p. 2614; Volume 11—p. 9324; Volume 12—p. 10333; Volume 15—p. 12138; Volume 19—p. 15431; Volume 21—p. 16983.

1. Recovery over by initial carrier.—[Vols. 3, 7, 11, 15, 18, 19, 21].—Plan I TOFC operations are valid through-route and joint-rate arrangements between connecting carriers and it necessarily follows that the respective liabilities of the participating carriers are to be governed by §§20(11) and 20(12). Under §20(11), the initial carrier is liable to the shipper for all damage or loss, whether caused by it or not, on the theory that in accepting the shipment under the through joint rate it becomes a principal and all its connecting carriers agents for the transportation; and §20(12) provides a "right over" in order to insure that the ultimate burden falls upon the carrier responsible for the loss. Nor can the Commission accept as seriously made the contentions of the freight forwarders to the effect that a railroad cannot assume responsibility to an unknown shipper. Prior to enactment of part IV, shippers by freight forwarder had for many years been allowed to sue the underlying carriers for loss or damage occasioned by the latter.—Substituted Service—Piggyback, 322 I.C.C. 301 (346)*.

To the extent that an agreement between carriers assigns portions of loss and damage claims on interline shipments to carriers not responsible for such claims, such agreement violates the spirit and the letter of §20 (12).—Loss and Damage Claims, 340 I.C.C. 515 (538).

Section 20a. Securities of carriers; issuance, etc.—(1) Carrier defined.—[Unchanged. See vol. 15, p. 12138.]

Amendments, see footnotes, vol. 15, p. 12138; historical notes, vol. 4, p. 2615, vol. 9, p. 7800, vol. 12, pp. 10218, 10330, vol. 13, pp. 10937, 11032, vol. 14, p. 11423, vol. 21, p. 16983.

Cross Reference

Section 13 of the Emergency Rail Facilities Restoration Act, Pub. Law 92-591, Oct. 27, 1972, 86 Stat. 1304, provides that a railroad qualifying for a loan or loans under that act "shall not be required to comply with the provisions of section 20a of the Interstate Commerce Act (49 U.S.C. 20a) with respect to such loan or loans."

Notes of Decisions

Volume 4—p. 2617; Volume 7—p. 5824; Volume 9—p. 7800; Volume 11—p. 9324; Volume 12—p. 10334; Volume 15—p. 12139; Volume 19—p. 15432; Volume 21—p. 16984.

1. Carriers subject to section.—[Vols. 4, 7, 9, 15, 19, 21].—See also Missouri Pac. R. Co.—Control—Chicago & E. I. R. Co., at §5(2), n. 45 conditions.

A common law business trust formed for the purpose of reorganization and acquisition of a nonoperating rail carrier is a common carrier within the meaning of §1(3)(a) of the Act; and, as such will be subject to §20a for the issue and assumption of obligation of any securities issued or guaranteed.—Pittsburgh & W. Va. R.—Pur.—Pittsburgh & W. Va. Ry. Co., 330 I.C.C. 593 (596).

Section 20a. (2) Issuance of securities; assumption of obligations; authorization.—[Unchanged. See vol. 9, p. 7801, vol. 21, p. 16985.

Historical notes, see vol. 4, p. 2615, vol. 9, p. 7801, vol. 12, p. 10330, vol. 14, p. 11549, vol. 16, p. 12784, vol. 17, p. 13472; cross reference, vol. 21, p. 16985.

Notes of Decisions

Volume 4—p. 2621; Volume 7—p. 5826; Volume 9—p. 7802; Volume 11—p. 9325; Volume 12—p. 10334; Volume 13—p. 11038; Volume 14—p. 11549; Volume 15—p. 12139; Volume 16—p. 12784; Volume 17—p. 13472; Volume 18—p. 14299; Volume 19—p. 15433; Volume 21—p. 16985.

Constitutionality; Purpose

2. Purpose.—[Vols. 4, 21].—Dominant purpose of Congress in enacting §20a was to protect investors in securities of railroads and other carriers from the all too frequent abuses of financial manipulations, watered stock, and over-extended capital structures; thus, it required that carriers obtain the Commission's approval before issuing securities or assuming liabilities or other obligations. Also, the requirement of prior Commission approval has been held to apply to any transaction by which carrier changes or affects terms of its outstanding securities. However, that established body of law does not compel the conclusion that deposit receipts, used as a mechanism for maintaining the status quo pending application for Commission approval, are securities as that term is used in §20a; and record is convincing that considered deposit receipts are not securities which require approval prior to issuance. Further, the court notes that, while plaintiff argues that alleged violation of §20a voids the control transactions under consideration, §20a(11) provides the remedy for a §20a violation.—Interstate Investors, Inc. v. United States, 287 F. Supp. 374 (386, 387-8)*.

3.—Safeguarding investors.—[Vols. 4, 7, 9, 14-17].—Commission required, as condition of its approval of transaction herein, publication of a prospectus conforming to Securities Exchange Commission Form S-2 which would detail the terms and risks involved to a prospective investor.—North Western Employees—Pur.—Chicago & N. W. Ry. Co., 342 I.C.C. 58 (77).

Construction

10. Construction, generally.—[Vols. 4, 7, 9, 11, 19, 21].—See also Federal Barge Lines, Inc., Assumption of Obligation, at n. 175 below.

Action by purchasers of railroad bonds against issuer, its officers, and underwriters for damages, claimed to result from their reliance on defendants' allegedly false and misleading offering circular, fails to state a claim under §§8, 20a and 20b on two grounds. First, §8 provides relief only for a carrier's violations of the Act and the complaint does not allege that any defendant is a carrier; second, it establishes liability only for a violation of the Act and, in instant case, such a violation can only be found if defendants failed to comply with applicable provisions of §20a concerning the issuance of securities. Therefore, since complaint alleges that the railroad bonds in question were approved by the Commission, even if it could be amended to allege that certain defendants are carriers, no possible violation of §20a is or could be alleged. Complaint dismissed for failure to state a claim under §§8, 20a and 20b of the Act.—Dorfman v. First Boston Corp., 336 F. Supp. 1089 (1098).

However, it is important to emphasize that the court's decision does not leave investors in securities issued under the Interstate Commerce Act without any remedy for misstatements or fraud as suggested by plaintiffs. Although §20a only affords limited protection concerning the registration of securities, an investor in a security issued thereunder is protected against misleading or fraudulent statements under §§12(2) and 17 of the Securities Act. And, in addition, the Exchange Act does not exempt §20a securities from its coverage.—Id., pp. 1098-9.

While §20a does not empower the Commission to grant immunity from the antitrust laws, when securities are issued in conjunction with carrier activity which has been approved under §5 of the Act and the Commission specifically finds the issuance necessary to carry out that activity, issuance of the securities will share the activity's antitrust immunization. Thus, when Commission order granted REA authority to issue considered notes to named owning railroads without competitive bidding and, in addition, the Commission expressly found that the notes were to be evidence of non-negotiable debt which REA owed the railroads and held that to be a necessary and appropriate purpose in performance of its carrier services pursuant to approved joint venture agreement, antitrust exemption for the notes was thereby granted. However, approval of issuance of the notes as evidence of the non-negotiable debt does not amount to a finding under §20a that the debt was necessary and appropriate to the railroads' joint venture agreement, previously approved under §5, and thus immune from the antitrust laws.—REA Express, Inc. v. Alabama G. S. R. Co., 343 F. Supp. 851 (858-9).

12. "Security".—[Vols. 4, 7, 11, 17-19].—Although under prior Commission decisions a mortgage, *per se*, is not a "security" within the meaning of the Act, the execution and delivery of a mortgage may constitute an assumption of obligation in respect of securities of others, regardless of whether assumption is formal or informal and undertaken in one instrument or at the time the debt is incurred; therefore, the Commission must look to the substance of the entire transaction.—Federal Barge Lines, Inc., Assumption of Obligation, 320 I.C.C. 600 (604).

The language of §20a and the history of its application give the Commission some latitude in defining what constitutes a "security" within reasonable limits, where a new situation arises or ambiguity exists. Such clarification is desirable in the case of loan agreements some of which are essentially notes and differ in substance from standby credit arrangements. The Commission affirmed its view that loan agreements which are definite as to their terms and certain as to their purposes constitute "securities" within the meaning of §20a.—Expanded Definition of Term "Securities", 340 I.C.C. 817 (824).

In addition, it is apparent from the history of the Act, and in essence admitted by opposing parties, that a primary purpose of §20a was to prevent carriers from becoming overcapitalized by requiring them at the time of filing a §20a application to lay the full facts of their financial situation before the Commission, enabling it to consider such facts in making the requisite statutory findings. Although other financing has become increasingly important to carriers, virtually all major carriers must periodically resort, nonetheless, to issuing securities under §20a (or 214). It is incumbent on the Commission at the time of passing on §20a (or 214) applications to give major consideration to the use which the carriers have made of their credit arrangements which did not involve the issuance of securities, to determine whether such credit was used prudently and therefore is not inimical to the purposes of §20a (or 214) applications.—Id., p. 824.

The Commission found that all carriers shall include in any application under §20a or 214 of the Act a list of the amounts, terms, and purposes of all nonsecurity financing for the current year when the application is filed and 2 previous calendar years, by separate categories, including, but not limited to, conditional sale contracts, chattel mortgages, security agreements, mortgages, deeds of trust, loan agreements in the nature of standby credit agreements, credit agreements, and advances, effective with all applications filed 60 days after publication in the Federal Register. The terms of each category of nonsecurity financing shall include the interest rate payable, terms of repayment, collateral pledged as security therefor, material restrictions of such instruments, as well as a detailed breakdown as to the use of the proceeds or credit thus obtained, specifically identifying uses for noncarrier purposes.—Id., p. 825.

13. "Issue" of securities.—[Vols. 4, 7, 9, 11-13, 15, 18, 19, 21].—It is incumbent on the Commission at the time of passing on §20a (or 214) applications to give major consideration to the use which the carriers have made of their credit arrangements which did not involve the issuance of securities, to determine whether such credit was used prudently and therefore is not inimical to the purposes of §20a (or 214) applications.—Expanded Definition of Term "Securities". 340 I.C.C. 817 (824).

Assets and Expenditures Capitalizable

25. Assets capitalizable, generally.—[Vols. 4, 7, 9, 11, 12, 15, 17].—In this §20a proceeding the traditional tests for determining capitalizable assets of operating carriers are not applicable where applicant, a nonoperating carrier, had leased all of its carrier operating properties to others and continued as a real estate investment trust whose present function was solely rent collection.—Pittsburgh & W. Va. R. Trust Certificate, 336 I.C.C. 530 (533-35).

General Considerations

48. Kind of securities proposed.—[Vol. 4].—In approved acquisition of nonoperating carrier's rail line, property and franchises and substitution as lessor under an outstanding lease agreement, issuance by acquiring common law trust of 1,510,000 certificates of beneficial interest of no par value to be exchanged for an equal number of shares of capital stock of acquired carrier and assumption of obligation and liability in respect of principal and interest of bonds and notes not exceeding the principal amount of $7,183,000 is for lawful objects within the purposes of the trust and compatible with the public interest.—Pittsburgh & W. Va. R.—Pur.—Pittsburgh & W. Va. Ry. Co., 330 I.C.C. 593 (594, 597).

Stock

100. In general.—[Vols. 4, 7, 9, 13, 15, 17-19].—Issuance by new Pittsburgh & L. E. R. Co. of Delaware of 20 shares of capital stock of $50 par value each to old P. &

L.E.R. Co. of Pennsylvania and Ohio, in order that former may have a stockholder which can assent to proposed merger of latter, also issuance after merger of shares of stock necessary to provide for employee stock purchase and stock option plans, and employee and officer incentive bonus plan, of old P. & L.E. in effect at time of merger, authorized.—Pittsburgh & L.E. R. Co. Merger, 320 I.C.C. 198 (199, 200, 205).

Proposed issuance of shares of beneficial interest approved. Applicant has leased all properties to Norfolk & W. Ry. Co. and now operates solely as a real estate investment trust and the transaction will enhance applicant's ability to perform its duties under the lease or in the event of termination of the lease.—Pittsburgh & W. Va. R. Trust Certificate, 336 I.C.C. 530 (535).

Purpose of Issuance

103. Exchange for other stock.—[Vols. 4, 7, 9, 11, 18, 19, 21].—Incidental to merger approved herein, the Commission authorized Seaboard to issue 336, 495 shares of common stock, par value $20 per share, for conversion and exchange at an exchange ratio of 1.5 to 1.—Seaboard Coast Line R. Co.—Merger—Piedmont, 334 I.C.C. 378 (394-95).

104. Payment for equipment or additions and betterments.—[Vols. 4, 7, 9, 12].—Applicant's plan for issuance of stock to finance modernization of its lines to enable it to handle high-speed trains in the future is compatible with public interest, and appropriate to its performance as common carrier because an overhaul of applicant's physical plant will benefit both shipping public and applicant and its shareholders by avoiding necessity of routing Chicago-bound traffic through St. Louis, Mo.—Chicago & E. I. R. Co. Stock, 338 I.C.C. 282 (288).

106. Payment for railroad properties, rights and franchises.—[Vols. 4, 7, 9, 11-14, 17-19, 21].—Issuance by new Pittsburgh & L.E. R. Co. of sufficient shares of $50-par-value capital stock to provide for exchange for a like number of shares of old P & LE stock outstanding or in its treasury immediately prior to approved merger, also, after consummation of merger, issuance of 31,620 shares of capital stock in exchange for 39,596 shares of capital stock of Pittsburgh, McK. & Y. R. Co owned by New York Central (the other 50 percent of P McK & Y's stock being acquired through merger of old P & LE), authorized.—Pittsburgh & L.E. R. Co. Merger, 320 I.C.C. 198 (199-200, 205).

Commission approved issuance of common stock and other securities by the Pennsylvania R. Co. in order to effect the merger proposed and approved herein.—Pennsylvania R. Co.—Merger—New York Central R. Co., 327 I.C.C. 475 (548).

Issuance by newly created railroad subsidiary, authorized to purchase small switching and terminal line, of 250 shares of its capital stock without par value to Norfolk and Western and 250 shares of such stock to New York Central, its parent railroads, for cash consideration of $4,000 per share to be used to finance the transaction, approved.—Norfolk & W. Ry. Co.—Control—FP&E Co.—Purchase, 330 I.C.C. 672 (683).

Authority sought in embraced proceeding to issue stock to be used for the purchase and operation of railroad property under consideration is denied in view of the fact that authority is concurrently granted to the railroad to abandon its entire line and also in view of the existing contracts providing for rail carrier's sale of its right-of-way to State authority and public utility upon approval of proposed abandonment.—Washington & Old Dominion R. Abandonment—Virginia, 331 I.C.C..587 (603)*.

Issuance of 27,141,336 shares of common stock, without par value, by applicant in transaction of merger proposed herein, approved.—Southern Pacific Transportation Co.—Merger, 334 I.C.C. 866 (872).

Assumption of Obligation or Liability

175. Assumption of obligations, generally.—[Vols. 4, 7, 9, 11, 17-19, 21].—Applicant's contention that Congress never intended to subject a mortgagor to that portion of §20a(2) dealing with assumption of obligation and liability is without merit; and the Commission's finding in 233 ICC 359 (interpreting the first clause of §20a(2)) that the word "other" will generally be read as "other similar", so that things therein may be read as *ejusdem generis* with, and not of a quality different from, those specifically enumerated, affords no support therefor. The doctrine *ejusdem generis* is not applicable to that portion of §20a(2) dealing with assumption of obligation, since a number of the specified terms are of widely different character in general and not all of them are of equal quality or import or typical of each other; moreover, by the use of the word "otherwise", the intent is clear that the terms preceding "otherwise" are not all-inclusive of the methods by which an obligation may be assumed. —Federal Barge Lines, Inc., Assumption of Obligation, 320 I.C.C. 600 (603, 604-5).

Under the proposed mortgage the applicant would subject its entire property to liability for the notes of its noncarrier parent company just as completely as if it were to specifically agree "to pay or assume" the notes; thus, fact that the mortgage does not specifically contain provisions for applicant's repayment is not controlling. Although the applicant's obligation is contingent, the liability of a party as endorser, guarantor, surety, or otherwise is also ordinarily contingent; therefore, the result intended or the substance of the transaction, rather than the form, controls. Motion to dismiss, on ground that issuance of the mortgage is not an assumption of liability subject to the Commission's jurisdiction, denied.—Id., p. 605.

176. Subsidiaries' or affiliated companies' obligations.—[Vols. 4, 7, 9, 11-15, 19, 21].—Transaction whereby applicant subsidiary would execute and deliver a mortgage on its barges and towboats as security for installment promissory notes to be issued by its noncarrier parent is found to fall within the purview of §20a as an assumption of obligation and liability in respect of the securities to be issued by the parent company; issuance of considered mortgage authorized as compatible with the public interest.—Federal Barge Lines, Inc., Assumption of Obligation, 320 I.C.C. 600 (605-6).

Regulations of the Commission

37 FR 7160, Apr. 11, 1972, Part 1115: Issuance of Securities, Assumption of Obligations, and Filing of Certificates and Reports, §1115.1 Application form, Form BF-6 referred to amended, effective 60 days after publication in the Federal Register.

37 FR 9119, May 5, 1972, Part 1115: Issuance of Securities, Assumption of Obligations and Filing of Certificates and Reports, effective date of order of March 22, 1972 (37 FR 7160) postponed to July 17, 1972, effective on date of order.

38 FR 23953, Sept. 5, 1973, Part 1115: Issuance of Securities, Assumption of Obligations and Filing of Certificates and Reports, expands the interpretation of the term "securities".

38 FR 24903, Sept. 11, 1973, Part 1115: Issuance of Securities, Assumption of Obligations and Filing of Certificates and Reports, Correction of regulations published at 38 FR 23953.

38 FR 25686, Sept. 14, 1973, Part 1115: issuance of Securities, Assumption of Obligations, and Filing of Certificates and Reports, Regulations prescribing the form for offering circulars for public sale of securities, effective Nov. 13, 1973.

38 FR 25686, Sept. 14, 1973, Issuance of Securities, Assumptions of Obligations, and Filing of Certificates and Reports; Correction of Expanded Definition of Securities published at 38 FR 23953.

38 FR 26608, Sept. 24, 1973: Issuance of Securities, Assumption of Obligations, and Filing of Certificates and Reports; correcting effective date of order published at 38 FR 25686 to Nov. 12, 1973.

39 FR 30135, Aug. 21, 1974: Issuance of Securities, Assumption of Obligations, and Filing of Certificates and Reports. Regulations promulgated as to definitions and form of public offering, effective Nov. 19, 1974.

Section 20a. (3) Scope of Commission's authority.—[Unchanged. See vol. 9, p. 7826.]

Historical note, see vol. 4, p. 2615.

Notes of Decisions

Volume 4—p. 2673; Volume 7—p. 5864; Volume 14—p. 11550; Volume 18—p. 14233.

Section 20a. (4) Form and contents of applications; oath and signature.—[Unchanged. See vol. 9, p. 7826.]

Historical note, see vol. 21, p. 16989.

Notes of Decisions

Volume 4—p. 2680; Volume 7—p. 5866; Volume 12—p. 10339; Volume 14—p. 11551; Volume 16—p. 12785; Volume 17—p. 13476.

Section 20a. (5) Disposition of securities described in application, etc.—[Unchanged. See vol. 9, p. 7827.]

Section 20a. (6) Notice of application to governors of States; intervention; hearings.—[Unchanged. See vol. 9, p. 7827.]

Notes of Decisions

Volume 4—p. 2685; Volume 16—p. 12786; Volume 18—p. 14233; Volume 19—p. 15437; Volume 21—p. 16989.

Section 20a. (7) Jurisdiction of Commission as exclusive and plenary.—[Unchanged. See vol. 9, p. 7828.]

Notes of Decisions

Volume 4—p. 2686; Volume 7—p. 5867; Volume 17—p. 13476; Volume 19—p. 15438; Volume 21—p. 16989.

2. Jurisdiction under this section.—[Vols. 4, 7, 17, 19, 21].—The Commission's function is to regulate rather than operate the railroad industry and therefore it has no authority to substitute its business judgment for that of applicant's management. Applicant's plan to modernize its facilities is prudent and the choice of means used to finance such plan lies within the discretion of management in spite of Commission's powers under §20a(3) to grant or deny such applications or to grant them with appropriate modifications.—Chicago & E.I. R. Co. Stock, 338 I.C.C. 282 (288-9).

Section 20a. (8) Guaranty of securities.—[Unchanged. See vol. 9, p. 7828.]

Notes of Decisions

Volume 4—p. 2688.

Section 20a. (9) Issue of short-term notes; certificate of notification; proviso.—[Unchanged. See vol. 9, p. 7829.]

Notes of Decisions

Volume 4—p. 2689; Volume 7—p. 5868; Volume 9—p. 7829; Volume 17—p. 13476.

Section 20a. (10) Reports by carriers as to securities or proceeds.—[Unchanged. See vol. 9, p. 7830.]

Section 20a. (11) Securities issued contrary to law void; effect; penalty.—[Unchanged. See vol. 9, p. 7831].

Notes of Decisions

Volume 4—p. 2692; Volume 7—p. 5869; Volume 9—p. 7832; Volume 14—p. 11551; Volume 16—p. 12786; Volume 17—p. 13476; Volume 19—p. 15438; Volume 21—p. 16991.

1. Effect of failure to obtain authority for issue.—[Vols. 4, 7, 9, 14, 16, 17, 19].—Commission has consistently held that by virtue of the language in §20a(11), a void security cannot be made lawful and Commission will not retroactively legalize any void securities, unless such securities were issued inadvertently (see 70 ICC 827). Record herein, especially the communications between this Commission and applicant's counsel, shows that subject notes were not issued inadvertently and accordingly, application herein is not approved.—Atlas Van Lines, Inc.—Notes, 338 I.C.C. 291 (294-6).

2. Remedies of holders of unauthorized securities.—[Vol. 4].—Section 20a(11) provides the remedy for violation of §20a, i.e., that securities issued without prior approval shall be void, and also provides that any holder of a void security may sue for damages or (if acquired directly from issuing carrier) may elect to rescind. However, plaintiff (protestant in Commission control proceeding) could not take advantage of such remedies even if deposit receipts in question were void or voidable because they were issued without prior Commission approval, as it alleges, when its only connection with proposed control transactions was its claimed agreement to purchase stock of one of the local bus lines that national bus line (applicant) sought authority to control; it certainly has no such remedy in its suit to set aside Commission order approving the control. Moreover, in approving applicant's issuance of stock necessary for agreed stock exchange, in connection with proposed transactions, the Commission necessarily considered the propriety of the deposit receipts and recognized their validity. Order of the Commission sustained.—Interstate Investors, Inc. v. United States, 287 F. Supp. 374 (379, 386-8, 391-2)*.

Section 20a. (12) Restrictions on actions of officers and directors; penalty.—[Unchanged. See vol. 9, p. 7832.]

Historical note, see vol. 21, p. 16991.

Notes of Decisions

Volume 4—p. 2693; Volume 7—p. 7832; Volume 11—p. 9332; Volume 12—p. 10340; Volume 13—p. 11041; Volume 15—p. 12141; Volume 17—p. 13477.

Regulations of the Commission

35 FR 7651, May 16, 1970, Part 1112: Interlocking Officers, new §1112.9 Common control, and §1112.10 Jointly used terminal properties, added, effective on date of service of order.

Section 20b. Modification of railroad financial structures.—(1)-(13).—[Unchanged. See vol. 14, p. 11551, vol. 18, p. 14233.]

Volume 15—p. 12142; Volume 16—p. 12787; Volume 17—p. 13478; Volume 18—p. 14235; Volume 19—p. 15439.

Alteration and Modification; Findings

30. Plan of alteration, modification. —[Vols. 15, 16, 19].—Modification of bonds due Sept. 1, 1971, authorized under §20b, along with modification of terms of Part V loan, as part of an overall package to avoid financial squeeze, which otherwise could have resulted in the bankruptcy of the railroad. Although involving two essentially different transactions, each was contingent on the consummation of the other.—Erie Lackawanna Ry. Co. Bonds Modification, 342 I.C.C. 403 (404-05)*.

Section 20c. Recordation of railroad equipment trust agreements and other evidences of equipment indebtedness.—[Unchanged. See vol. 16, p. 12788.]

Historical note, vol. 17, p. 13481.

Regulations of the Commission

31 FR 16318, Dec. 21, 1966, Part 57: Recordation of Documents, §57.3(b) amended; §57.4(d) and (e) redesignated as §57.4(e) and (f), respectively, and a new §57.4(d) added; and new §57.5(e) added, effective 30 days date of order.

Section 21. Annual reports of Commission.—[Unchanged. See vol. 9, p. 7833.]

Amendments, see footnotes, vol. 4, p. 2695, vol. 9, p. 7833.

Section 22. Restrictions; quotations of rates for United States Government.—[Unchanged. See vol. 11, p. 9333, vol. 12, p. 10340, vol. 17, p. 13482, vol. 18, p. 14236.]

Historical note, see vol. 21, p. 16992.

CONSULT THE TABLE OF CASES WHENEVER A CITATION IS FOLLOWED BY AN ASTERISK

Historical Note

On July 10, 1973, The Commission submitted to the Congress a draft bill to amend §22 of the Interstate Commerce Act to eliminate free or reduced rates for Government traffic, except in time of war or other national emergency and except in the transportation of commodities exempt from economic regulation under parts II or III of the Act. S. 2251 was introduced to implement the Commission's recommendation, and was included in H.R. 5385 and H.R. 12891 upon which hearings were held in March 1974. Annual Report, 1974, p. 83.

Notes of Decisions

Volume 4—p. 2700; Volume 7—p. 5875; Volume 9—p. 7836; Volume 11—p. 9336; Volume 12—p. 10341; Volume 13—p. 11042; Volume 14—p. 11560; Volume 15—p. 12153; Volume 16—p. 12790; Volume 17—p. 13482; Volume 18—p. 14237; Volume 19—p. 15441; Volume 21—p. 16992.

Purpose and Construction

2. Interpretation, in general.—[Vols. 4, 7, 9, 11, 17, 19, 21].—Railroad serving the Denver Federal Center (within Denver switching limits) is estopped from recovering additional demurrage charges claimed to be due under its tariffs, when uncontroverted evidence shows that the Government relied to its detriment on oral agreement with plaintiff's representative for release of empty cars at the Depot, instead of interchange track, on days railroad did not switch cars at the Center. Defendant's reliance is not unjustified, as a carrier need not abide by its published rates when dealing with the Government; government's request for a §22 agreement waiving collection of the demurrage charges had not been approved, but §22(2) permits retroactive confirmation in writing of a variation from published tariff rate; thus, carrier's arguments that the demurrage charges are not a matter of contract and may not be modified by either party and that, since prerequisites of a valid §22 agreement were not met, claimed tarrif charges must be collected, are not persuasive. On facts of record, the defense of estoppel may be invoked; defendant's motion for summary judgment granted.—Chicago, B. & Q. R. Co. v. United States, 439 F. 2d 1224 (1226-8).

The Commission's position regarding §22 rates has been a matter of public record for at least a decade. We have consistently proposed (see our Annual Reports for 1961 at page 184 and 1967 at page 94) that §22 be amended to eliminate free or reduced rates for government traffic except in time of war or other national emergency, and except as to commodities exempt as to other carriers and we have supported legislation which would implement such a provision. Since we have attempted to remedy the §22 situation by legislation, no benefit would accrue from an investigation in this area and we will not, therefore, consider §22 rates in this proceeding.—Investigation of Railroad Freight Rate Structure, 340 I.C.C. 868 (875-76).

Authorized Reductions

5. Governmental bodies; United States.—[Vols. 4, 7, 9, 11-19].—In suit to recover additional charges on four shipments of troops and military impedimenta from Fort Hood, Tex., to Fort Stewart, Ga., during Cuban Missile Crisis, which moved under a §22 Agreement over routes over which a higher combination rate applied because alternate routes (over which lower single factor through rate applied) were congested by movement of 10 other such government shipments, railroad is entitled to judgment on its claim. Time was of the essence during the military emergency and, even if railroad could be charged with failure to select cheapest available route for "unrouted" shipments because it submitted routing suggestions, as §22 agreement authorized, military authorities accepted suggested routing and prepared bills of lading—specifying that routing—to cover the movement. Responsible military authorities were charged with the knowledge that suggested routing was not the least costly and,

having failed to reject the routing suggestions, they are bound to pay charges based on combination rate applicable over route of movement.—Seaboard Coast Line R. Co. v. United States, 412 F. 2d 1274 (1275-7).

In motor carrier's action to recover amounts allegedly due for transportation, under Government bills of lading, of household goods belonging to military personnel between points overseas and United States points, failure of carrier to bill the Government for additional compensation for diversion of shipments did not indicate a contemporaneous interpretation of the contracts so as to be binding, particularly when the original bills were later corrected by audit and by supplemental bills submitted. Thus, where shipment was diverted to a new destination without storage-in-transit, under applicable tariff and regulation, carrier was entitled to compensation in addition to its long-haul transportation charge. And when transportation officer directed placement of a shipment in storage at destination and subsequently directed plaintiff to deliver it to the property owner shown on bill of lading, though charge for delivering shipment to storage-in-transit was improper, carrier was entitled to additional compensation for the delivery from storage to the owner.—Global Van Lines, Inc. v. United States, 456 F. 2d 717 (722-31)*.

However, in instances where plaintiff, in order to meet carrier competition, submitted to Department of Defense special quotations offering lower rates on military household goods than rates in tariffs and tenders filed by the carrier bureau that represented it and other carriers, it indicated a willingness to handle under such quotation any shipments originating within jurisdiction of the military transportation officer, and within designated geographical areas surrounding named military installations. And contrary to plaintiff's contention, its special quotations were effective and applicable as to shipments originating within transportation officer's territorial jurisdiction; therefore, after obtaining that business by inducing defendant to rely on its special quotations, plaintiff is estopped from denying the validity of such special rate quotations.—Id., pp. 742-6.

On the other hand, equitable doctrines of estoppel and laches should not bar any of carrier's other valid claims. Most of claims sued on were not embraced in initial bills submitted in connection with the respective shipments, and which defendant paid on presentation, but plaintiff later submitted supplemental bills, after engaging two firms to audit its accounts with Department of Defense, asking for charges not included in original bills, or for additional amounts in connection with previous charges; and there is no sound basis for permitting defendant, on ground of estoppel, to withhold from plaintiff proper amounts for the transportation services. As to asserted laches, fact that processing of the vast number of separate claims against the Government would involve a great deal of trouble and expense affords no basis for rejecting just claims; nor is defendant's practice of destroying documents relating to household goods shipments after 4 years a proper basis for disallowing a just claim, especially when the claim is not time-barred until 6 years after accrual of the cause of action. Plaintiff is entitled to recover on its claims found to be meritorious.—Id., pp. 749-51.

Complainant United States availed itself of the §22 transit tender and accepted and paid a commodity rate based upon transit at Lathrop, Calif. Such rate quotation under §22 resulted in charges lower than those applicable to the public generally and the Government was bound thereby unless and until relief in the form of lower charges under §1 could be secured through Commission actions.—United States v. Central of Georgia R. Co., 332 I.C.C. 33 (36).

Regulations of the Commission

36 FR 8351, May 4, 1971: Drought Order No. 66, Transportation of Hay to Designated Disaster Area at Reduced Rates, railroads authorized to transport hay to the counties in Texas listed; and also to named counties in Oklahoma, at reduced rates until June 30, 1971, effective on date of order.

6 FR 12340, June 30, 1971: Drought Order No. 67, Transportation of Hay at Reduced Rates, railroads authorized to participate in such transportation to the counties in Arizona listed, effective on date of order.

36 FR 12340, June 30, 1971: Drought Order No. 68, Transportation of Hay at Reduced Rates, railroads authorized to participate in such transportation to the counties in New Mexico listed, effective on date of order.

36 FR 12341, June 30, 1971: Drought Order No. 66; Sub. No. 3, Transportation of Hay at Reduced Rates, railroads authorized to participate in such transportation to additional counties in Texas listed, effective on date of order.

36 FR 12342, June 30, 1971: Drought Order 66; Sub. No. 4, Transportation of Hay at Reduced Rates, railroads authorized to participate in such transportation to additional counties in Texas listed, effective on date of order.

36 FR 13958, July 28, 1971; Drought Order No. 66; Sub. N0. 7, Transportation of Hay at Reduced Rates, railroads authorized to participate in such transportation to counties in Texas listed, effective on date of order.

36 FR 13958, July 28, 1971: Drought Order No. 68; Sub. No. 2, Transportation of Hay at Reduced Rates, railroads authorized to participate in such transportation to counties in New Mexico listed, effective on date of order.

36 FR 16538, Aug. 21, 1971: Drought Order No. 66; Sub. No. 10, Transportation of Hay at Reduced Rates, railroads authorized to participate in such transportation to counties in Texas listed, effective on date of order.

36 FR 16151, Aug. 19, 1971: Drought Order No. 68; Sub. No. 3, Transportation of Hay at Reduced Rates in certain areas in New Mexico, extends expiration date of Drought Order 68 and Subs Nos. 1 and 2 thereunder, effective on date of order.

36 FR 16151, Aug. 19, 1971: Drought Order No. 66; Sub. No. 8, Transportation of Hay at Reduced Rates in certain areas in Oklahoma and Texas, extends expiration date of Drought Order 66 and Subs Nos. 1 through 7, effective on date of order.

36 FR 16151, Aug. 19, 1971: Drought Order No. 66; Sub. No. 9, Transportation of Hay at Reduced Rates, railroads authorized to participate in such transportation to the counties in Texas listed, effective on date of order.

36 FR 18351, Sept. 11, 1971: Drought Order No. 66 (Sub No. 11), Transportation of Hay at Reduced Rates, railroads authorized to participate in such transportation to four Oklahoma counties, and three Texas counties, listed, effective on date of order.

Section 23. Mandamus to obtain equal facilities for shippers.—[Unchanged. See vol. 4, p. 2821, vol. 11, p. 9336.]

Historical note, see vol. 4, p. 2821; for amendments, see footnotes, vol. 4, p. 2821, vol. 11, p. 9336.

Notes of Decisions

Volume 4—p. 2822; Volume 7—p. 5898; Volume 10—p. 8264; Volume 11—p. 9336; Volume 14—p. 11560; Volume 15—p. 12154; Volume 19—p. 15444; Volume 21—p. 17000.

Section 24.—[Restated in §11 and §18. See vol. 4, p. 2723.]

Historical Note

Note.—Effective Dec. 16, 1967, compensation of members of the Commission is determined under Chapter 11, Title 2, USC, through the Commission on Executive, Legislative, and Judicial Salaries. Upon recommendation of the President of the United States, the annual rate of basic compensation of the Commissioners after Feb. 14, 1969, is $38,000, and that of the Chairman of the Commission is $40,000. See note following Section 358 of Title 2, USC.

Section 25. Safety appliances, methods, and systems.—[Unchanged. See vol. 9, p. 7843, vol. 11, p. 9337.]

Amendments, see footnotes, vol. 9, p. 7843, vol. 11, p. 9337; historical notes, vol. 4, p. 2737, vol. 13, p. 11042, vol. 14, p. 11560, vol. 15, p. 12155, vol. 16, p. 12791, vol. 17, p. 13486.

Notes of Decisions

Volume 4—p. 2738; Volume 7—p. 5884; Volume 9—p. 7847; Volume 11—p. 9337; Volume 12—p. 10342; Volume 14—p. 11561; Volume 15—p. 12155; Volume 16—p. 12791; Volume 17—p. 13486; Volume 18—p. 14239; Volume 19—p. 15444; Volume 21—p. 17001.

2. Construction and purpose of section.—[Vols. 4, 7, 9, 11, 14, 16-19, 21].—Although the Commission found that the petitioners for amendment of §132.12 of the Rules for Inspection, Testing and Maintenance of Air Brake Equipment failed to submit adequate proof to justify the proposed amendment, a new construction was placed on the proviso of the rule which permits changes in the rules, standards and instructions prescribed only when such changes are promulgated "solely for the purpose of achieving safety." Interpreted in terms of the national transportation policy of promoting economy and efficiency as well as safety, the word "achieve" may be construed as "maintain" with regard to a level of safety previously attained; thus proof that safety would be maintained by a proposed amendment which furthers economy and efficiency would be valid.—Rules for Inspection of Power or Train Brakes, 329 I.C.C. 442 (444-445)*.

The statutory criterion for rule revision in §25 is in marked contrast with the standard established by the Congress in §9 of the Safety Appliance Acts which provides that changes in the rules, standards, and instructions for the installation, inspection, maintenance, and repair of power or train brakes may be promulgated "***solely for the purpose of achieving safety." This sharply restrictive language does not apply to a proceeding for revision of rules under §25. In light of the relevant statutory criteria, the Commission concluded that the standard to be followed in considering the proposed rule revisions in the instant proceeding is whether a proposed change will impair safety giving due consideration to efficient and economical service.—Rules, Standards, and Instruction for Signal Systems, 329 I.C.C. 717 (719)*.

6. Automatic stops.—[Vols. 4, 7, 14-19, 21].—Discontinuance of automatic trainstop system as proposed by applicant will remove the protection afforded thereby, namely the automatic stopping of a train when an engineman, because of physical disability, human failure, or any other cause fails to observe or does not respond to a restrictive or stop signal. Notwithstanding improved operating conditions since installation of considered system, none of the improvements are capable of performing the safety function of an ATS system; and safety is the primary consideration. While approval of proposed changes would effectuate financial savings for applicant, §25 under which safety appliances, methods, or systems are administered has no provision for the consideration of financial advantages or savings. Terrain in the area is mountainous with steep grades and curves and the territory is subject to heavy snowfall; train movements are fairly heavy and train speeds have been increased. Adequate protection and safety will not be provided for train movements if considered ATS system is discontinued; denied.—Southern Pac. Co. Modifications of Systems, 325 I.C.C. 168 (172-4).

On numerous occasions the Commission has stressed the importance to safety of automatic train-stop systems in proceedings in which railroads have sought to discontinue existing automatic train-stop systems and operate under systems involving observation of automatic wayside signals from the locomotive cab. Such permission was denied even where territorial operating conditions had improved. Such permission was denied where the petitioner's line was completely dieselized, the diesels were equipped with electric windshield wipers, defrosters, emergency control valves which automatically stopped the train if the engineer failed to depress the so-called dead man's pedal and all wayside signals were so located as to be clearly visible from the cab.—Appliances and Systems to Promote Safety of Operation, 329 I.C.C. 266 (274).

While permission has sometimes been granted to discontinue automatic train-stop systems, such permission did not involve operation at speeds in excess of 79 miles per hour. Petitioner's evidence of favorable topography, improvements in track, rolling equipment and other physical features, is of little probative value in showing that there will be no dimunition of safety if operations at 80 miles per hour or more are permitted without the installation of the qualifying systems. Therefore, petition to operate passenger trains over main line track in Florida at speeds of 79 or more miles per hour without the installation of an automatic train-stop, train-control or cab-signal system, denied.—Id., pp. 274, 280.

14. Particular installations of devices required; tests; approval.—[Vols. 4, 7, 9, 15-19, 21].—Application seeking individual relief from the requirements of §136.21 of the Commission's Rules, Standards and Instructions, approved to the extent that applicant was permitted to install signals to the left, instead of over or to the right of the tracks, since after certain changes most of the line between the involved points will be single track, for which this change would be adequate; and over the remainder of the route which is double track the applicant is increasingly mechanizing its installations, consisting mainly of centralized track control and dual-directional signals.—Rules, Standards and Instructions for Signal Systems, 329 I.C.C. 438 (441).

18. Signal and interlocking systems. —[Vols. 9, 11, 12, 15-19, 21].—Pursuant to the provisions §25, the Commission adopted 26 proposed revisions of various rules governing railway signal systems. The revisions were necessary due to technological improvements and developments which have occurred since the rules were established in 1950.—Rules, Standards, and Instructions for Signal Systems, 329 I.C.C. 717 (735)*.

Section 26. [December 23, 1970] ***[49 U.S.C. §26a]*** **Exemption of Certain Compensation of Employees From Withholding For Income Tax Purposes.**— [Added by P. L. 91-569, 84 Stat. 1500.] (a) No part of the compensation paid by any railroad, express company, or sleeping car company, subject to the provisions of this part, to an employee (1) who performs his regularly assigned duties as such an employee on a locomotive, car, or other track-borne vehicle in more than one State, or (2) who is engaged principally in maintaining roadways, signals, communications, and structures or in operating motor trucks out of railroad terminals in more than one State, shall be withheld for income tax purposes pursuant to the laws of any State or subdivision thereof other than the State or subdivision wherein more than 50 per centum of the compensation paid by the carrier to such employee is earned: *Provided, however,* That if the employee did not earn more than 50 per centum of his compensation from said carrier in any one State or any subdivision thereof during the preceding calendar year, then withholding shall be required only for the State or subdivision of the employee's residence, as shown on the employment records of any such carrier; nor shall any such carrier file any information return or other report for income tax purposes with respect to such compensation with any State or subdivision thereof other than such State or subdivision of residence and the State or subdivision for which the withholding of such tax has been required under this subsection.

(b)(1) For the purposes of subsection (a)(1), an employee shall be deemed to have earned more than 50 per centum of his compensation in any State or subdivision thereof in which the mileage traveled by him in such State or subdivision is more than 50 per centum of the total mileage traveled by him in the calendar year while so employed.

(2) For the purposes of subsection (a)(2), an employee shall be deemed to have earned more than 50 per centum of his compensation in any State or subdivision thereof in which the time worked by him in such State or subdivision is more than 50 per centum of the total time worked by him in the calendar year while so employed.

(c) For the purposes of this section the term 'State' also means the District of Columbia; and the term 'compensation' shall mean all moneys received for service rendered by an employee, as defined in subsection (a) in the performance of his duties and shall include wages and salary. (Act of Dec. 23, 1970, Public Law 91-569, §1, 84 Stat. 1500.)

Section 27 ***[49 U.S.C. 26b].*** **(1) Office of rail public counsel; establishment.**—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §304, 90 Stat. 51.]

Sec. 27. (1) There shall be established, within 60 days after the date of enactment of this section, a new independent office affiliated with the Commission to be known as the Office of Rail Public Counsel. The Office of Rail Public Counsel shall function continuously pursuant to this section and other applicable Federal laws.

Section 27. (2) Director, appointment and term.—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §304, 90 Stat. 51.]

(2)(a) The Office of Rail Public Counsel shall be administered by a Director. The Director shall be appointed by the President, by and with the advice and consent of the Senate.

(b) The term of office of the Director shall be 4 years. He shall be responsible for the discharge of the functions and duties of the Office of Rail Public Counsel. He shall be appointed and compensated, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, classification, and General Schedule pay rates, at a rate not in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of such title.

Section 27. (3) Employees; reports.—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §304, 90 Stat. 51.]

(3) The Director is authorized to appoint, fix the compensation, and assign the duties of employees of such Office and to procure temporary and intermitten services to the same extent as is authorized under section 3109 of title 5, United States Code. Each bureau, office, or other entity of the Commission and each department, agency, and instrumentality of the

executive branch of the Federal Government and each independent regulatory agency of the United States is authorized to provide the Office of Rail Public Counsel with such information and data as it requests. The Director is authorized to enter into, without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of his functions and duties. The Director shall submit a monthly report on the activities of the Office of Rail Public Counsel to the Chairman of the Commission, and the Commission, in its annual report to the Congress, shall evaluate and make recommendations with respect to such Office and its activities, accomplishments, and shortcomings.

Section 27. (4) Duties of office.—[Added by the act of Feb 5, 1976, Pub. L. 94-210, §304, 90 Stat. 51.]

(4) In addition to any other duties and responsibilities prescribed by law, the Office of Rail Public Counsel—

(a) shall have standing to become a party to any proceeding, formal or informal, which is pending or initiated before the Commission and which involves a common carrier by railroad subject to this part;

(b) may petition the Commission for the initiation of proceedings on any matter within the jurisdiction of the Commission which involves a common carrier by railroad subject to this part;

(c) may seek judicial review of any Commission action on any matter involving a common carrier by railroad subject to this part, to the extent such review is authorized by law for any person and on the same basis;

(d) shall solicit, study, evaluate, and present before the Commission, in any proceeding, formal or informal, the views of those communities and users of rail service affected by proceedings initiated by or pending before the Commission, whenever the Director determines, for whatever reason (such as size or location), that such community or user of rail service might not otherwise be adequately represented before the Commission in the course of such proceedings; and

(e) shall evaluate and represent, before the Commission and before other Federal agencies when their policies and activities significantly affect rail transportation matters subject to the jurisdiction of the Commission, and shall by other means assist the constructive representation of, the public interest in safe, efficient, reliable, and economical rail transportation services.

In the performance of its duties under this paragraph, the Office of Rail Public Counsel shall assist the Commission in the development of a public interest record in proceedings before the Commission.

Section 27. (5) Budget requests.—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §304, 90 Stat. 52.]

(5) The budget requests and budget estimates of the Office of Rail Public Counsel shall be submitted concurrently to the Congress and to the President.

Section 27. (6) Appropriations.—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §304, 90 Stat. 52.]

(6) There are authorized to be appropriated to the Office of Rail Public Counsel for the purpose of carrying out the provisions of this section not to exceed $500,000 for the fiscal year ending June 30, 1976, not to exceed $500,000 for the fiscal year transition period ending September 30, 1976, and not to exceed $2,000,000 for the fiscal year ending September 30, 1977.

Section 28 *[49 U.S.C. 26c].* (1) discriminatory tax treatment of transportation property; prohibited acts.—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §306, 90 Stat. 54.]

Sec. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the Tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

Section 28. (2) District court's jurisdiction to enforce; exceptions. —[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §306, 90 Stat. 54.]

(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

Section 28. (3) Definitions.—[Added by the act of Feb. 5, 1976, Pub. L. 94-210, §306, 90 Stat. 55.]

(3) As used in this section, the term—

(a) 'assessment' means valuation for purposes of a property tax levied by any taxing district;

(b) 'assessment jurisdiction' means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

(c) 'commercial and industrial property' or 'all other commercial and industrial property' means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

(d) 'transportation property' means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.

Section 29. [49 U.S.C. §29].—Short Title.—[Unchanged; Formerly section 26 but was redesignated as section 27 by Public Law 91-569, Dec. 23, 1970, 84 Stat. 1499; subsequently redesignated as section 29 by Public Law 94-210, Feb. 5, 1976, §304, 90 Stat. 51. See vol. 11, p. 9339]

PART II

INTERSTATE COMMERCE ACT; MOTOR CARRIERS

Chapter 8, Title 49, U.S. Code

Section 201. [§*301 U.S.C.*] Short Title.—[Unchanged. See vol. 11, p. 9339.]

Section 202. (a) [§*302 U.S.C.]* Application of provisions.—[Unchanged. See vol. 11, p. 9339.]

Notes of Decisions

Volume 15—p. 12158; Volume 16—p. 12795; Volume 17—p. 13489; Volume 19—p. 15453; Volume 21—p. 17005.

2. Construction and interpretation.—[Vols. 15, 16, 19, 21].—Rocks, debris, and other commodities obtained from excavations and demolition of buildings, for which common carrier authority is sought, is held not to be "property" for purposes of Commission jurisdiction. Contractors, who are obligated to dispose of such debris, claim no beneficial ownership thereof, do not select destination to which it is moved, and apparently relinquish any nominal ownership thereof at the time it is loaded and removed from the demolition or excavation site; thus, considered commodity does not have the attributes commonly associated with the word property. Authority is not required; application dismissed.—Joray Trucking Corp. Common Carrier Application, 99 M.C.C. 109 (110).

Section 202. (b) [§*302(b) U.S.C.*] State regulation of intrastate commerce.—(1) Unchanged except by insertion of a comma and "except as provided in section 226A," immediately after "Nothing in this part" by act of Dec. 23, 1970, Public Law 91-569, 84 Stat. 1500. [See vol. 11, p. 9340, vol. 21, p. 17006.]

(2) * * * As so certified, such standards, or amendments thereto, shall be promulgated forthwith by the Commission and shall become effective five years from the date of such promulgation: *Provided,* That (1) any amendments of such standards, which are determined by the national organization of the State commissions and promulgated by the Commission prior to the initial effective date of such standards shall become effective on such initial effective date; and (2) after such standards become effective initially, any amendments of such standards, which are subsequently determined by the national organization of the State commissions, shall become effective at the time of promulgation or at such other time, subsequent to promulgation by the Commission, as may be determined by such organization. * * * [The second sentence was amended beginning with "Provided" by Pub. Law 93-496, 88 Stat. 1532, October 28, 1974. See vol. 21, p. 17006.]

Notes of Decisions

Volume 9—p. 7862; par.(c)]; Volume 11—p. 9340; Volume 2—p. 10343; Volume 13—p. 11043; Volume 14—p. 11562; Volume 15—p. 12159; Volume 16—p. 12797; Volume 17—p. 13490; Volume 18—p. 14242; Volume 19—p. 15453; Volume 21—p. 17007.

5. State regulation and taxation.—[Vols. 9, 11-19, 21].—In action to enjoin State Commission and officials from interfering with plaintiff's shipments of grain from Kansas origins to Kansas City, Kans., where the grain is stored until sold and shipped to out-of-State points, when the Motor Carrier Act was enacted Congress intended federal regulation and the specific exceptions to applicability of that Act to occupy the entire field. Thus, since trucks hauling nonmanufactured agricultural products are exempt by §203(b6) from regulation, except as to safety of operation and equipment, that statutory exception must prevail against the Kansas commission's attempt to regulate interstate grain shipments. Plaintiffs' grain shipments are exempt from State tariff regulations by reason of federal pre-emption of the field; defendants are permanently enjoined from enforcing any State tariff regulation against hauling by truck, between Kansas points, shipments of unprocessed grain that are moving in interstate commerce.—Farmers Union Coop. Marketing Ass'n v. State Corp. Commission of Kans., 302 F. Supp. 778 (783-5).

Approval of minimum gallonage requirements, including intrastate as well as interstate quantities, for application of respondents' weekly rates on gasoline and fuel oils transported in one vehicle for one shipper from Sparks, Nev., to points within 200 miles thereof does not involve regulation of intrastate commerce. The reduced rates could not be justified without full utilization of the vehicle, and not enough interstate gallonage is available for round-the-clock operation; although there is only one weekly tender, it is made up of numerous prospective single shipments, and tariff provisions for multiple deliveries do not cover commingling of interstate and intrastate shipments. Consideration of intrastate gallonage in determining the minimum required for application of the interstate rates could not possibly impinge on the State's power to regulate intrastate commerce, even if the State should prohibit volume rates.—Weekly Rates on Petroleum Products—from Sparks, Nev., 322 I.C.C. 541 (546-7).

While respondents' revenues and expenses might be affected if Nevada chose to regulate intrastate rates, the power of a State to prescribe a level of rates or minima on intrastate traffic different from that applicable to interstate traffic is always present, and its existence does not preclude the Commission from approving interstate rates on the same level as intrastate rates; nor does such approval open the door to possible discrimination as results of any changes in the intrastate rates.— Id., p. 547.

20. Operation in intrastate commerce.—[Vols. 9, 11, 19, 21].—See also Anchorage Transit System, Inc. case, §203(b), n. 40; Morgan Drive-Away v. Mid-States Trailer Transport case, §203(a)(10), n. 5 *Intrastate.*

Evidence of record overwhelmingly supports the Commission's conclusion that plaintiff's operations from Pittsburgh to Philadelphia, Pa., areas over authorized interstate routes tacked at points in New Jersey are not logical and normal interstate operations, but artificial, contrived arrangements employed by it to avoid the rightful jurisdiction of the Pennsylvania commission over considered traffic. [218 F. Supp. 133, aff'd 377 US 217, distinguished.] The Commission's authority is predicated on the recognized federal power over interstate commerce; and where there is no such commerce, there can be no legitimate use of federal rights granted for that purpose. Accordingly, the Commission was warranted in concluding that to permit such operations as plaintiff was openly conducting would illegally impinge upon Pennsylvania's exclusive jurisdiction over intrastate shipments. Complaint dismissed.—Leonard Express, Inc. v. United States, 298 F. Supp. 556 (558-60)*.

Regardless of the intention of any passenger to continue or complete an interstate journey, defendant passenger carrier operating wholly within a single state, selling no through tickets, and having no common arrangements with connecting out-of-state carriers, is not engaged in transportation in interstate or foreign commerce; and the out-of-state casinos' chartering defendant's buses is of no particular significance since only intrastate transportation was requested and engaged in.—Greyhound Lines, Inc. v. Allen, 99 M.C.C. 1 (4).

Defendant's transportation of cash letters from a bank at Marlboro, Mass., to the United States Post Office at Boston, Mass., for ultimate delivery by the Post Office Department to a bank at New York, N.Y., is not interstate transportation subject to Part II of the Act. The transportation of mail is a government monopoly and those performing service for the Post Office Department are governmental instrumentalities engaged in the performance of a public function. This decision is predicated on the unique status enjoyed by the Post Office and in no way conflicts with other Commission decisions dealing with operations within a single state in connection with pipelines, aircraft, or ocean liners. The distinction is clear; in those cases connecting movement was performed by a fore-hire carrier; however, to the extent conclusions and findings of 51 MCC 263 are inconsistent with decision herein, they are overruled.—Armored Carrier Corp. v. Security Dispatch, Linc., 102 M.C.C. 246 (247-9).

Where traffic originating at and destined to points in the same State is transported over routes partly in the State, and partly in another State, such routing not being circuitous, and is required to permit processing of essentially less-than-truckload traffic through a principal terminal, and where such traffic represents only a small portion of the total, defendant is found not to have been engaged in unlawful operation.—Pennsylvania P.U.C. v. Arrow Carrier Corp., 113 M.C.C. 213 (220)

Regulations of the Commission

33 FR 19250, Dec. 25, 1968, Part 1023; Standards for Registration of Certificates and Permits with States, §1023.34 Execution for application for cab card, revised; §1023.36 Form of cab card, amended; and §1023.101 Reproduction of form, revised; all effective concurrently with original standards promulgated which is 5 years from Dec. 14. 1966.

35 FR 2524, Feb. 4, 1970, Part 1023: Standards for Registration of Certificates and Permits with States, §1023.13 Filing of application, and §1023.33 Forms and execution of application for identification stamps or number, last sentence in each section revised, effectively concurrently with original standards promulgated which is 5 years from Dec. 14, 1966.

36 FR 3417, Feb. 24, 1971, Part 1023: Standards for Registration of Certificates and Permits with States, §1023.32, §1023.33, §1023.35, and §1023.40 amended in accordance with resolution of the National Association of Regulatory Utility Commissioners, as certified to the Commission, effective concurrently with original standards promulgated which is 5 years from Dec. 14, 1966.

38 FR 33772, Dec. 7, 1963, Part 1023: Standards for Registration of Certificates and Permits with States, §§1023.32, 1023.33, 1023.40, 1023.105, and 1023.106 amended in accordance with resolution of the NARUC, as certified to the Commission, effective Dec. 27, 1973.

Section 202. (c) [§*302 (c) U.S.C.*] Incidental transportation exempt under part II.—[Unchanged. See vol. 11, p. 9342.]

Notes of Decisions

Volume 11—p. 9343; Volume 12—p. 10344; Volume 13—p. 11043; Volume 14—p. 11562; Volume 15—p. 12159; Volume 16—p. 12798; Volume 17—p. 13491; Volume 18—p. 14244; Volume 19—p. 15455; Volume 21—p. 17011.

5. In general.—[Vols. 11-19, 21].—The scope of rule 4 of Ex Parte No. MC-19, 17 MCC 467, 505-506 [49 CFR 176.4], which requires motor common carriers to publish separate charges for each accessorial service rendered in connection with household goods movements where the line-haul transportation is performed by a motor carrier, is limited to areas over which the Commission has requisite jurisdiction within the purview of the exemptions prescribed under sections 202(c) (1) and (2) and 203(b) (8) of the Act. Considered within the context of the instant situation involving local services performed for exempt freight forwarders, such local operations would not be exempt under these sections of the Act.—United Van Lines, Inc., v. Calif. Household Goods, 329 I.C.C. 742 (748).

For motor carriage of articles to be mailed see Armored Carrier Corp. v. Security Dispatch, Inc. case, §202(b), n. 20.

See also Bartz Cartage Co., Inc.—Common Carrier Application case, §203(b), n. 55; Behnken Truck Service, Inc., Ext.—Exbarge Traffic case, §203(a) (10), n. 5.

Express Agency: [Vols. 11, 13, 16, 19, 21].—See Barton Truck Line, Inc. v. Railway Exp. Agency, Inc., case, §1(6), n. 663.

Foreign commerce: [Vol. 18].—Although the Commission in its 69th annual report urged Congress to amend §202(c) to make the terminal area exemption available for pickup and delivery at international boundary municipalities such as Detroit, Mich., and Windsor, Ontario, Congress took no action on that recommendation, and it appeared settled that performance of such service between United States border points and contiguous or adjacent foreign municipalities was nonexempt, until decision in 154 F. Supp. 431 made the contiguous-municipalities exemption of §203(b8) available to the U.S. segment of transportation between a U.S. municipality and a contiguous municipality in a foreign country. However, the §202(c) exemption has no effect on Detroit-Windsor traffic because the Commission has generally limited a line-haul carrier's terminal area at a given service point to the commercial zone thereof, and Windsor is not within a carrier's terminal area at Detroit, because of its exclusion from definition of the Detroit commercial zone in 48 MCC 95; and the Commission has no power to determine the commercial zone of a foreign municipality such as Windsor or the terminal areas of carriers serving such a point.—Commercial Zones and Terminal Areas—Detroit, 96 M.C.C. 709 (716)*.

Forwarders: [Vols. 11, 12, 19, 21].—While partial exemption of §202(c)(2) exempts motor carrier operations conducted for a regulated freight forwarded within its terminal area, that exemption clearly is not available to motor carriers rendering local transfer, collection, or delivery service for forwarders of used household goods operating under the §402(b)(2) exemption, because those forwarders are not subject to part IV of the Act.—Kingpak, Inc., Investigation of Operations, 103 M.C.C. 318 (340)*.

Under the statute, pickup and delivery service for a freight forwarder is exempt only if the forwarder is subject to part IV of the Act; thus, local carriers and warehousemen must hold authority for pickup and delivery service for exempt forwarders of used household goods because, whether such motor carrier operations are within or outside a commercial zone, the §202(c)(2) terminal area exemption is not available to carriers serving a forwarder—who holds no part IV authority—in the movement of through shipments in interstate or foreign commerce.—District Moving and Storage, Inc., Common Carrier Application, 107 M.C.C. 896 (899).

See also New Orleans Shippers Assn. case, §203(b), n. 55.

Jurisdiction of the Commission: [Vol. 16].—Protestant's contention that radioactive waste is without the attributes of term "property" as used in the Act and is thus exempt from Commission's regulation is predicated on the finding in 99 MCC 109. However, as "property" is not defined in the Act and is used therein in its broadest sense, Commission cannot exclude from its economic regulation the transportation of such dangerous materials, although destined for burial.—Long Island Nuclear Service Corp. Com. Car. Applic., 110 M.C.C. 398 (403-4)*.

Issues raised by protestant City of Chicago as to whether the vehicular ramps and roadways within O'Hare International Airport are public or private and the nature and extent of Chicago's proprietary rights relative to O'Hare arise under State law and are beyond the scope of the Commission's jurisdiction.—Tri-State Coach Lines, Com. Car. Applic., 110 M.C.C. 601 (609).

Passenger carriers: [Vol. 16, 19, 21].—See Salem Transp. Co. v. United States, §208(a), n. 30.

Terminal areas: [Vols. 12, 13, 16-19, 21].—Applicant's driveaway automobile service is not within the "terminal area" exemption, which exempts from economic regulation only motor carrier collection, deliver and transfer services performed for, and within the terminal area of, motor carriers, railroads, and freight forwarders subject to the Act. Applicant's operations, regardless of their limited scope, are not performed for line-haul carriers subject to the Act, and, therefore, are not exempt.—Drive Away Transport, Inc., Com. Car. Application, 99 M.C.C. 75 (79).

A motor carrier holding authority to serve a point in connection with line-haul operations is not authorized to conduct terminal operations within such city or its commercial zone. In 74 MCC 593, the Commission concluded that applicant required specific authority to serve Seattle and points within the commercial zone thereof even though that carrier was authorized to serve Seattle as a terminal and intermediate point pursuant to various certificates.—Service Transfer, Inc., Contract Carrier Application, 115 M.C.C. 29 (34).

Water Carriers: [Vols. 11, 12, 15, 19, 21].—Section 202(c) partially exempts from regulation motor-vehicle operations performed for a water carrier in the performance within terminal area of bona fide transfer, collection, or delivery services, as distinguished from line-haul transportation. While, in some instances, the scope of a water carrier's terminal area may be properly identified by the naming of particular points, an accompanying description of outer limits of the entire terminal area is necessary when numerous points are involved. Moreover, as stated in 82 MCC 395, any service that goes beyond a single homogenous community identifiable as such by the factors of commercial and industrial integrity, population and business density, and some reasonably compact limit to geographical scope of community affairs and influence, is intercommunity in character and cannot be considered as a bona fide terminal-area transfer, collection, and delivery service.—Atchison, T. & S.F. Ry. Co. v. Sea-Land Service, Inc., 103 M.C.C. 184 (191-2).

In light thereof, evidence affords no basis for finding that Los Angeles terminal area points served by defendant are located beyond permissive limits of the terminal area which it may claim as incidental to its water-carrier operations at Los Angeles Harbor. As to the San Francisco/Oakland Bay area, however, while evidence shows that entire San Francisco Bay area is tending to become integrated commercially, industrially, and culturally with the two port cities, the entire surrounding land area does not now qualify as a single water-carrier terminal area within the rationale in 82 MCC 395. Accordingly, defendant's current San Francisco Bay terminal area is described as bounded generally by San Rafael, San Pablo, Hayward, and San Mateo and, also, as including all points within commercial zones of Oakland, San Francisco, Alameda, and Richmond, in addition to those points located on the west side of the Bay between Redwood City and San Francisco commercial zone.—Id., pp. 192-3.

Section 203. (a)(1)-(9). [§*303 U.S.C.*].—[Unchanged. See vol. 9, p. 7867; vol. 15, p. 12161.]

Amendments, see footnotes, vol. 14, p. 12161.

Notes of Decisions

§203(a) (9): Volume 9—p. 7867; Volume 11—p. 9345; Volume 13—p. 11044; Volume 21—p. 17016.

5. In general.—[Vols. 9, 11, 13].—Commission reiterated its findings in 93 MCC 579, that State agencies may be admitted to the status of carrier. Protestants' contention that such agencies are not "persons" within the meaning of the Act is refuted by the inclusionary purpose of §203(a)(1).—Mercer County Improvement Authority, Transferee, 109 M.C.C. 795 (798)*.

Section 203. (a)(10) [§*303(a)(10) U.S.C.*] Interstate commerce.—[Unchanged. See vol. 9, p. 7869; vol. 19, p. 15459.]

Notes of Decisions

Volume 9—p. 7869; Volume 11—p. 9346; Volume 12—p. 10346; Volume 13—p. 11044; Volume 14—p. 11564; Volume 15—p. 12161; Volume 16—p. 12802; Volume 17—p. 13493; Volume 18—p. 14247; Volume 19—p. 15459; Volume 21—p. 17017.

5. Interstate commerce defined.—Vols. 9, 11-19, 21].—Since the statutory definition of interstate commerce does not specifically enumerate shipments partly by motor carrier and partly by pipeline, it might be argued that the use by Congress of words "partly by motor vehicle and partly by rail, express, or water" means that such combination shipments are limited to those enumerated and, thus, do not include pipeline. However, the restrictive doctrine of the "last antecedent" is not without limitation; and one such limitation, stated in 277 US 189, is that where a statute contains a grant of power enumerating certain things that may be done and also a general grant which, standing alone, includes those things and more, the general grant may be given full effect if the context shows that the enumeration was not intended to be exclusive.—Galbreath v. Gulf Oil Corp., 294 F. Supp. 817 (823-4).

In the "by rail, express, or water" enumeration, Congress may have intended not to limit its grant of jurisdiction over interstate commerce, but rather to illustrate its breadth, particularly since it is preceded by the word "whether"; the cases hold, without exception, that words following "whether" do not restrict the meaning to any following terms but, rather, they enlarge it. Therefore (in action seeking overtime compensation pursuant to Fair Labor Standards Act), the court concludes that interstate commerce as defined in the Motor Carrier Act includes all combination motor carrier shipments as long as they continue their interstate movement, whether partly by rail, express, water, or pipline.—Id., p. 824.

And when petroleum products moved from oil company's Texas refinery, through its pipeline and Atlanta terminal, to its service stations in Georgia whose requirements were known to (or controlled by) the oil company before shipment was ever made, there was a "practical continuity of movement", within 317 US 564, so that the goods were moving in "commerce" not merely to the terminal but all the way to ultimate retail outlets. "Commerce" is not a technical legal conception, but a practical one, drawn from the course of business; and since the halt of movement at the Atlanta terminal was merely a convenient intermediate stop in the process of delivery at ultimate destinations, the goods continued to move in interstate commerce until they were delivered at the final destination. Action dismissed.—Id., pp. 822-3, 825.

When grain was shipped by local cooperatives from Kansas origins to agricultural marketing cooperative at Kansas City, Kans., which local cooperatives owned, where it was stored in elevators until sold and shipped to points outside the State, the truck movement between Kansas points was "interstate commerce" notwithstanding fact that local cooperatives remained owners of, and could divert, the shipments until the grain was graded and purchased by the marketing cooperative. Goods ultimately destined for shipment to another State acquire the character of interstate commerce when the journey begins, even though there is a temporary break in transit in the State of origin; accordingly, considered truck shipment to marketing association's elevators was the commencement of movement to ultimate destinations outside Kansas and the halt in transit at Kansas City was an incident to the interstate movement.—Farmers Union Coop. Marketing Ass'n v. State Corp. Commission of Kans., 302 F. Supp. 778 (783-4). .

When evidence in Commission proceeding under review showed that motion picture film is shipped from out-state points to Indianapolis with the understanding and intent that it would not remain there, but would be sent on to exhibitors in Indiana "in a movement as continuous as practicable," the Commission properly concluded that plaintiff's transportation of the film beyond Indianapolis is a part of the continuous movement for which appropriate authority is required. Apply the principle used in determining whether a shipment is one in interstate commerce, as stated by the court in 195 F. 2d 252, it is clear from the facts of record that, notwithstanding temporary stoppages at distributor's exchange in Indianapolis, the producer intends its film prints to move beyond that point to contracting exhibitors in Indiana, and that the transportation from the exchange to the exhibitors, and thereafter between exhibitors, is part of a continuous movement in interstate commerce. Therefore, the Commission decision is affirmed.—Feature Film Service, Inc. v. United States, 349 F. Supp. 191 (196-7)*.

Less-than-truckload shipments between points in the same state but which traverse roads in an adjoining state are in interstate commerce, irregardless of shipper's intent that shipment should be of an intrastate character only.—Applicable Rates on Intrastate Shipments, 335 I.C.C. 472 (475)*.

Applicant's proposed service of transporting freight between Chicago, Ill., and Milwaukee, Wis., without any motor operation on its part outside the commercial zone of Chicago, is not in interstate commerce, even though an employee of applicant would travel as a train passenger carrying the involved freight as baggage in same-day round trip messenger service for shippers in the cities, because applicant's proposal neither entrails interstate motor movements nor arrangements with other carriers for continuous transportation.—Cannonball, Inc., Common Carrier Application, 99 M.C.C. 326 (328, 329).

Proposed transportation of ex-barge bulk shipments of dry fertilizers and fertilizer materials from river ports in Illinois to other points in Illinois is not shown to be transportation in interstate or foreign commerce subject to regulation. Citing 298 US 170, the Commission said that although concerned traffic had been moved by barge to these ports from points outside Illinois, it had moved under the exemption of §303(b) of the Act and, therefore, proposed intrastate movement is not subject to Commission regulation. In addition, the Commission cites from 94 MCC 541, "that not all commerce is transportation; that transportation begins only when merchandise has been placed in the possession of a carrier subject to economic regulation; * * * ".—Behnken Truck Service, Inc., Ext.—Ext.—Exbarge Traffic, 103 M.C.C. 787 (792-7).

See also Greyhound Lines, Inc., v. Allen case, §202(b), n. 20.

Between State points: [Vols. 11, 19, 21].—The transportation of pipe from defendant carrier's storage-in-transit yards in Texas,. to an interior point in Texas, the movement into Texas being performed by a for-hire rail or water carrier or by a defendant, is in interstate commerce. The pipe is transported by defendants pursuant to the terms of the storage-in-transit arrangement provided in the tariff duly filed with the Commission; all the pipe does in fact move beyond the transit point, and it is the intent of the shipper that the movement from origin to ultimate destination constitutes one continuous movement. Merely because the exact identity of a particular consumer is unknown is of no moment, nor does the fact that the pipe may be sold by the shipper while in the possession of a defendant carrier change its interstate characteristics.—Railroad Comm. of Texas v. Oil Field Haulers Assn., 325 I.C.C. 697 (704-06).

Although considered movement of household goods is solely between intrastate points, it is part of an interstate movement. Applicant packs outbound shipments and moves them to one of its warehouses for weighing where they are held for dispatch instructions from household goods forwarders, who arrange for futher motor and water transportation; inbound shipments arrive at applicant's warehouse or nearest railhead and, after arranging a delivery date (which sometimes requires temporary storage) applicant delivers and unpacks the shipments. The pause at applicant's warehouse is, at best, temporary; it does not break the continuity, and therefore does not change character of the commerce. Considered movements are in interstate commerce.—Nilson Extension—South Carolina, 95 M.C.C. 326 (327, 329).

Changing traffic patterns and shifting methods of distribution of cement often require coordinated rail-motor service composed of rail movement to storage silos or facilities at locations convenient to marketing areas, e.g., construction sites of dams, highways, air fields or missle facilities, and distribution therefrom by motor carriers. At the time of initial rail movement, shipments, for the most part, are not allocated to any particular consignee; the cement comes to rest at the storage point and a separate motor movement then delivers it to the ultimate consignee. In other instances, there are times when a separate shipment moving by rail is transferred directly to motor vehicles; that type service lends itself best to coordinated rail-motor movement. In considering applications for authority to provide such motor service, it is unnecessary to determine which types of motor carriage are in interstate and which are in intrastate commerce.

However, since §303(b) is an exemption providing generally that transportation by a water carrier of a commodity in bulk is not subject to the Act, it follows that when bulk cement is transported by water to a storage point within a state and later moved from that point to a market area within same state by motor carrier, the cement is not placed in the possession of a carrier subject to economic regulation until the start of the motor movement; thus, the motor transportation, considered separately, would be intrastate commerce within a single State. Therefore, application for interstate authority for the motor segment of such a water-motor operation is denied.—Transport, Inc., Extension—Ex-Rail Cement, 96 M.C.C. 671 (676-7).

Defendant's routing and handling of traffic originating at and destined to points in Missouri through Kansas appears operationally reasonable, and absent evidence of bad faith on defendant's part, defendant cannot be found to have misused its interstate operating authority to mask an essentially intrastate operation. Fact that defendant holds no intrastate authority for certain of these movements should not of itself condemn what appears, as a result of out-of-state routing, to be ostensibly interstate movements, and lead to characterization of the traffic as intrastate.—Missouri Pub. Ser. Comm. v. Missouri Arkansas Transp. Co., 103 M.C.C. 641 (646-7).

Intent: [Vols. 11, 12, 21].—Whether nature of a shipment of goods is interstate, or otherwise, is to be determined by essential character of the movement, not by particular intention of the parties. From time of truck shipment of grain by local cooperatives from Kansas origins to marketing cooperative's elevators at Kansas City, Kans., until it was sold and shipped to out-of-State buyers, all activities in connection therewith were performed in furtherance of a clear intent that the grain would ultimately be delivered outside Kansas. Properly considered, question of intent of initiating shippers is not concerned with personal motivation of those shippers, but with their intent as respects movement of the grain in commerce; since original intent was to move the grain in interstate commerce, its storage and handling at Kansas City did not change interstate character of the truck movement to that point.—Farmers Union Coop. Marketing Ass'n v. State Corp. Commission of Kans., 302 F. Supp. 778 (784-5).

Essential character of interstate commerce is not affected by temporary storage in a warehouse pending intrastate delivery, if shipper's original intent is to make continuous through shipments from out-of-state origins to in-state destinations.—Petroleum Transit Co., Inc., Extension— Wilmington, N.C., 102 M.C.C. 380 (385).

Intrastate: [Vols. 11-13, 19, 21].—When oil company shipped petroleum products to its Muskegon, Mich., terminal on the basis of sophisticated estimates of customer needs and knew each customer who would be served by that shipment but, at time it moved from out-of-State origin, had not determined the specific quantity to be shipped to a given ultimate destination, tank truck movement thereof from the terminal to destinations in Michigan was not part of a continuous movement in "interstate commerce" as defined in the statute. While not used as a retail outlet, the terminal may be classified as a local marketing facility; the goods at the terminal were inventory-in-store for actual future orders from shipper's customers, and no final transportation arrangements were made until after they were inventoried at Muskegon; therefore, considered truck movement from the terminal to ultimate destinations was wholly intrastate in character. And appellant's contention that its mere possession of interstate authority to transport petroleum products (that had not been used for several years) exempts its drivers from maximum hours provisions of the Fair Labor Standards Act, is without merit.—Baird v. Wagoner Transp. Co., 425 F. 2d 407 (411-13). [Not arising hereunder.]

Movement by defendants from or to Hammond, Ind. (in the Chicago, Ill., commercial zone), of mobile-home trailers, which moved from or to a point in Illinois beyond the limits of the Chicago commercial zone, is movement in interstate commerce, and since such movement is not within the partial exemption under §203(b8), it requires appropriate authority from the Commission. However, following decision in *Motor Transportation of Property Within a Single State* [94 MCC 541], defendants' transportation of mobile home trailers, brought by private carriage across the Illinois-Wisconsin State line and tendered to defendants for delivery within Illinois, is not transportation in interstate commerce subject to economic regulation under part II of the Act.—Morgan Drive-Away v. Mid-States Trailer Transport, 105 M.C.C. 896 (899-900).

For motor carriage of articles to be mailed see Armored Carrier Corp. v. Security Dispatch, Inc. case, §202(b), n. 20.

For interstate routing to evade state regulation, see Pennsylvania Public Utility Comm. case, §202(b), n. 20.

Section 203. (a)(11) [*§303(a)(11) U.S.C.*] Foreign commerce defined.—[Unchanged. See vol. 17, p. 13494.]

Amendments, see footnotes, vol. 15, p. 12162-3; vol. 17, p. 13494.

Notes of Decisions

Volume 11—p. 9348; Volume 12—p. 10347; Volume 13—p. 11045; Volume 14—p. 11564; Volume 17—p. 13494; Volume 18—p. 14251; Volume 19—p. 15461; Volume 21—p. 17021.

5. Foreign Commerce, in general.—[Vols. 11-19, 17-19, 21].—The essential character of the commerce determines whether a shipment is interstate (foreign) or intrastate in nature, and the question of when or to whom title passes is not controlling. One of the most important factors in determining the essential character is the fixed and persisting transportation intent of the shipper, or the one for whose benefit the shipment is made; and while there must be continuity of movement before the transportation of imported articles from the port to interior destinations in the same State is part of the movement in foreign commerce, such continuity is not interrupted by a temporary pause in the carriage of the goods. The mere fact that the goods are placed in a warehouse for a short period preceding the final movement does not change the character of the commerce from foreign to intrastate. —Iron and Steel Articles, Wilmington to Points in N.C., 323 I.C.C. 740 (742)*.

Respondent's transportation of imported iron and steel articles from Wilmington, N.C., to interior North Carolina points for shipper operating a chain of hardware stores is in foreign commerce subject to the Act.

After the articles ordered by shipper from foreign suppliers are unloaded at the port and stacked in transit sheds of the State Ports Authority, shipper pays the sight draft, receives title to the goods, and allots the merchandise to its stores according to their needs. Pursuant to shipper's instructions, respondent then transports the shipments to destinations, the shipments from the port being almost invariably made within the 5 days' free time allowed by the ports authority. Under the tests set forth by the courts and the Commission there is thus an essential continuity of movement between the shipments to Wilmington and the subsequent movements to the interior points.

Shipper's whole plan is to stock its stores with the articles it orders from overseas; the ultimate destinations are known when it places its purchase orders, in fact having been ascertained prior to arrival of the goods at Wilmington. That a particular article ordered for one store may be diverted to another does not affect the character of the commerce; no single step in the operation is an end in itself, but each is undertaken as a means to accomplishment of the controlling purpose. According to shipper's original intention, Wilmington is but an intermediate stopping point; and though, until shipper pays the sight draft and takes title, the supplier could dispose of the goods otherwise, such action is not contemplated by the parties and is no more than a bare possibility which does not determine the essential nature of the movements.—Id., p. 742-4.

The definition of "foreign commerce" is as broad under part II of the Act as it is under part I (§1(1), as amended by the Transportation Act of 1920) and it plainly embraces nonadjacent as well as adjacent foreign countries.—International Joint Rates and Through Routes, 337 I.C.C. 625 (630).

Automobiles moving in applicant's driveaway service between points in the New York City commercial zone are usually the subject of a prior or subsequent movement by water from or to a United States territory or possession or a foreign country. And, as the driveaway transportation is clearly part of a continuous movement, part of which is in foreign commerce, to or from a point beyone the commercial zone, the driveaway transportation itself is in foreign commerce and subject to the Commission's regulatory jurisdiction.—Drive Away Auto Transport, Inc., Com. Car. Application, 99 M.C.C. 75 (78).

Traffic moving under fixed and persisting intent of shipper to engage in commerce from United States origins to Canadian destinations, or vice versa, is in foreign commerce pursuant to part II of the Act and any portion thereof which traverses the United States is subject to full economic regulation by the Commission. Therefore, carrier applicant, who utilized United States highways in transporting traffic originating at or destined to points in the United States, is subject to Commission regulation, although it transported the traffic only between points in Canada and had no joint or through arrangements with any United States carrier.—D.S. Scott Transport Ltd. Extension—General Commodities, 100 M.C.C. 1 (3, 6).

Since supporting shipper imports sufficient urea to meet monthly contract quotas plus needs of its fertilizer plant, and since except for one account it selects motor carrier and pays transportation charges, it has the fixed intent to make continuous through shipments from Trinidad to specific North Carolina consignees. The only uncertain element is the ultimate delivery date for each account; thus, essential character of concerned commerce is not affected by temporary warehouse storage, which is entirely "within concept of continuity of movement in shipper's urea importing business". Therefore, shipments of imported urea from Wilmington to other points in N.C. are part of continuing movement in foreign commerce for which appropriate authority is required.—Petroleum Transit Co., Inc., Extension—Wilmington, N.C., 102 M.C.C. 380 (385-6).

Respondents' operations between California and Mexico are obviously operations in foreign commerce and authority to conduct such service must be obtained from the Commission; these operations are not authorized by respondents' state certificates registered under §206(a)(7) of the Act since operations in interstate or foreign commerce at any point outside of a single state or the United States may not be conducted by motor carriers operating under this section. —Imperial Truck Lines, Inc.—Common

Carrier Application, 106 M.C.C. 741 (750-51).

It has long been established that before a motor carrier certificate or permit be issued by this Commission to a Canadian-domiciled applicant authorizing operation in foreign commerce, between points in the International Boundary line between the United States and Canada, on the one hand, and, on the other, points in the United States, which operation is in fact a portion of the carrier's proposed through operation extending from and to points in Canada, the applicant shall first submit a sworn statement that it has obtained appropriate complimentary authority from the proper Canadian authorities. Nevertheless, at the time this Commission makes its initial determination as to whether the application to it for authority to operate within the United States should be granted, a Canadian-domicile applicant need only show that it is diligently seeking complimentary authority from the proper Canadian authorities, if such be required for that part of the proposed operation to be conducted over Canadian soil, and that an appropriate application is then pending. Denial of applicant's first application for Canadian authority complementary to that sought from this Commission, is of no moment so long as there exists a (second) pending application for such authority since insincerity of prosecution of the pending application cannot be presumed.—Yelle Contract Carrier Application, 115 M.C.C. 408 (413)*.

Section 203. (a)(12) [*§303(a)(12) U.S.C.*] Highway defined.—[Unchanged. See vol. 9, p. 7871.]

Notes of Decisions

Volume 17—p. 13495; Volume 19—p. 15461.

3. Highway, "way," defined.—[Vols. 17, 19].—A "highway" is defined in the statute to mean "the roads, highways, streets, and ways in any State". "Way" is defined in *Webster's International Dictionary* (1961) as a "thoroughfare used or designed for traveling or transportation from place to place"; and the same authority defines a "waterway" as a "way or route for traffic by water". Therefore, there being no other means of surface travel in the southeastern Alaska panhandle, it is concluded that the water route of the Alaska State Ferry System is a "way" and a "route" within the meaning of the statute.—Alaska Motor Coaches, Inc., Extension Southeast Alaska, 98 M.C.C. 642 (645).

Section 203. (a)(13) [*§303(a)(13) U.S.C.*] Motor vehicle defined.—[Unchanged. See vol. 11, p. 9349.]

Amendments, see footnotes, vol. 9, p. 7871, vol. 11, p. 9349.

Notes of Decisions

Volume 13—p. 11045; Volume 15—p. 12163; Volume 17—p. 13495; Volume 19—p. 15462; Volume 21—p. 17022.

Section 203. (a)(14) [*§303(a)(14) U.S.C.*] Common carrier defined.—[Unchanged. See vol. 11, p. 9349.]

Notes of Decision

Volume 9—p. 7871; Volume 11—p. 9349; Volume 12—p. 10347; Volume 13—p. 11046; Volume 14—p. 11564; Volume 15—p. 12163; Volume 16—p. 12803; Volume 17—p. 13495; Volume 18—p. 14252; Volume 19—p. 15462; Volume 21—p. 17023.

1. Common carrier defined.—[Vols. 9, 11-19, 21].—Proposed transportation of cash letters between banks is common carriage when applicant will offer service to more than a limited number of shippers, and when the commodity it seeks to transport is not of such intrinsic value that it need be guarded or transported in special vehicles.—Continental Dispatch, Inc., Common Carrier Application, 95 M.C.C. 483 (488-9).

Common carriers can legally dedicate equipment to the exclusive use of shippers they are serving, so long as they are willing to provide a similar service to their other shippers.—Kerr Contract Carriage, Inc., Contr. Car. Applic., 115 M.C.C. 862 (870).

See also National Trailer Convoy, Inc. v. United States case, §203(a)(19), n. 2.

Dealers in commodities: [Vols. 9, 11, 12].—See T & T Supply, Inc.—Investigation of Operations case, §203(c), n. 5.

Furnishing vehicles and drivers: [Vol. 12].—The fact that applicant does furnish drivers along with its leased equipment, and is engaged in motor common carriage rather than a simple leasing arrangement, is borne out by the following illustrations: before a vehicle is furnished to a group, applicant pre-determines that there are a sufficient number of persons in the group who are licensed and who are willing to drive the vehicle. Each potential driver (not a single driver in each group) must be acceptable to applicant's insurance carrier. If a vacancy occurs in a group, it is applicant (not the members of a specific group) which furnishes a replacement who incidentally may be or must be willing to drive the vehicle. In the initial trip or trips, applicant's representative drives the vehicle for demonstration purposes.—Monarch Associates, Inc., Common Carrier Application, 107 M.C.C. 277 (282)*.

Holding out: [Vols. 11, 12, 21].—In defining motor carriers for regulatory purposes, the Act distinguishes between common and contract carriers. Statutory definition of a common carrier stresses not what a person does but what he holds himself out to do; holding out is important because, even if performance does not match the promise it may have an adverse effect on "existing carriers upon whom the bulk of shippers must depend for access to market" which underlines the requirements for a certificate or permit. [340 F. 2d 820.] Plaintiff in action to recover undercharges does not fit within statutory definition of a contract carrier because it holds itself out to the public as a common carrier operating under its interstate certificate; and even if it were acting as a contract carrier, claimed undercharges are based on its common carrier tariff rate and, since it holds no permit, it would not be entitled to recover undercharges for illegal carriage.—Mars Express, Inc. v. David Masnik, Inc., 401 F. 2d 891 (893).

Number of shippers served: [Vols. 11, 19, 21].— See E. A. Gallagher & Sons v. Cleveland General Transport case, and Gray Line Scenic Tours, Inc. case §203(a) (15), n. 1.

Pickup and delivery: [Vols. 9, 11, 12, 14].—Normal pickup and delivery service encompasses any and all loading and unloading functions, including the performance of all types of related extra services without regard to the nature or type of freight involved or to which particular carrier handles same in line-haul movement, which one carrier employee (usually the driver) can perform in accordance with directions from the consignor or consignee, as the case may be, during the allotted free time.

The preceding definition governs those situations in which the carriers are obligated by a tariff-imposed duty to load and unload. Except where otherwise provided in a tariff, shippers and receivers of freight in truckload lots shall have free use of a carrier employee during the published free-time period, and the applicable line-haul rates properly should include compensation for such use as described in the preceding definition.—Segregation of Freight, New Eng. & Mid. Atl. States, 340 I.C.C. 306 (321-2)*.

Special service: [Vols. 11, 12, 19, 21].—Publication of weekly rates on gasoline and fuel oils, applicable when stated minimum gallonages are tendered for transportation by one carrier in one vehicle in 7 consecutive days, is not repugnant to the common-carrier definition in §203(a)(14) merely because it contemplates a highly personalized and specialized service, with dedication of equipment over a 7-day period to exclusive use of a particular shipper. The only limitation by definition on transportation which common carriers may provide is that it be held out to the public generally, and there is no statutory restriction on the manner in which a common carrier may perform its physical operations, provided the same service is made available to all who may desire to use it. Considered operations are not beyond scope of respondents' operating authority as common carriers.—Weekly Rates on Petroleum Products—from Sparks, Nev., 322 I.C.C. 541 (548).

A rail passenger with baggage, consisting entirely of the involved freight, performing messenger service between Chicago, Ill., and Milwaukee, Wis., is not operating as a common carrier by motor vehicle so as to require a certificate under §206, because such service involves neither interstate motor movements nor arrangements with other carriers for continuous transportation.—Cannonball, Inc., Common Carrier Application, 99 M.C.C. 326 (329).

Ib. —Operation by lease or other arrangement.—[Vols. 9, 11-19, 21].—Applicant's operations in assembling groups of commuters and furnishing vehicles to such groups constitutes for-hire, common carriage transportation rather than a genuine lease of equipment since applicant controls the transportation and assumes the characteristic burdens thereof. By its lease applicant controls where the vehicles are garaged, the persons, and the number of persons who will occupy the automobile; the use of the equipment; the number of days it will be used; and, to a lesser degree, the number of miles the equipment will be operated. Control is further asserted by applicant in its approval of the available drivers. The multiple drivers rather than a single driver assist rather than hamper applicant's control of the equipment. Lastly, the right to cancel the lease during its term compels acquiescence to applicant's control by the "recipients".—Monarch Associates, Inc., Common Carrier Application, 107 M.C.C. 277 (281-82)*.

Section 203. (a)(15) [§*303(a)(15) U.S.C.*] Contract carrier defined.—[Unchanged. See vol. 11, p. 9360; vol. 18, p. 14254.]

Notes of Decisions

Volume 9—p. 7882; Volume 11—p. 9360; Volume 12—p. 10350; Volume 13—p. 11047; Volume 14—p. 11566; Volume 15—p. 12165; Volume 16—p. 12804; Volume 17—p. 13496; Volume 18—p. 14254; Volume 19—p. 15467; Volume 21—p. 17027.

1. Contract carrier defined.—[Vols. 9, 11-19, 21].—See also Continental Contract Carrier Corp. v. United States case, §209(a)(1), n. 25; H. Prang Trucking Co., Inc.—Purchase—Hyer Trucking case, §5(2), n. 48 *Discontinued operations;* Gypsum Haulage, Inc., Extension case, §209(a)(1), n. 5; Luper Transportation Co.—Petition for Amendment case, §209(a)(1), n. 5; Mars Express, Inc. v. David Masnik, Inc. case §203(a)(14), n. 1 *Holding out;* National Trailer Convoy, Inc., v. United States case §203(a)(19), n. 1; T.I. McCormack Trucking Co., Inc., Ext. case, §209(a)(1), n. 25.

When plaintiff (applicant in Commission proceeding) proposed to serve 1 shipper under a continuing contract, and to assign motor vehicles to shipper's exclusive use, Commission's finding that plaintiff proposed to operate as a contract carrier was a proper determination under §203(a)(15).—Transportation Unlimited of California, Inc. v. United States, 300 F. Supp. 474 (475)*.

In ruling on applications for contract carrier permits, Commission must first determine whether applicant satisfies definition of a contract carrier under §203(a)(15) and then determine whether applicant satisfies the five criteria of §209(b) for determining consistency of an application with public interest and the national transportation policy. In denying plaintiff's application, Commission failed to consider, or failed to rule upon, question whether plaintiff satisfied §203(a)(15) by virtue of having entered into a continuing contract with one person for transportation of property. District court, therefore, reverses Commission's denial of plaintiff's application and remands the application to the Commission for further consideration.—Keller Trucking, Inc. v. United States, 374 F. Supp. 848 (849)*.

The finding of the joint board that proposed service would enable applicant to serve more than a limited number of shippers, thus resulting in his operations becoming those of a motor common carrier is affirmed. While applicant excepted to this finding, it offered at the same time to accept a grant of common carrier authority, and filed an application to convert all his outstanding permits to certificates. Apparently, he has by these actions conceded the appropriateness of the joint board's recommendation in this regard. The type of service applicant provides, the number of shippers he serves, and his obvious intention to expand the scope of his operations still further make it clear that the joint board reached the correct conclusion.—Gorski Extension, 95 M.C.C. 514 (517).

Service proposed is that of a contract carrier when applicant will serve only a single shipper through assignment of equipment, obtained from owner-operators under long-term leases, for continuing period of time to shipper's exclusive use. Applicant holds contract carrier authority to transport commodities not related to those being considered for another shipper and, if its pending applications were granted, it would be authorized to serve four shippers; and that applicant would use its equipment to transport exempt commodities as a backhaul does not affect exclusiveness of assignment of vehicles to supporting shipper for the outbound movement.—Continental Contract Carrier Extension, 96 M.C.C. 321 (326-7); Owens Contract Carrier Application, 95 M.C.C. 586 (587, 589)*.

Inasmuch as applicant proposes to serve only the one supporting shipper and will dedicate its equipment exclusively to shipper's service, proposed service is that of a contract carrier as defined by the Act.—Minnesota Trucking, Inc., 96 M.C.C. 330 (332); Jamerson Contract Carrier Application, 110 M.C.C. 469 (474); James Enterprises, Inc., Contract Carrier Application, 115 M.C.C. 44 (46)*.

It is clear that applicant contract carrier's present management had changed its operations from those of a contract carrier to those of a common carrier when, although its operations had previously been found to be within §203(a)(15, as amended, and it had only one active contract at time of change in management, within a year thereafter its activities had increased so that it was providing service under 16 active contracts, 8 of which had been in effect less than 6 months; also, applicant no longer assigned equipment to shippers' exclusive use, some of its contracts involved only a single shipment, and others were for periods as short as 2 weeks or 1 month. While there is no arbitrary number of contracts at which services of a contract carrier necessarily become common carriage, the abrupt and aggressive manner in which it so radically expanded its operations leaves no doubt that it had abandoned its contract carriage and has been operating unlawfully as a common carrier.—Contractors Cargo Co.—Extension, 96 M.C.C. 306 (315-7)*.

Applicant's return movements, after performing proposed service, would consist of shipments for supporting shipper's account, exempt commodities and occasional movements, as a contract carrier, for another shipper. Latter movements for another shipper, representing less than 1 percent of the total return movements, preclude a finding that applicant assigns vehicles to its contract shipper's exclusive use with meaning of §203(a)(15); however, since applicant's service is designed to meet shipper's "distinct need", the alternative criteria of the statute are met. Proposed service is that of a contract carrier.—Western Lines, Inc., Extension—Kansas City, Kans., 96 M.C.C. 657 (661, 665-6).

Applicant's proposed operations fall within the statutory meaning of contract carrier, in as much as its operations are specifically designed to serve a limited number of shippers, which have a "distinct need" for a service, unique and specialized in nature.—Eddlemen Bros. Contract Carrier Application, 98 M.C.C. 681 (690)*.

In exercising its right to select the shippers whom it will serve, a motor contract carrier, if it is not to breach the line of demarcation between contract and common carriage, must affirmatively stand aloof from the lure of a public calling by restricting its service to one or a limited number of persons. While a "limited number of persons" is, of course, a relative term to which significance is imparted only when carrier's overall operations are considered, it cannot be stretched so far as to embrace all of defendant's 49 custcmers. By adding to the number of shippers served and by making its services available to virtually any shipper willing to contract with it, defendant has exceeded the scope of contract carriage contemplated by statute and has been operating unlawfully as a motor common carrier.—E. A. Gallagher & Sons v. Cleveland General Transport, 98 M.C.C. 356 (359).

Trip-leasing of the same vehicles to other carriers for a return movement would not necessarily affect applicant's "exclusive assignment of vehicles"; statutory standard requires only that shipper be given exclusive use of sufficent vehicles to handle its shipments without admixture with shipments of others. Requirement that vehicles be exclusively assigned to shipper for a "continuing period of time" relates to that period covered by the contract with shipper; it does not preclude trip-leasing on return movements; nor does such trip-leasing preclude a carrier from meeting the statutory standard. Contract carrier's ability to transport "exempt" commodities in backhaul movements without necessarily impairing an assignment of equipment has heretofore been recognized; and, under the circumstances, the distinction previously made between backhauls conducted under motor-carrier authority (common or contract) and backhauls of exempt commodities should no longer be followed. In the future, when such matters arise they will be considered on a case-by-case basis in accordance with evidence submitted.—Owens Contract Carrier Application, 100 M.C.C. 34 (41-3)*' Aubrey Extension—Milwaukee and New York City, 100 M.C.C. 652 (656-7).

Although at original proceeding applicant had continuing contracts with 27 individual shippers, it now has such contracts with only 7 shippers and therefore, the primary issue is whether or not applicant is serving a "limited number" of shippers within the statutory meaning. The term "limited number" is a relative term without any particular significance until compared to overall operation of applicant; and in such light applicant's present service is restricted to a "limited number" of shippers because its service is devoted to one industry, it operates under one permit in the northeastern section of the United States, and it provides a similar kind of service to all its customers. And while prior proceeding relied on 91 MCC 691 (from which instant proceeding is distinguishable) in determining that applicant's operations did not possess high degree of specialization generally required of contract carriers, the above circumstances counterbalance that decision. Granted.—Cardinale Trucking Corp. Extension—Centreville, N.J., 100 M.C.C. 126 (129-31)*.

Protestants' contention that applicant's operations are not within the statutory definition of contract carriage is incorrect; a class of shippers, such as the farmer employers herein, constitutes a limited number of shippers as contemplated by the terms of §203(a)(15) and considered transportation of migrant workers, proceeding to or returning from employment in agriculture, is contract carriage.—Bracero Transp. Co., Inc., Extension—Migrant Workers, 100 M.C.C. 359 (364).

Applicant's proposal to transport house trailers by assigning motor vehicles for a continuing period of time to the exclusive use of five supporting shippers is within the purview of contract carriage. Furthermore, its proposals to condition used trailers for over-the-road movement, connect electrical and plumbing facilities, and expand and set up "expando" home trailers at their destination are part of the proposed transportation service; these specialized services are "incidental" to the movement of house trailers from one place to another and as such must be considered in disposition of the application.—Griffin Mobile Home Transporting Co. Contract Carrier Application, 103 M.C.C. 482 (500-1)*.

After resolving the status of supporting shipper, applicant's proposal to assign its vehicles for a continuing period of time to the exclusive use of this shipper is found to be that of contract carriage within meaning of §203(a)(15). Shipper is a market support distribution facility which maintains an inventory of general merchandise for 49 manufacturers at its warehouse facilities and daily distributes about 300,000 pounds of this merchandise to customers of these manufacturers; citing 96 MCC 87, the Commission found that shipper is a bailee of the goods it distributes for the manufacturers thereof and that it is a shipper qualified to enter into a bona fide contract with applicant.—Commerce Consultants Corp. Contract Car. Application, 103 M.C.C. 725 (727-8). [But see dissent].

Applying the "limited number of persons" test which (the same as in contract carriage of freight) requires determination of the persons that actually would be served. Applicant's proposed transportation of passengers, on individual or group bases, over regular and irregular routes between certain California points and Nevada locations of the six supporting "contracting" casinos, is not within the scope of contract carriage as defined in the statute. While the casinos might benefit from the proposed service through increased business, the prospective patrons apparently represent true users to which service would be held out because, ultimately, they would pay the transportation charges. Also, an indeterminate and changing number of patrons would be solicited for each trip from the general public. In the factual situation presented, substance of applicant's proposal is in the nature of a motor common, rather than contract, carrier service.—Gray Line Scenic Tours, Inc., Contract Carrier Application, 103 M.C.C. 807 (810-13)*.

While there is no question that applicant proposes to enter into a contract with North Central and will assign at least one vehicle to North Central's exclusive use, the problem is whether North Central, a common carrier by air operating under authority issued by the Civil Aeronautics Board (C.A.B.), qualifies as a person within the meaning of §203(a)(15) with whom applicant may contract. Citing 96 MCC 87 and 103 MCC 725, the Commission concludes that when North Central takes into its possession the goods tendered to it for transportation, it becomes a bailee for hire of such goods and, therefore, qualifies as a shipper. No decision, however, was reached as to whether an airline may be a "shipper" as to applicant and a "carrier" as to the shipping public; this decision was left to the legal and policy discretion of the C.A.B.—Howard Contract Carrier Application, 105 M.C.C. 354 (357).

Applicant's proposed service fails to qualify as that of a contract carrier under §203(a)(15); although the matter of rates is one factor considered, albeit an important factor, the desire by shipper for and ability of applicant to provide service at a lower cost cannot form the sole basis for a finding of "distinct need." Additionally, even if applicant could meet the "distinct need" requirement, the application would have to be denied, because applicant has active contracts with 11 shippers; this number exceeds the "limited number of persons" contract carriers may generally serve.—Liberty Transfer Co., Inc., Extension—Specified Points, 105 M.C.C. 437 (441-2)*.

In light of the criteria of 100 MCC 34, applicant's proposal for the "assignment" of vehicles to two shippers for the northbound movement of roofing materials and grocery items and for the assignment of the same vehicles to two other shippers for the southbound movement of wood shingles, shakes and ridges, can properly be considered as that of a contract carrier within the "exclusive use" alternative requirement of §203(a)(15), because applicant's proposal is adequate to meet each shipper's "present and reasonably foreseeable needs". The proposed movement neither materially affects the quality of applicant's service nor the necessary assignment of vehicles; additionally, it is significant that each shipper acknowledges fact that vehicles are to be assigned for one-way movement only.—Smack, Inc., Contract Carrier Application Segundo, 105 M.C.C. 524 (525-8)*.

On remand the Commission decides that applicant's proposal to assign nine tractor trailer combinations to the exclusive use of supporting shipper satisfies the "exclusive use" statutory contract carrier definition; that applicant might also use these vehicles for transportation of exempt commodities does not defeat this exclusive assignment. In addition, since applicant's proposal comes within the first alternative definition of contract carriage, it is not necessary to discuss whether the proposed service is also designed to meet supporting shipper's distinct need.—Mid-West Truck Lines, Ltd., Contract Carrier Application, 105 M.C.C. 822 (824)*.

Proposed operations do not meet the statutory definition of contract carriage; applicant does not propose to assign any specific vehicles to the exclusive use of supporting shipper, since the availability of equipment would be dependent upon the regulated movement of dairy products and fresh and frozen meats from St. Paul and points in Wisconsin to points near the proposed origin points. Although the assignment of vehicles to the exclusive use of a shipper does not necessarily preclude a regulated movement on a backhaul, applicant's mere permitting shipper to use those unassigned vehicles which may be available in the area does not amount to "assignment of equipment to the exclusive use of a shipper." Moreover, proposed irregular-route operations featuring only multiple pickups and deliveries is nondistinctive and, standing alone, fails to qualify as contract carriage under the alternative definition thereof.—Frigid Food Express, Inc., Ext.—Floor Covering, 106 M.C.C. 259 (262).

After considering cases involving exempt backhauls and intrastate operations by regulated contract carriers, the Commission concluded that, inasmuch as applicant seeks only to obtain permanent authority with respect to service for one shipper, its exempt operations under §203(b)(8) of the act (for 40 contract shippers solely within the New York commercial zone) do not preclude consideration of the proposed operation relative to the "limited number of persons" provision of §203(a)(15).—J & J Trucking Co., Inc., Contract Carrier Application, 106 M.C.C. 345 (347)*.

The term "limited number" is a relative term without any particular significance unless compared to the overall operations of an applicant. Factors to be considered are: different types of commodities transported, number of permits under which carrier operates, territory in which operation is conducted, similarity in services that carrier performs under its effective continuing contracts, and degree of specialization required by nature of shippers' business. These applicable standards are not such that they will always yield a definite maximum (or minimum) number of shippers that must be constant and unchanging. Such governing criteria recognize that, as a practical matter, there must be some flexibility in the number of shippers that may be served at a given time by a contract carrier, and that it is often the pattern of a carrier's operations and holding out of services that is determinative of its status. Therefore, Commission must decide what constitutes a "limited number" of persons to be served based on facts of the case.—Frost Trucking Co., Inc., Ext.—Phila., Pa., 110 M.C.C. 203 (207-8)*.

Applicant is a motor common carrier providing transportation of cash letters for banks and banking institutions. It seeks a permit authorizing the same operations it is now performing under its common carrier authority. In 102 MCC 411 Commission found that cash letter transportation was contract carriage because it provides for a limited number of shippers, is highly specialized and held out only to a defined class of shippers, and is designed to meet the distinct needs of each individual customer. Applicant's proposed operations meet the second test of §203(a)(15) and therefore fall within the definition of a contract carrier by motor vehicle.—Bankers Dispatch Corp. Conversion Application, 100 M.C.C. 294 (304-5).

Section 203(a)(15) defines a contract carrier by motor vehicle as one which transports passengers or property in interstate or foreign commerce, for compensation, under continuing contracts with one person or a limited number of persons for the furnishing or transportation services either (a) through assignment of motor vehicles for a continuing period of time to exclusive use of each person served or (b) designed to meet the distinct need of each individual customer. It is well established that compliance with either of these two tests will establish applicant's proposal as one for contract carriage. Commission disagrees with the examiner's conclusion that applicant's tariff restriction against circuity will render dedication of equipment remote as some transportation will be permitted even under the most severe interpretation of said restriction. Applicant's proposed service is that of a contract carrier.—Art Quiring Contract Carrier Application, 110 M.C.C. 480 (484).

Precedent-making decisions over the last several years have firmly established the previously unstated but tacitly acknowledged principle that the designation of a property carrier service as a bona fide regular-route operation as opposed to an irregular- route operation (see 47 MCC 23) should ordinarily apply only to those instances where the involved carrier is or will be authorized to transport general commodities with or without exceptions, or a large number of diverse commodities rather than a limited range of specified commodities. Vast majority of contract carriers carry specified commodities and provide specialized service which, like carriage of specified commodities, tend definitely to negative any regular-route operations.—Motor Service on Interstate Highways—Passengers, 110 M.C.C. 514 (544-45).

Since transporters of specified commodities and contract carriers cannot today ordinarily be classified appropriately as bona fide regular-route operators, the property carrier superhighway rules, which relate only to regular-route operators, should not be made applicable to such carriers. Consistent with the foregoing, the property carrier deviation rules adopted herein are limited in like manner so as to exclude consideration of contract carriers and transporters of specified commodities under the provisions therein which pertain exclusively to regular-route operations.—Id., p. 545.

Proposed operations found to be contract carriage as applicant has reduced the number of shippers it serves from 14 to 6 thus adhering to the criterion of "limited number" of shippers required for contract carrier status. Applicant serves only shippers of certain indicated commodities in the Middle Atlantic area and provides all shippers a typical "house carrier" service. Application granted but applicant is admonished that inclusion of an additional shipper will be carefully scrutinized.—C & R Trucking Co., Ext.—Winslow, N.J., 112 M.C.C. 336 (338-9).

Proposed operations by applicant found to be contract carriage as applicant proposes to provide a service peculiarly tailored to supporting shippers' demonstrated needs. Although this is the seventh shipper served by applicant, which number approaches the maximum permitted (see 91 MCC 691), such fact does not alter applicant's contract carrier status. However, applicant is hereby admonished that the inclusion of an additional shipper may result in a finding that applicant holds itself out to serve the general public.—P-N-J Kornacker, Inc., Extension—Malt Beverages, 112 M.C.C. 580 (586)*.

The special dimensions of applicant's equipment, as well as the recessed rollers in each vehicle, meet shippers' distinct needs for efficient and economical loading and unloading as well as relatively damage-free transportation and therefore represent service of a motor contract carrier.—Fairchild General Freight, Ext.—Fiberboard Containers, 113 M.C.C. 598 (600)*.

Applicant's proposed operation was held to be one of contract carriage within purview of §203(a)(15) of the Act, and unregulated oceancarrier engaged in foreign commerce was found to be a person qualified to enter into a bona fide contract with applicant.—Service Transfer, Inc., Contract Carrier Application, 115 M.C.C. 29 (33).

Proposed operations for exempt shippers association with over 600 members found not to be transportation for "one person or a limited number of persons" and therefore, is held to be common carriage of general commodities rather than contract carriage. —C-Line, Inc., Extension—Precious Jewelry, 114 M.C.C. 226 (232).

Application for extended authority brought into question carrier's conformity to restriction of operation as contract carrier to a limited number of persons. In addition to standard criteria for defining this restriction, the historical manner in which the carrier's business has grown and developed was held to be a factor. The extension sought was granted, though it expands applicant's contracts to include 7 shippers; applicant admonished that attempts to enter into further contracts could result in reconsideration of its status as a contract carrier.—Prang Trucking Co., Inc., Ext.—New Brunswick, N.J., 117 M.C.C. 38 (44-45)*.

Refusal of authority in a prior application was based on applicant's failure to supply statements affirmatively establishing complete and conclusive divestiture of common control with other carriers, including those aspects of control related to ownership and common representation by the same counsel or association of counsel, in a manner consistent with the discussion and conclusions in the prior report. On supplying evidence of divestiture of controls and a statement of willingness to terminate its relationship with cocounsels, the Commission was satisfied that applicant was shown to be a separate entity which will be operated as a contract carrier serving a limited number of shippers independent of any affiliation with other carriers. Granted.—Interstate Contr. Car. Corp. Ext.—Confectionaries, 117 M.C.C. 396 (396-397, 399)*.

The mere movement of traffic from or to a person does not qualify him as the shipper controlling the movement. Any other interpretation would render meaningless the definition of contract carriage and place all existing contract carriers in competition with motor common carriers for any traffic that could be handled from or to a shipper's facilities. See also, §209(a)(1), n. 1.—Administrative Ruling No. 76, 117 M.C.C. 433 (442).

Citing 113 MCC 205, it was found that since (1) applicant's supporting shipper's only interest in the involved traffic was in providing connecting water service subject to FMC jurisdiction, and (2) the supporting shipper is engaged in serving the general public, it does not qualify as a supporting shipper under §203(a)(15) of the Act other than to transport the containers or trailers it supplies for the considered movement. The proposed motor transportation of loaded containers or trailers was found to be that of a common carrier as defined in the Act.—Service Transfer, Inc., Contract Carrier Application, 117 M.C.C. 506 (511-512).

The Commission is obliged to consider the total number of shippers served under contract, not only by applicant, but also by applicant's affiliated contract carriers, for the purpose of determining whether applicant meets the "limited number of persons" criterion of §203(a)(15) of the Act. Also, a pattern of rapid expansion of a contract carrier's operation must be viewed as a holding out of service inconsistent with the §203(a)(15) criteria.—Crete Car. Corp.—Maremount Contr.—Auto Parts, 117 M.C.C. 634 (637)*.

Applicant, a contract carrier, applied for extension of its authority to serve a broader geographical area serving 11 shippers; the services it now provides and proposed to provide are not unique and do not require a high degree of specialization. Considering applicant's rapid expansion of its operations since it first received its permit and its willingness to offer transportation to any shipper who would contract with it, its activities constitute a holding out of service to the public generally as might be expected from a common carrier. Therefore, even though devoted to only one industry, since applicant's service does not possess a high degree of specialization, the proposed expansion to 11 shippers places applicant in clear contravention of the terms of the Act, and places it in a position of serving more than a "limited number of persons"; consequently, it does not meet the statutory definition of a contract carrier by motor vehicle; permit denied.—Id., pp. 209-10; Genova Transport, Inc., Ext.—Plastic Articles, 118 M.C.C. 160 (166-7)*.

Section 203. (a)(16) [*§303(a)(16) U.S.C.*] Motor carrier defined.—[Unchanged. See vol. 9, p. 7885.]

Notes of Decisions

Volume 11—p. 9363; Volume 12—p. 10352; Volume 13—p. 11048; Volume 14—p. 11566; Volume 15—p. 12166; Volume 16—p. 12805; Volume 19—p. 15473; Volume 21—p. 17037.

Section 203. (a)(17) [*§303(a)(17 U.S.C.*] Private carrier defined.—[Unchanged. See vol. 9, p. 7885.]

Notes of Decisions

Volume 9—p. 7885; Volume 11—p. 9363; Volume 12—p. 10352; Volume 13—p. 11049; Volume 14—p. 11567; Volume 15—p. 12166; Volume 16—p. 12085; Volume 17—p. 13497; Volume 18—p. 14258; Volume 19—p. 15473; Volume 21—p. 17038.

5. Private carrier defined.—[Vols. 9, 11-19, 21].—See also §203(c), notes.

The Commission may properly look to substance of the arrangements underlying purported private carriage in determining whether for-hire transportation is actually performed under the guise of an equipment leasing plan; and such determination may be made by looking to who has the right to control the transportation or by looking to other factors. While respondent corporation's basic equipment rental agreement stipulates that shipper-lessee has complete direction and control of the leased equipment, and not all the drivers on respondent driver-registry's list are used in those leased vehicles, those considerations are not material in determining the issue in instant case. Record is clear that equipment lessor and the driver registry regularly cooperate to provide both vehicles and drivers to a substantial number of shippers and that, in addition to transferring the ordinary burdens of transportation to those respondents, the shippers also allow the transportation to be controlled by them; resultant transportation constitutes for-hire, not private, carriage. —Empire Truck U-Drive-It, Inc., Investigation, 96 M.C.C. 29 (41).

Even if considered rock, debris and rubble (held not to be "property" for purposes of Commission jurisdiction) could be regarded as property, proposed transportation thereof from excavation and building demolition sites is not subject to Commission regulation under part II of the Act. Such debris has a negative value to, and is not purchased from, contractors who desire its removal; they are not concerned with any beneficial ownership thereof and, apparently, relinquish any nominal ownership when it is loaded and removed. Under facts presented, beneficial ownership in the debris, if there is such, rests in applicant and applicant would be transporting it in its behalf in the performance of a disposal service. Authority is not required for proposed operations; application dismissed.—Joray Trucking Corp. Common Carrier Application, 99 M.C.C. 109 (110-11).

Applicant's transportation of radioactive waste materials meets the definition of private carriage since applicant appears to have the beneficial ownership of the materials; in addition, applicant arranges for the storage and actual burial of the material, and since applicant's primary business is the rendition of a disposal service, its transportation of the radioactive contaminated waste is merely an incident of that service.—Long Island Nuclear Service Corp.—Common Carrier Application, 107 M.C.C. 885 (888-89).

Respondent shippers' transportation operations considered herein are determined to be bona fide private carriage exempt from economic regulation as they conform to the 2 criteria set forth in 368 US 370 (repeated herein) which require shippers to have the exclusive right and privilege of directing and controlling the transportation service and also assume in significant measure the characteristic burdens of the transportation business. Shippers' control of considered operations is established by the nature of agreements between all parties, manner in which they were entered into, and actual conduct of the challenged operations. Respondent shippers obtained suitable equipment and drivers by separate, unrelated arrangements to transport goods directly connected with respondents' primary nontransportation business. Such showing meets one criterion for considering involved operations to be private carriage. Respondent shippers established their assumption of characteristic burdens of transportation by application of a "test of substance" (see 92 MCC 728). Evidence of relationship between all parties, and shippers' responsibility for variable cost items, driver wages and dismissal, and use and maintenance of equipment show that respondents have assumed such burdens, which meets second criterion for considering involved operations to be bona fide private carriage.—Personnel Service, Inc.—Investigation, 110 M.C.C. 695 (704-11). (704-11).

Application of the "primary business" test as defined in §203(c) plainly shows that petitioner Church is a legitimate nontransportation enterprise. The nature of its functions makes it impossible for Church to avail itself of the options, herein stated, enabling business corporations to conform to part II of the Act. Having thus pierced the corporate veil, transportation activities of the Church are shown to be in furtherance of the Church mission and not for-hire service subject to regulation by this Commission. Because of the nature of petitioner's functions, the eleemosynary nature of the considered operation, and the probable economic consequences of a contrary finding, Commission holds that situation portrayed on this record may be treated as sui generis and that abundant justification is shown for treating involved Church affiliates as a single entity and operations on their behalf as private carriage in furtherance of a nontransportation enterprise.—Status of Certain Church Transportation, 112 M.C.C. 59 (62-3).

Transportation of antifreeze and related commodities by individual petitioners found to be private carriage as record shows that petitioners meet the two criteria for defining such carriage stated in 368 US 270, inasmuch as shipper exericses direct operational control over the involved transportation and also assumes the characteristic burdens of transportation, especially the financial risks of such operations. Fact that the shipper obtains both drivers and equipment from one source under one lease is not determinative of for-hire transportation and is effectively rebutted by a showing of shippers's control.—Ontario Company—Declaratory Order, 112 M.C.C. 211 (212-17).

See also Behnken Truck Service, Inc., Est.—Exbarge Traffic case, §203(a)(10), n. 5; Keller Industries, Inc.— Declaratory Order case, §203(c), n. 3.

Section 203. (a)(18) [§*303(a)(18) U.S.C.*] Broker defined.— [Unchanged. See vol. 9, p. 7887.]

Notes of Decisions

Volume 9—p. 7887; Volume 11—p. 9365; Volume 12—p. 10354; Volume 13—p. 11050; Volume 14—p. 11567; Volume 15—p. 12167; Volume 16—p. 12806; Volume 17—p. 13498; Volume 18—p. 14259; Volume 19—p. 15478; Volume 21—p. 17043.

1. **Broker defined.**—[Vols. 9, 11-19, 21].—The term "for compensation" must be read into the definition of broker; a broker provides its services "for compensation." Applicant's intent here is consistently to produce sufficient revenue from its brokerage activities to defray its total office expenses, to support its other nonrevenue produc-

ing activities, and to insure that it does not lose money; therefore, regardless of applicant's corporate status it proposes to conduct its brokerage operations within meaning of "for compensation" and must be licensed by the commission.—Automobile Club of R.I., Inc.—AAA Broker Application, 98 M.C.C. 540 (543).

Operations by defendant as a broker in arranging for the transportation of passengers at New York, N. Y., pursuant to a license limited territorially to that point, and as a purported "agent-employee" of affiliated motor carriers at points beyond the scope of the license, is found to be inconsistent. "Agent-employee of a carrier" within the meaning of the exclusion in §203(a)(18) of the Act is construed as virtually synonymous with "employee", and as requiring a continuity and character of service such that individual claiming status as such is part of the individual normal organization of the carrier served. When a carrier makes use of the facilities or personnel of a broker as its agent to promote, advance, or intercede in its arranging for charter tours, it would be an unusual situation where it could be claimed, with substantiation, that the broker is not engaged in brokerage operations by such intervention.—Manhattan Transit Co. v. Inter-City Tours, Inc., 113 M.C.C. 102 (108).

2. Construction and interpretation.—[Vols. 9, 11, 15].—See Passengers Transportalion in Special Operations case, §211(b), n. 30, for various types of brokers. See also Kerrville Tours, Inc., Broker Application case and T.N.M. & O. Tours, Inc. case, §211(b), n. 3.

Section 203. (a)(19) [§*303(a)(19) U.S.C.*] "Services" and "Transportation."—[Unchanged. See vol. 9, p. 7890.]

Notes of Decision

Volume 9—p. 7890; Volume 11—p. 9368; Volume 12—p. 10355; Volume 13—p. 11050; Volume 16—p. 12807; Volume 17—p. 13498; Volume 18—p. 14260; Volume 19—p. 15479; Volume 21—p. 17044.

1. Services and operations distinguished.—[Vols. 9, 11, 12, 19, 21].—The Commission, not the reviewing court, is charged with administration of the Act; and the delineation of what are transportation services is particularly within its competence and expertise. "Services" and "transportation" are defined by statute as including all vehicles and other facilities used in providing transportation or "in the performance of any service in connection therewith"; also, one of the prime purposes of the contract-carrier provisions is to provide services designed to meet distinct need of each individual customer, although the statute does not require that such services be necessary but rather that they be designed to meet individualized transportation needs. Services—in addition to over-the-road transportation of mobile homes—offered by applicant for a contract carrier permit meet all those tests in that, as a whole, they were designed with specific transportation needs of supporting shippers in mind; therefore, the Commission's finding that those services are transportation services within meaning of the statute is sustained.—National Trailer Convoy Inc. v. United States, 293 F. Supp. 630 (633-4)*.

2. Transportation defined.—[Vols. 9, 11-13, 16-19, 21].—In suit to set aside order granting authority in common carrier application proceeding, Commission finding that two services—in addition to line-haul movement of mobile homes—offered by applicant were "transportation services" within the Act and proper subjects for consideration, cannot be sustained when its sole rationale therefore was its decision in 103 MCC 482, a contract carrier application proceeding wherein transportation and nontransportation services were distinguished. In view of statutory distinction between common and contract carriers, i.e., proposed services of common carrier applicant must be "required by" public convenience and necessity whereas such services of contract carriers need not be "required," the Commission's reliance on 103 MCC 482 seems misplaced. Since the Commission failed to recognize statutory distinction between the two classes of carriers in determining that "transportation services" were involved, the order is set aside and the case remanded for further action consistent with the court's opinion.—National Trailer Convoy, Inc. v. United States, 293 F. Supp. 634 (636-7)*.

On reconsideration of application for contract carrier authority to transport house trailers, following remand in 227 F. Supp. 730, with instructions to distinguish between transportation and nontransportation services, an "incidental" to transportation standard is adopted, incidental meaning a minor adjunct to the prime matter, of lesser significance, but related and necessary to the complete effectuation of the transportation service. Thus, applicant's proposals to condition used trailers for over-the-road movement, connect electrical and plumbing facilities, and expand and set up "expando" home trailers at destination, are transportation services incidental to the movement of house trailers from one place to another; such services are, therefore, part of the total transportation service proposed and must be considered in disposition of the application.—Griffin Mobile Home Transporting Co. Contract Carrier Application, 103 M.C.C. 482 (498, 500-1)*.

On reconsideration, Commission found that applicant's provisions for winch service, air compressors to inflate flat tires, and repair or replacement of damaged trailer tires as needed, are necessary and incidental to line-haul transportation and are thus transportation services entitled to consideration in deciding if operating authority to transport housetrailers, in secondary movements, in truckaway service, should be granted.—Martin Trailer Toters, Inc., Common Carrier Application, 111 M.C.C. 841 (856-7)*.

Applicant seeks authority to transport liquid gilsonite sealer and its proposed service includes a spreading service performed from the same vehicle which performs the line-haul movement. Protestants contend that we cannot consider the spreading service, in passing upon the application, because it is a nontransportation service unrelated to the over-the-road transportation. Under §203(a)(19) of the Act the term transportation has a broader meaning than the mere carriage of persons and goods from place to place, since it embraces a variety of connected services as well. Thus, it includes services performed at origin points while a line-haul movement is in progress; and services performed at destination points, after a line-haul movement has been completed. Services which are necessary and incidental to the line-haul transportation come within the definition of transportation and services contemplated by §203(a)(19) of the Act. It is clear on this record that spreading the sealer on the surface is the most feasible means of accomplishing the delivery of this commodity. We see no reason to force shipper to make private arrangements for any other methods of delivery when applicant seeks to fulfill shipper's requirements by expeditiously providing the complete service shown to be needed.—W.S. Hatch Co. Extension—11 States 108 M.C.C. 853 (860, 862). (But see dissent).

The fact that protestants have chosen not to perform this spreading service does not prevent it from being a transportation service, for under the Act it is clear that transportation services can include those services which carriers are not legally obligated to perform as part of the line-haul movement. This does not mean, however, that we will certificate every applicant who proposes to render any additional service beyond the line-haul movement, for we are aware that some applicants might devise schemes to offer novel and unneeded services as a means of gaining entry into the business of for-hire motor transportation. Accordingly, before we will certificate an applicant proposing extra services beyond the line-haul transportation, we will satisfy ourselves that those services are necessary and incidental to the line-haul operation. The determination of what is a necessary and incidental service can vary with the facts of each particular case, so that we will be obliged to scrutinize each application on its own merits.—Id., p. 861.

Carrier's provision of mobile storage bins to shippers or receivers of cement is an "extra" or "accessorial" service requiring specific tariff or schedule provision therefor, and not an ordinary or normal incident of line-haul service.—Chemical Leaman, Matlack, and M. & M.—Investigation, 118 M.C.C. 238 (243).

Section 203. (a)(20)-(21) [§*303(a)(20)-(21) U.S.C.*] Interstate operation; Foreign operation.—[Unchanged. See vol. 9, p. 7893.]

Section 203. (a)(22), (23) [*§303(a)(22, 23) U.S.C.*] Migrant farm workers.— [Unchnaged. See vol. 17, p. 13499.]

Section 203. (b) [§*303(b) U.S.C.*] Vehicles excepted from operation of law.—[Unchanged. See vol. 21, p. 17046.]

Notes of Decisions

Volume 9—p. 7894; Volume 11—p. 9371; Volume 12—p. 10356; Volume 13—p. 11051; Volume 14—p. 11567; Volume 15—p. 12169; Volume 16—p. 12807; Volume 17—p. 13499; Volume 18—p. 14263; Volume 19—p. 15480; Volume 21—p. 17046.

2. Construction and interpretation.—[Vols. 12, 13, 15-19, 21].—In suit to enjoin and set aside Commission order holding that carriers of certain pre-cooked or cooked poultry commodities are not within the partial exemption of §203(b6), the legislative history of 1958 amendment thereto is convincing that Congress intended for cooked poultry to be an exempt commodity under the statute, as amended, and the court so holds. In reaching a conclusion contrary to the Commission, the court is not unmindful of deference due the agency's construction of a statute which it is charged with administering. But as the Commission admitted, the question of a statute's construction in light of its legislative history is one of law; and a reviewing court is not obliged to stand aside and rubber stamp its affirmance of an administrative interpretation that it finds is contrary to Congress' intent. Since material facts in instant case are undisputed, and the application of §203(b6) to them is conceptually a matter of law, remand to the Commission for further consideration is not necessary. The Commission's order is enjoined and set aside.—Gold Kist, Inc. v. United States, 339 F. Supp. 1249 (1254-5, 1256)*.

Commission found that railroads may substiture motor-for-rail service for transportation of commodities exempt from economic regulation under §203(b)(6) without obtaining special permission or relief from other rules and regulations. This applies where motor service is substituted for a part of the rail service; charges are based on published all-rail rates for the entire movement; commodities move on rail bills of lading between rail-served points and have prior or subsequent to the rail movement; railroads accept responsibility for lading; and schedules show the exact nature of service to be performed.—Substitution of Motor for Rail Serv. & Publ. of Rates, 341 I.C.C. 88 (96-102).

The language of §203(b)(5) is not so clear and unambiguous that it should not be subject to interpretation by the Commission. —Cache Valley Dairy Assn. Investigation of Operation, 96 M.C.C. 616 (619).

In enacting P.L. 90-433 referring to §203(b)(5) of part II of the Act dealing with the exemption from economic regulation accorded motor vehicles controlled and operated by agricultural cooperative associations or federations, although the Congressional amendment does not confer specific authority on the Commission to prescribe rules and regulations to implement the amendment, Congress recognized that proper administration of the amendment would require promulgation by the Commission of implementing rules and regulations. Thus the legislative history of P.L. 90-433 obligates the Commission to establish reasonable and necessary rules and regulations designed to implement its requirements.—Implementation of Public Law 90-433—Agricultural Cooperative Transportation Exemption, 108 M.C.C. 799 (804).

See also I.C.C. v. Milk Producers Marketing Co. case, §203(b), n. 45; United States v. Chartered Bus Service, Inc. case, §203(b), n. 32.

20. Casual, occasional, reciprocal transportation.—[Vols. 9, 11, 12, 15, 17-19, 21].—As held in 33 MCC 69, casual, occasional, or reciprocal transportation of passengers when sold, offered for sale, provided, furnished, or arranged for by a third party intermediary for compensation or as a regular occupation or business, is not within the §203(b9) exemption. Therefore, since applicant (engaged in assembling groups of passengers and leasing a vehicle to each group for the purpose of commuting to and from their place of employment) as a third party intermediary brings together the driver and the passengers for compensation, the §203(b9) exemption does not apply to those who drive its vehicles. Furthermore, as "repeat" drivers, it is doubtful that the drivers involved can otherwise qualify as casual or occasional transporters of passengers.—Monarch Associates, Inc., Common Carrier Application, 107 M.C.C. 277 (283)*.

25. Carriage of newspapers—[Vols. 9, 11, 12, 14, 15, 17].—Rolls of newspaper inserts printed in continuous lengths on one side only, which are to be printed on other side and cut for insertion in newspapers, found not to be "newspapers" and not embraced by exemption of §203(b) since they are not in a form ready to be brought into the hands of the public (see 71 F. Supp. 991).—Southern Express, Inc., Investigation of Operations, 113 M.C.C. 628 (631).

32. Transportation of school children.—[Vols. 9, 19, 21].—Issue presented in civil suit against bus company which transported college students through several states without having a certificate or permit to do so, and which contends all that transportation is exempt under §203(b)(1), is the statutory construction of "school children" and whether or not Congress intended that term to include college students; yet, legislative history of the Act and amendments provides no clue to Congress' intent, and a search into judicial interpretations of §203(b) reveals no statutory construction of the term "school children" by district or appellate courts. However, contemporaneous construction of the Act by the Commission is entitled to great weight and respect and should not be overturned by the courts unless it is arbitrary or clearly erroneous; and the Commission's construction of term "school children" in §203(b1), i.e., that it does not include persons attending a college or university, was not arbitrary or clearly erroneous. Thus, the transportation of college students not being within the exemption, the bus company was subject to civil forfeiture proceeding under §222(h); Commission motion for summary judgment, granted.—United States v. Chartered Bus Service, Inc., 329 F. Supp. 1073 (1074, 1076-7).

Only operations, which involve schoolbuses used regularly and exclusively for transportation of schoolchildren and their teachers in school-related activities, sponsored and supervised by school authorities, are exempt under this provision of the Act. And in deciding whether a trip is directly connected with school-related activities, the determinative factor should be the primary purpose of the trip itself; and neither practice of having parents underwrite the cost of such trip, nor presence of a reasonable number of parents on the bus, acting as chaperones, should defeat this exemption. However, to extent applicant uses vehicles which are not utilized exclusively as school buses, such operations are not exempt; fact

State of New Jersey prescribes different physical specifications for charter buses than for schoolbuses does not operate to change scope of this exemption. Furthermore, essentially sightseeing trips, which are not directly related to school functions and are not supervised or sponsored by school authorities, do not fall within the scope of this exemption, although they may be composed of school children.—Pat & Gordon, Inc.—Charter, 102 M.C.C. 553 (556-8).

Regulation (49 CFR 1047.2) adopted providing that "§203(b)(1) of the Act shall not be construed as being inapplicable to motor vehicles being used at the time of operation in the transportation of school children and teachers to or from school, even though such motor vehicles are employed at other times in transportation beyond the scope of the exemption".—Schoolbus Exemption, 113 M.C.C. 258 (288, 293).

Commission found that college students are not embraced in the phrase "schoolchildren" as employed in §203(b)(1) as previously stated in 110 MCC 423, and transportation of such students herein is unauthorized interstate for-hire transportation. Respondent was ordered to cease and desist from such operations.—Dorsey Bus Co., Inc.—Investigation of Operations, 113 M.C.C. 574 (576-8).

Dual use of buses as both schoolbuses and commercial buses does not void the applicability of schoolbus exemption in §203(b) of the Act. Commission's decision interpreting applicability of schoolbus exemption does not affect the power of the Department of Transportation to regulate for-hire schoolbus operations.—Schoolbus Exemption, 114 M.C.C. 531 (533-4)*.

35. Taxicab operation.—[Vols. 9, 11, 12, 14-18].—The essential characteristic of a bona fide taxicab service, as distinguished from special or charter operations, is its inherently local nature; it is ordinarily conducted within a municipality or township and immediate environs thereof. However, establishment of a rigid mileage limit beyond which an operation will not be considered a bona fide taxicab service is neither necessary nor desirable; in each case consideration must be given to, among other factors, the size and population of the base city or town, the extent of development of suburban or nearby communities, and the distances involved.—D & M Taxi Co., Inc., Common Carrier Application, 96 M.C.C. 439 (445).

Even under the most liberal application of those standards, transportation between Fort Dix, N.J., or McGuire Air Force Base and New York City cannot be considered a local service; operations to the Borough of Manhattan involve a cross-country haul of at least 50 miles, and those to Brooklyn and La Guardia and Kennedy airports even greater distances. Moreover, the substantial volume of service provided by protestant buslines indicates that taxi service is not the primary mode of transportation between those points. And while distances to Philadelphia are only some 28 miles to the city center and somewhat further to the airport, development of the intermediate communities is not such as to constitute Dix and McGuire points within the immediate environs of Philadelphia; also, again, a large number of persons apparently travel in vehicles other than taxicabs. Therefore, entire proposed operation between those military bases and surrounding area, on one hand, and the New York and Philadelphia airports, on the other, falls outside scope of the §203(b2) exemption.—Id., pp. 445-6.

The essential characteristic of a bona fide taxicab service as distinguished from special or charter operations is its inherently local nature; taxicab service is ordinarily conducted within a coporate municipality or commercial environ. Limousine service between Hartford, Conn., and points in eight states is not encompassed by the exclusion in §203(b2) of the Act.—Cotter Garage Corp. Common Carrier Application, 113 M.C.C. 589 (594); Airfield Service Co. Ext.—Charter Operations, 117 M.C.C. 165 (169)*.

40. Transportation incidental to aircraft transportation.—[Vols. 11, 14, 15, 17-19, 21].—Partial exemption of motor carriage of persons or property when incidental to air transportation, provided in §203(b)(7a), merely exempts pickups and deliveries within "terminal area" of an airport for the purpose of servicing air carriers at that airport;

and such terminal area is generally defined as the area within a 25-mile radius of the airport. Therefore, when one defendant carrier has no interstate operating authority and the other holds general-commodity authority between named Michigan airports and two airports at Chicago, Ill., they may legally transport between Michigan airport and points within 25 miles thereof goods which are moved by air, but they must have express authority to transport goods picked up locally at Michigan points all the way to a Chicago airport. Mere ultimate relationship to air transportation does not alone suffice to bring defendants' motor carrier operations to and from the Chicago airports to and from points in Michigan within the incidental-to-air exemption.—I.C.C. v. Howard, 342 F. Supp. 1112 (1115-6).

Motor carrier transportation of passengers having a prior or subsequent air movement is exempt under §203(b)(7a) of the Act when performed within a 25-mile radius of the pertinent airport or within a muncipality any part of whose commercial zone, as defined by the Commission, falls within such radius (95 MCC 526); also, in the absence of through routes or common arrangements between participating carriers such intrastate transportation is exempt (98 MCC 362). Thus, although applicant may intend to handle some passenger transportation on through tickets or under common arrangements with air carriers for movements beyond a 25-mile radius of the International Airport at Anchorage, Alaska, the evidence does not reflect or support such a conclusion. Authority for proposed service is not needed on this record and application denied.—Anchorage Transit System, Com. Car. Application, 98 M.C.C. 775 (776-7).

Transportation to qualify as transportation incidental to transportation by aircraft within meaning of §203(b)(7a) "shall be performed on a through air bill of lading covering, in addition to the line-haul movement by air, the collection, delivery, or transfer service performed by the motor carrier". Fact defendant issued no bill of lading, but marked his transportation charges on air bill, does not mean that shipments moved on air bill from point of pickup; on the contrary, since the air bill was only executed after air carrier received physical custody of goods, there was no bill of lading for defendant's operations, and his collection service was not covered by air bill of lading. Therefore, although defendant transported shipments for subsequent movement by air to Stapleton Airport at Denver from Golden, Colo., within 25 miles of airport, such transportation is not exempt from Commission regulation.—Colorado Cartage Co., Inc. v. Murphy, 100 M.C.C. 745 (748-9).

The unique characteristics of air cargo transportation and the essential idea of related trucking within and beyond the air terminal areas suggests a need for authorization of motor carriers which specialize in air-truck traffic. In instant application both the rapid population growth and increased air-truck operations indicate need for applicant's proposed operations within present New York City terminal area and to Calverton, N.Y., in order to provide supporting shippers and receivers with a continuing and complete service. Proposed service is not incidental to transportation by aircraft, since bulk of applicant's service is performed on behalf of shippers and consignees, rather than on behalf of air carriers and since most shipments move pursuant to arrangements between applicant and shippers instead of between applicant and air carriers; furthermore, there is no air bill of lading covering applicant's operations on outgoing traffic since the air bill is only executed when air carrier receives physical custody of the shipments. Authority granted, restricted to shipments with prior or subsequent movement by air.—Commodity Haulage Corp. Common Carrier Application, 106 M.C.C. 135 (139-41).

Applicant performs collection, delivery and transfer services within the Philadelphia air terminal on behalf of an air freight forwarder. Approximately 5 percent of the traffic collected by applicant which is indeterminable at the time of collection and which is turned over to the forwarder does not move from the Philadelphia Airport by air, but is transshipped by motor vehicle in applicant's service pursuant to its certified authority. This application was filed for operating authority for this small portion of traffic handled by applicant with an accompanying motion to dismiss on the ground that the proposed operation is exempt from economic regulation pursuant to §203(b)(7a) of the Act. The Commission found that as long as applicant believed in good faith that the motor segment of the total service involved is but a part of continuous motor-air movement, then the cover of the partial exemption is maintained. Application dismissed.—Airline Freight, Inc., Extension—Philadelphia Air Terminal Area, 108 M.C.C. 197 (199, 201).

§203(b)(7a) permits substitution of motor-for-air transportation only in situations resulting from emergency conditions. Thus, only emergency situations or conditions resulting from causes beyond the control of the direct air carrier, and not those stemming from causes beyond the control of the air forwarder or motor carrier can bring substituted motor-for-air service within the ambit of the partial exemption. Therefore, overlooking of space by the direct or indirect air carrier does not create the type of "emergency" situation contemplated by the regulations. To determine otherwise would open the door to practices whereby an air freight forwarder might knowingly tender to an air carrier traffic in excess of the latter's space capacity, and then claim the benefits of the partial exemption to have the traffic move in unregulated surface transportation. This situation would be virtually unpoliceable, and the possibility of abuse far outweighs any benefit to be gained from a contrary construction.—Id., pp. 202, 203.

This proceeding embraces two others; all applicants seek permits to perform contract carriage on behalf of direct and indirect (air freight forwarders) air carriers. The threshold question to be determined by the Commission is the extent to which air carriers, serving the general public both directly and indirectly, may utilize for-hire motor carrier transportation services without subjecting themselves to the regulatory provisions of the Act. It was found that the proposed use of applicants' for-hire motor transportation services by the direct and indirect air carriers extends to points beyond the terminal area of the air freight forwarder, and therefore, such service cannot be construed as being incidental to air within the meaning of §203(b)(7a) and is thus not exempt from economic regulation by the Commission. Applicants' proposed service on behalf of and beyone the terminal area of the air freight forwarder constitutes a line-haul operation clearly requiring specific authorization for its lawful performance pursuant to part II of the Act.—Theodore Savage Contract Carrier Application, 108 M.C.C. 205 (209, 210)*.

To clarify the relationship between air freight forwarders and motor carriers, regulation 49 CFR 1082.1 was promulgated whereby an air freight forwarder could receive from, or turn over to, authorized motor carriers shipments the motor transportation of which does not come within the partial exemption of §203(b)(7a). This regulation provides that air freight forwarders and motor carriers may perform connecting-line service from or to points outside the air carrier's air terminal area, provided there is an attendant separation of responsibility as between the air and surface carriers. Since the rule permits only independent service, participation in such air-motor movements by motor contract carriers under contract with the air freight forwarders (and hence under such forwarders' continuing responsibility) clearly would be inappropriate.—Id., pp. 211, 212.

On reconsideration, both applications for authority to transport ex-air shipments of general commodities between numerous Kentucky Counties, on the one hand, and, on the other, three airports, were handled under consolidated proceedings. Because of unique characteristics of air cargo transportation and the essential idea of related trucking within and beyond air terminal areas, there exists a need for authorization of motor carriers which specialize in air-truck traffic; both applicants specialize in air-truck traffic, while only one of three protestants specializes in such traffic, and only a minor portion of all three protestants' total revenue is derived from ex-air traffic transportation. Because existing motor common carriers fail to expedite movements of ex-air shipments causing costly delays and because no specialize for-hire service is available for transportation of ex-air shipments, shippers have been forced to use private carriage. The present difficulties experienced by shippers indicate that the issuance of authorities in this specialized field of motor carriage in the involved counties has lagged behind demand; authority granted to both applicants.—Turner Expediting Service Extension—Montgomery County, Ky., 110 M.C.C. 342 (344, 348, 349)*.

Petition to remove all points in indicated counties from exempt air-passenger zone denied. Petitioners present no evidence to prove the distances traveled within present zone are not subordinate to prior or subsequent air travel and a grant of authority on grounds other than this would lead to confusion and uncertainty as to present rule. There is not a sufficient showing of change in circumstances since adoption of these regulations to warrant narrowing of limits of present zone.—Exempt Zone—LaGuardia and Kennedy Airports, 111 M.C.C. 284 (288)*.

Motor vehicle transportation of property having prior or subsequent movement by air and consisting of collection and distribution and performed within limits of a terminal area is found to be bona fide pickup and delivery service incidental to aircraft transportation and exempt from economic regulation by this Commission pursuant to §203(b)(7a). Such service is line-haul or peddle service subject to regulation when performed beyond such terminal area limits. Airport terminal area limits are to be delineated by the 25-mile "rule of thumb" radius unless considerations of community homogeneity, as herein defined, require extension. In instant case, terminal areas for Weir Cook Municipal Airport, Indianapolis, Ind., and Atlanta Muncipal Airport, Atlanta, Ga., are hereby prescribed in accordance with such guidelines. 49 CFR 1047.40 is modified to reflect these findings.—Motor Transp. of Property Incidental to Air, 112 M.C.C. 1 (15, 17-23). Terminal area of Bradley Field, Conn., includes points within a 25-mile radial area, including points in Massachusetts.—Key Trans-port Service, Inc., 98 M.C.C. 628 (630); exempt zone of Savannah, Ga., airport redefined to include all portions of Hilton Head Island, S.C.—Exempt Zone (Passengers)—Savannah, Ga., Airport, 114 M.C.C. 804 (805).

Common carrier operations performed on carrier's own bill of lading from consignor to a consolidator found not to have been within the incidental-to-aircraft exemption of §203(b)(7a) of the Act. Cease and Desist order entered.—Buck's Express Service, Inc.—Investigation, 115 M.C.C. 353 (356).

Regulations governing the motor transportation of passengers incidental to transportation by aircraft is within the exemption of §203(b)(7a) provided it is confined to the transportation of passengers that have had or will have an immediately prior or subsequent movement by air and is performed within an area 25 miles of the boundary of the airport, including all of any commercial zone, any part of which falls within that area. However, where passengers operations from and to an airport are entirely within a single state, the transportation being performed for and paid for by the passenger and not the airline, and there are no through tickets or other through arrangements with the airline or with interstate motor carriers, the operations are in intrastate commerce and not subject to regulation under the Act. This is true even if it is known that the passengers have come from or are destined to points beyond the state.—Portland Airport—Petition for Declaratory Order, 118 M.C.C. 45 (47).

Motor carriers will qualify for the substituted motor-for-air exemption (an incidental transportation) when they transport air passengers that have been grounded and if (1) the air carrier bears the expense of the substitute transportation, and (2) there exists an emergency situation (adverse weather conditions, equipment failure, or other causes beyond the control of the air carrier) as specified in 49 CFR 1047.45(b). Baggage intended to accompany air passengers but which is misplaced, delayed, or misrouted en route, may be transported from the destination airport under the exemption to the same extent as passengers. Baggage not intended to accompany passengers is subject to the same interpretations and regulations as the transportation of property.—Id., p. 48; carriage of general commodities between indicated cities when restricted to "emergency" situations in which airline shipper is prevented from delivering such traffic to airport destinations by conditions beyond its control constitutes exempt substitution of motor-for-air service.—Hill Trucking Co., Ext.—Jumbo Jets, 111 M.C.C. 742 (744);

Murphy Surf-Air Trucking Co., Inc., Ext.—Kentucky, 111 M.C.C. 570 (573)*.

See also Howard Contract Carrier Application case, §209(a)(1), n. 25.

45. Operation by or for agriculture cooperative associations.—[Vols. 19, 21].—Activities of coopjative association's transportation division, in extensive for-hire transportation of general commodities for nonmembers throughout the United States, are not exempt from regulation by §203(b)(5), as contended; such activities are not incidental to the milk and dairy business operated by the cooperative within a comparatively small area in Kansas and Missouri, and are not shown to be necessary to effective performance of its primary activity as a "cooperative association as defined in the Agricultural Marketing Act". Transportation performed by exempt agricultural cooperative must be incidental to its primary statutory activity and necessary to effective performance thereof; and, since the only claim of necessity is that profitable interstate truck operations are needed to sustain cooperative's money-losing primary activity, motor carrier operations in issue do not meet that incidental and necessary test. A cooperative cannot engage in interstate transportation, without authority, for the reason that its primary activities are unprofitable.—I.C.C. v. Milk Producers Marketing Co., 405 F. 2d 639 (640-42)*.

Furthermore, 1968 amendment to §203(b)(5) codified the incidental and necessary rule which the courts had applied theretofore and limited an agricultural cooperative's transportation for nonmembers to 15 percent of its total annual interstate transportation, measured in tonnage. That amendment, enacted after filing of instant complaint but before the trial, did not unconstitutionally deprive appellant-defendant of its property without due process of law, as it argues; the Commission did not seek, and the three-judge district court did not enter, considered injunction under or in reliance on the 1968 amendment. Issue before the trial court was whether questioned activities of defendant's transportation division were exempt from Commission regulation under the law as it existed when suit was filed; the court correctly held that no constitutional question was presented and that it had authority to grant the injunction; affirmed.—Id., pp: 640-2.

In suit to enjoin association from conducting motor carrier operations that it claims are within "agricultural cooperative exemption," evidence shows that defendant is not a bona fide agricultural cooperative association as defined in the Agricultural Marketing Act and, thus, is not entitled to benefits of the exemption accorded such cooperative associations or federations thereof by §203(b)(5). In addition to fact that defendant was not substantially controlled by its members, record shows that it engaged in for-hire carriage for nonmembers that was not necessary and incidental to that performed for members, and has consistently hauled nonmember tonnage in excess of 15 percent of its total interstate tonnage. While defendant argues that the Commission only recently implemented the 15-percent requirement with regulations, a statute which does not specifically require implementation through regulation is effective even though there are no regulations; hence, defendant has been in violation of the requirement since its general manager took control. Defendant association, and the manager, permanently enjoined from continuing such unauthorized motor carriage.—I.C.C. v. Southwest Marketing Association, 315 F. Supp. 805 (808-12, 813-4).

In view of all the circumstances and the doctrine of primary jurisdiction, the court will stay its hand on motion to modify its order enjoining agricultural cooperative from engaging in unlawful for-hire carrier operations. As required by applicable law, defendant cooperative applied to the Commission for authority, as transferee, to acquire motor carrier certificate and, pending Commission decision on its application, holds temporary authority to lease the certificate; thus, administrative agency should determine whether agricultural cooperative may hold temporary authority to lease certificate that it has contracted to purchase and, conversely, whether the Commission can issue or approve transfer of a certificate to a qualified cooperative, either on temporary or permanent basis. The court will not advise the agency, but it must observe that no statute or controlling court decision prohibits an agricultural cooperative association from acquiring a motor carrier certificate, if otherwise qualified. Court proceedings stayed pending Commission decision or further order.—I.C.C. v. Milk Producers Marketing Co., 320 F. Supp. 738 (742)*.

Under the §203(b5) exemption, an agricultural cooperative's transportation for "nonmembers who are neither farmers, cooperatives nor associations thereof" is limited in two ways: (1) to 15 percent of its total annual interstate tonnage and (2) to the "incidental and necessary" standard of the statute. Therefore, since the United States is specified as a nonmember, and since it is not included in description "farmers, cooperatives nor associations thereof," defendant cooperative's transportation for the government is subject to the 15 percent limitation; and defendants concede that, if the 15 percent limitation is applicable, then the statutory "incidental and necessary" limitation also applies to such transportation. Furthermore, as applied to defendants in instant injunction proceeding, §203(b5) does not violate their constitutional protections of due process and equal protection of the laws.—I.C.C. v. Big Sky Farmers & Ranch. Mkg. Coop. of Montana, 321 F. Supp. 79 (82-3)*.

In enacting the aricultural cooperative exemption, Congress did not intend to allow agriculture cooperative associations to engage indiscriminately and without restriction in the general trucking business at expense of regulated motor carriers. Though transportation supplied by such associations need not originate or end at a farm in every case, but may include transportation to market of farm products delivered by farmers to a cooperative and return transportation of farm supplies to member cooperatives for resale, to meet the statutory definition of an agricultural cooperative and thus qualify for the exemption an association (1) must be composed of member farmers acting together for their mutual benefit as producers of farm products in processing, preparing for market, handling, or marketing the farm products of persons so engaged, or of farmers acting together in purchasing, testing, grading, distributing, or furnishing farm supplies or farm business services, and (2) must not deal in farm products, supplies, and business services for nonmembers in an amount greater in value than the total amount of such business transacted with or for members.—Agricultural Transp. Assn. of Tex., Investigation, 96 M.C.C. 293 (297)*.

While "farmers" includes not only individuals but also corporations, partnerships, and other business entities engaged in farming operations, and their participation in farming operations may be either as actual producers of agricultural products or as owners of farms, persons not engaged in farming and having no agricultural activities whatever clearly are not eligible for membership in an agricultural cooperative, even though they may use farm products as raw materials in their manufacturing processes. And while inclusion of a minority of nonfarmers in a farm cooperative does not automatically cause it to lose its status as a bona fide agricultural cooperative, provided it is substantially owned and controlled by farmers, it is noteworthy that the Farm Credit Administration, in administering its responsibilities under the Agricultural Marketing Act, looks to whether 90 percent of the voting media of a cooperative is held by either farmers or agricultural cooperative associations.—Id., pp. 297-8.

There must be a functional relationship between the farmer and the traffic transported for him, since the services contemplated by the Marketing Act are farm services and must by their very nature be functionally related to the farming activities of a cooperative's members; to hold otherwise would ignore the purpose of that act, which is to assist cooperatives in providing farm services for farmers. But if the cooperative is performing transportation functionally unrelated to farmer members' farming activities, the revenues derived therefrom must be treated as nonmember business for purpose of determining compliance with the third proviso of §1141j of the Marketing Act, under FCA's ruling that in determining eligibility for loans under that act all business transacted with members that are neither producers not cooperative associations shall be deemed to be nonmember business.—Id., p. 299.

Whether a farm cooperative association does or does not conduct nonmember business no greater in value than that handled as agent for its own members can be determined only by examination of its total business activities over a long enough period to establish the normal and usual ratio between its member and nonmember business. Of three surveys of respondent's business offered in evidence, the third, which includes several months between institution of investigation and opening of the hearing, covers the longest time and may be considered the best available for that purpose, even though respondent was apparently spurred by commencement of the investigation to show a more favorable ratio of member to nonmember business than had theretofore persisted. As that survey shows that 55 percent of respondent's revenues are derived fom its members, the members' status must be examined to determine whether their traffic can validly be considered members' traffic within meaning of the Agricultural Marketing Act.—Id., pp. 300-1.

While there is no question as to validity of member status of five agricultural cooperatives which because of their close association with farming can be considered "farmers" within meaning of the Marketing Act, or of six members who operate farms or feed lots and have tendered only unprocessed agricultural commodities for transportation, the volume of traffic tendered by those members has been comparatively small. By far the largest part of respondent's traffic is transported for members whose feed lots and farms provide a part, but not all, of the livestock or produce which is processed by them and subsequently tendered to it. At time of hearing, 22 of respondent's 47 members were engaged in packing or fabricating meats and meat products, and though part of their livestock requirements was obtained from proprietary feed lots, in most instances they purchased the majority of their livestock from outside sources; and at least one such packer cannot be considered an eligible member because its livestock was procured from feed lots operated by its stockholders rather than from ones which it owned or operated itself.—Id., pp. 301, 303.

Thus, while respondent was organized in form of a lawful cooperative association, since most of its members own or operate farms, its adherence to matters of form has not extended to matters of substance, since the transportation provided its members has seldom been functionally related to their farming activities. As only an inconsequential part of its revenues has been derived from transportation performed on behalf of its members as legitimate member business, it is not lawfully constituted as an agricultural cooperative pursuant to requirements of the Agricultural Marketing Act. Cease and desist order entered.—Id., pp. 303, 304.

On reconsideration, however, majority of respondent's membership found to consist of persons engaged in business as packing houses and food processors or canners who either separately or as an incident of or in combination with such business, participate in varying degree, directly or indirectly, in farming or ranching functions, many of which are governed by so-called grower contracts under which crops are grown for member-processor by someone else. While mere existence of grower contract does not alone confer "farmer" status upon processor, it does not preclude finding member-processor a "farmer". Grower contracts vary widely according to terms thereof covering kind and number of processes shifted from one party to the other, allocation of responsibility, assumption of risk or loss, furnishing of raw materials, financing arrangements, and degree of supervision exercised; and although general guide lines are set forth for use analyzing such contracts in the future, precise nature of contracts involved are not set forth and Commission assumes (for purposes of this case only) that all members whose relationship to farming is derived through grower contracts are "farmers."—Id., 102 M.C.C. 527 (543).

Apart from any percentage imbalance between member and nonmember business, there is no basis for finding that transportation performed for nonmember meat packers and food processors is lawfully performed in furtherance of primary statutory activity of respondent under "incidental and necessary" standard adopted in 350 F. Supp. 252; the rationale of that case is that an association's transportation of products not qualifying as membership traffic, must, as a matter of fact, be shown to be incidental and necessary to performance of the association's primary activity before it properly can be undertaken under partial exemption of §203(b)(5). In instant proceeding, respondent has not shown that its transportation of nonmember traffic is incidental and necessary to its transportation of member traffic.—Id., p. 546.

On reconsideration entire Commission found that where a member's farm and his nonfarm related products are commingled so that the two classes of traffic cannot be identified or separated, the revenue derived therefrom must be pro-rated and considered as resulting from member business to extent that the transportation of member's products are proportionately related to his farming activities. However, such a pro-rata approach is adopted only when items involved are being carried for member in his capacity as a farmer; a member who is both a farmer and a processor cannot fairly rely upon an exemption for a "farmers" cooperative association, when he ceases to act as a farmer and functions instead as a processor. Thus, when items have been so extensively commingled and processed as to lose their identity as farm products, then as to those items, the member is no longer a farmer and their transportation is no longer a "farm business service."—Id., p. 548.

Upon reconsideration the entire Commission found that respondent's transportation of nonfarm-related traffic for nonmembers was "incidental and necessary" to its farm-related business and thus, exempt from economic regulation. Respondent is a farmer-owned and farmer-controlled cooperative association within meaning of Agricultural Marketing Act; its members, each having one vote, are all producers of dairy products; its officers and directors are dairy farmers; the products marketed by it are for its members who receive all proceeds after payment of costs; in addition, the amount of business transacted with nonmembers accounts for only 2.3 percent of its total revenue. Citing 350 F 2d 252, cert. denied, 382 US 1011, the Commission states that "a cooperative which otherwise meets in all respects the requirements of the Marketing Act definition lawfully may transport nonfarm related traffic on a for-hire basis for nonmembers to the extent*** 'incidental and necessary' to the performance of its primary farm related functions specifically authorized by that act".—Cache Valley Dairy Assn. Investigation of Operation, 103 M.C.C. 798 (799, 803-4)*.

Transportation performed for independent retail gasoline service stations, not as part of a return movement, but as a separate direct movement related to the activities of the cooperative only by the fact that the necessary equipment of the cooperative would otherwise be idle, is not exempt from Commission regulation. Although respondent is a cooperative association within the meaning of the Agricultural Marketing Act, it is performing direct transportation for nonmembers and is refunding excess revenues to these nonmembers; in addition, there is no incidental relationship between nonmember transportation and respondent's exempt transportation nor is there any indication that this transportation is necessary for the continued operation of motor vehicles by respondent. Accordingly, to the extent respondent is transporting such nonmember traffic in the manner described, its operations are not exempt.—Edgerton Coop. Oil Assn.—Investigation, 105 M.C.C. 100 (106, 8).

Pursuant to the enactment of P.L. 90-433 amending §203(b)(5) of the Act dealing with the exemption from economic regulation accorded motor vehicles controlled and operated by an agricultural cooperative association or federation of such associations, this Commission promulgated the following regulations to implement the Congressional enactment: §220 of the Act was amended by the addition of subsection (g) which specifically authorizes the Commission to inspect the books and records pertaining to motor vehicle transportation of certain cooperatives and federations; computation of tonnage in nonfarm-nonmember transportation allowed to be transported in any fiscal year by a cooperative association or federation of cooperative associations; overall limitation of nonmember transportation for compensation in any fiscal year; notice to the Commission of intent to perform nonmember transportation; time for filing and information required; from BOp 102 prescribed for use by those filing such notice.—Implementation of P.L. 90-433—Agric. Coop. Exemption, 108 MCC 799 (803).

This proceeding was instituted to prescribe regulations that will provide useful guidelines for those who seek in good faith to operate pursuant to the exemption from economic regulation which §203(b)(5) of the Act, as amended by P.L. 90-433, effective July 26, 1968, accords to motor vehicles controlled and operated by an agricultural cooperative association or by a federation of such associations. These regulations are not all-inclusive and are not intended to displace established administrative and judicial precedent respecting pseudo-cooperatives or the meaning of the statutory phrase "motor vehicles controlled and operated by" appearing in §203(b)(5). These are matters which may in the future properly be made the subject of supplemental rulemaking processes the need therefore later appear.—Id., p. 826.

Commission found that neither the Act nor the national transportation policy precludes the issuance of a certificate of public convenience and necessity authorizing operations as a common carrier by motor vehicle to an agricultural cooperative performing exempt transportation under section 203(b)(5) of the Act. Based on this finding, and a demonstrated need of the proposed service, the Commission granted American Farm Lines certain common carrier authority, concluded that AFL and other respondents had not been operating unlawfully, and reopened the United Agricultural Transportation Association of American Marketing Co-Op proceeding for further hearing. The Commission has determined that this proceeding involved an issue of general transportation importance.—American Farm Lines Common Carrier Application, 114 M.C.C. 30 (41-42)*.

See also Munitions Carriers Conference, Inc. v. American Farm Lines case, §222(b), n. 11.

50. Carriage of livestock, fish, agricultural commodities.—[Vols. 9, 11-19, 21].—While purpose of the 1958 amendment to §203(b)(6), which incorporated with modifications Administrative Ruling No. 107 of the Bureau of Motor Carriers, was to narrow the class of commodities due exempt status, it was expressly expanded to include cooked fish; and though cooked poultry is not specifically mentioned therein, explanatory floor remarks by member of the Senate committee and sub-committee that studied legislation to narrow the agricultural exemption, who was manager of bill to amend that amendment during its consideration by the Senate, are sufficient to establish Congress' intent to also include cooked poultry as an exempt commodity. Therefore, in suit to set aside the Commission's decision to the contrary, the court holds that Congress intended for cooked poultry to be exempt under §203(b)(6), as amended. It is also concluded, however, that all cooked poultry was not intended to be exempt; poultry items which would be nonexempt, if uncooked, do not automatically become exempt merely by cooking; thus, exempt status of precooked or cooked poultry items in dispute depends on whether they would be exempt if they were uncooked.—Gold Kist, Inc. v. United States, 339 F. Supp. 1249 (1252-5)*.

Since neither cut-up uncooked poultry, nor breaded or battered poultry, nor cut-up, uncooked poultry that is either breaded or battered, or marinated breaded and/or battered are mentioned in §203(b6) or Administrative Ruling No. 107, whether they are exempt "agricultural commodities" depends necessarily on the "continuing substantial identity" test promulgated by the Supreme Court in 351 US 49. Every change in a commodity does not require that it be nonexempt; a "manufacturing" change must produce a new and different product, and an article must emerge having a distinctive name, character or use. Dressed poultry is exempt under the statute, and, while considered poultry items are processed further than the dressed poultry, the changes they undergo are not so drastic as to change their substantial identity as poultry; therefore, poultry items in question are agricultural commodities within the §203(b)(6) exemption. Consequently, because it is concluded that each of the poultry items involved in instant case would be exempt if uncooked, and because Congress intended for cooked poultry to be an exempt commodity if it would be exempt if uncooked, the court holds that considered cooked or precooked, frozen or refrigerated poultry is within the agricultural exemption of §203(b); and that, therefore, motor carriers who transport those specific poultry items are exempt from economic regulation by the Commission. Order of the Commission, to the contrary, is enjoined and set aside.—Id., p. 1255-6.

In determining whether lactose and Culturemate (produced from milk) are exempt agricultural commodities under the "continuing substantial identity" test set forth in 351 US 49, incidental or preliminary processing does not result in a loss of the §203(b6) exemption; but a "manufacturing" deprives the commodity of its exempt status. Lactose is composed of milk sugar plus minute traces of protein and ash, and is produced by a process in which the milk sugar undergoes a change; however, while manufacture implies a change, every change is not a manufacture. The conversion of milk sugar into lactose, without adding any substantial amount of extraneous materials, involves a processing, but not any manufacturing; therefore, notwithstanding the processing changes, lactose retains its substantial identity as an exempt agricultural commodity.—I.C.C. v. Schaetzel, 339 F. Supp. 1345 (1346-7).

Culturemate, on the other hand, consisting of non-fat dry milk powder which comprises between 85 and 90 percent by weight of the product and the remaining 10 or 15 percent consisting of dry phosphate salts, dry pancreas extract, and small amounts of other products, has lost its original characteristics and has been manufactured into a new product. The addition of such a substantial amount of new materials to the dry milk powder produces a different article with its own distinctive name, character and use; thus, Culturemate is a new, manufactured product which is not exempt under the statute.—Id., p. 1347.

Act of 1958: [Vols. 19, 21].—Reevaluation of the whole record, including evidence concerning certain additional shipments introduced at further hearing, warrants finding that (in addition to "grandfather" rights under §7(c) of Transportation Act of 1958 which applicant was found entitled to in 84 MCC 637, on and since May 1, 1958, applicant has engaged in bona fide operation as a common carrier of (1) frozen fruits and vegetables from Portland and Hillsboro, Oreg., to Indianapolis and Southbend, Ind., and Reno, Nev.; and (2) frozen vegetables from Los Angeles, Calif., and Idaho Falls, Idaho, to Chicago; authority for continuance of such operation granted.—Consolidated Freightways Corp. of Del. "Grandfather" Application, 95 M.C.C. 220 (222-4, 228)*.

Applications under the "interim" provisions of §7(c) of Transportation Act of 1958 must be determined on basis of public convenience and necessity, but they differ from typical §207 applications in that operations during pendency thereof are authorized by law. While there is no doubt that applicant transported shipments of frozen fruits, frozen vegetables, and tea during the interim period, he was unable to produce shipper support for transportation of the frozen commodities; and, since the shipper of tea had moved from origin point of shipments during the interim period, need for continuance of that transportation is not shown, and present origin is outside the scope of the "interim" application. In addition, since record contains no evidence that applicant was engaged in transportation of bananas during the interim period, no authority can be granted therefor notwithstanding shipper support for proposed service. Applicant has failed to establish the right to authority sought under §7(c) of the 1958 Act.—Midwest Emery Freight System, Inc., Interim Application, 95 M.C.C. 642 (646-8).

Fish, including shellfish: [Vols. 16, 19, 21].—Upon petition, the Commission (Division 1) found that for-hire motor transportation of ground oyster shells is not within the partial exemption from economic regulation stated in §203(b)(6) of the Act. Although "oysters, with or without shells" are covered by this partial exemption, the shells at issue herein have ceased to be oysters as the living tissue in them has decomposed through the passage of time (in this case up to 3,000 years) and their only reasonable link to oysters is as possible fossils or relics. Therefore, questions as to whether these shells are "manufactured of" or "processed from" oysters, or their intended use are irrelevant and immaterial. In support the Commission cited 66 MCC at 123, wherein it is stated that once the oyster has been removed,"the shell alone cannot be considered as any longer a variety of shell fish".—Grant's Trucking Co.—Petition—Oyster Shells, 118 M.C.C. 892 (894-5).

Fruits, juices and vegetables: [Vols. 18, 19, 21].—The transportation of cherries in brine is exempt from economic regulation within the purview of §203(b)(6), even though "cherries in brine" is not specifically mentioned in administrative Ruling No. 107, 49 CFR 210.25 (now incorporated in §203(b)(6)), which lists as "exempt" fruits and berries shipped in brine to retain freshness; in addition the "continuing substantial identity" test, used by the Supreme Court in 351 US 49, in deciding when an exempt agricultural product is subject to economic regulation, favors position that transportation of cherries in brine is within exemption and, therefore, not subject to regulation.—Maxwell Co. Extension—Cherries in Brine, 100 M.C.C. 10 (12).

Grains: [Vols. 18, 19].—Petitioner seeks declaratory finding that a commodity described as "wild birdseed bell" is exempt from economic regulation under §203(b6) of Act as amended by Transportation Act of 1958. Bell is made up of various grains (seeds) which in a loose state are exempt from economic regulation. However, to make bell, corn sirup, which is not an exempt commodity and which is used solely for its adhesive properties, is added to mixture of these seeds and the product is poured into a mold resembling a bell. A wire is placed inside bell to allow bell to be hung on inside of birdcage. Protestant claims that adhesive additive and wire placed inside mold results in a product that has acquired new form, qualities, properties, value and combinations which takes this commodity out of exempt commodity status of §203(b6) of Act. Relying on substantial identity test enunciated in 351 US 49 Commission concluded that essential use of seeds does not change; both before and after processing, it is birdseed. Only the form changes. Consequently, there is a continuing substantial identity between loose birdseed and the birdseed mixed with an adhesive to form a bell; therefore, "wild birdseed bell" is an exempt commodity within purview of §203(b6) of Act.—Petition for Declaratory Order—Wild Birdseed, 110 M.C.C. 406 (407).

See also Farmers Union Coop. Marketing Ass'n v. State Corp. Commission of Kans. case, §202(b), n. 5.

Livestock; poultry; products thereof: [Vols. 16, 19].—Transportation of considered poultry commodities is not exempt under §203(b6) of the Act. These commodities are not merely cleaned, dressed or cooked, but are further processed by the complete grinding of all solid, edible portions; in addition, the liquid part is spray-dried to form a powder and fatty portions are otherwise rendered or spray-dried. Futhermore, under these processes the poultry undergoes a drastic physical change and is transformed into several new and different articles with characteristics unlike those of poultry. Thus, the resulting poultry products or byproducts do not retain a continuing substantial identity with the initial agricultural commodity and are, in fact, so thoroughly processed that they must be treated as "manufactured" products, which are not exempt under §203(b6).—Henningsen Foods, Inc., Petition for Declaratory Order, 106 M.C.C. 286 (290).

Nuts: [Vols. 18].—The transportation of ground pecan shells in motor vehicles is exempt from Commission regulation provided that the concerned motor vehicles are not at the same time transporting any other property in interstate or foreign commerce subject to regulation. In order to fall within the scope of this exemption the considered commodity must not emerge from the processing state a new and different commodity with a distinctive name, character and use. Herein the grinding process to which the pecan shells are subjected is nothing more than a pulverizing operation designed to obtain fragments of desired sizes; under these circumstances the end product, ground pecan shells, is still, in effect, the original base agricultural product and cannot be characterized as a byproduct of any manufacturing process possessing a new identity and new properties.—Kinner Common Carrier Application, 99 M.C.C. 748 (750-753).

55. Transportation under common control, management, etc.—[Vols. 9, 11-15, 21].—See also Archambault Common Carrier Application case, §206(b), n. 22; Illinois-Calif. Express—Purchase—Ariz.—Utah Express case, §5(2), n. 45; Kingpak, Inc., Investigation of Operations case, §203(b), n. 60.

Motor carrier operations of partnership performing break-bulk and distributing service at New Orleans for purported shippers' association are conducted under a common control, management, or arrangement for a continuous carriage of freight from points outside the New Orleans commercial zone and therefore are not within exemption of §203(b8). And since the association and its consolidating agents are found to be unlawfully conducting a common-carrier forwarder service without a permit issued under part IV, the partnership's operations are not within exemption of 2(c)(2) and are likewise unlawful. New Orleans Shippers Assn., Inc., Investigation, 323 I.C.C. 619 (638-9).

Proposed interstate movement of packages by applicant's messengers traveling between Chicago, Ill., and Milwaukee, Wis., as rail passengers with baggage is not a new service under common control, management or arrangement with other carriers and therefore, does not alter applicant's status as an exempt motor carrier in the Chicago commercial zone. Said messengers are applicant's employees, retain either custody or control of packages in their charge as baggage, pay the same fares, and travel under the same conditions as other rail passengers; furthermore, any charges for actual motor transportation in the Milwaukee area as well as charges for transportation, other than those of applicant, in the Chicago area are to be paid by shipper or consignees to the carrier performing the service. Thus, since proposed service does not require authority from this Commission, application dismissed.—Cannonball, Inc., Common Carrier Application 99 M.C.C. 326 (328-9).

The "so-called commercial-zone exemption" does not include applicant's driveaway automobile service between points in the New York City commercial zone and the New York City piers, because the automobiles are handled under continuous carriage arrangements and normally have prior or subsequent movement outside the New York commercial zone.—Drive Away Auto Transport, Inc., Com. Car. Application, 99 M.C.C. 75 (78-9).

Common arrangement, as set out in §203(b)(8), has been held to require an arrangement between carriers. However, considered customs brokers, agents for Mexican Government and Mexican consignees, hold themselves out to perform services necessary to facilitate movement of shipments through United States and Mexican customs at Laredo and Nuevo Laredo. Therefore, since these brokers realize no profit on transportation aspect of their service, issue no bills of lading, and assume only responsibility for proper classification of shipments, payment of required duties, and for loss or damage resulting from their own negligence, they are considered as shippers, not carriers, for purposes of movement from Laredo to Mexican destination. In addition, evidence mitigates against finding that there is a concrete or practical working arrangement between local American motor carriers and Mexican line-haul carriers which would void the statutory exemption.—G. Arredondo Transfer Co., Inc.—Petition, 106 M.C.C. 557 (575-8)*.

Applicant's operations, consisting of collection and delivery services under contractual or agency relationships with line haul carriers is not exempt from economic regulation under §203(b)(8) because it is performed under an arrangement with line haul carriers; however, such transportation is exempt under §202(c)(2) of the Act since it is performed within the "terminal areas" of the line-haul carriers.—Bartz Cartage Co., Inc.—Common Carrier Application, 107 M.C.C. 378 (382).

56. Wrecked vehicles, emergency towage.—[Vol. 21].—Applicant would tow wrecked or disabled vehicles to California for storage and then subsequently to Oregon for repair and would also tow repossessed vehicles, and although §203(b)(10) excludes from economic regulation the emergency transportation of any accidently wrecked and disabled motor vehicles in interstate commerce, the proposed operation does not entail the towing of any wrecked and disabled vehicles in emergency situations and therefore does not qualify under the exemption.—Skyline Diesel Sales & Service, Inc., Com. Car. Applic., 96 M.C.C. 430 (431).

In application proceedings wherein it must be determined whether the proposed towing of accidentally wrecked or disabled motor vehicles is within the exemption of §203(b)(10) of the Act, inferences in the evidence that the transportation would originate at points other than the actual scenes of accidents may be found sufficient to establish that the proposed operations are not within the purview of the statutory exemption.—Ford Common Carrier Application, 113 M.C.C. 193 (197)*.

Transportation of accidentally wrecked or disabled motor vehicles in interstate commerce by towing found not to be exempt emergency transportation, as defined in §203(b)(10) of the Act, if those motor vehicles are transported from points other than the actual scene of an accident, even if the same motor carrier performs the service from the accident scene to the point from which the second movement originates. —Fairall Common Carrier Application, 113 M.C.C. 238 (245)*.

Applicants in proceedings wherein authority to transport wrecked or disabled motor vehicles is sought cannot be strictly held to proving each of the elements of proof set forth in *Novak Contract Carrier Application*, 103 M.C.C. 555, 557, inasmuch as the sites and frequency of accidents as well as the locations to which these vehicles are thereafter brought, are not susceptible of proof with any high degree of certainty.—Little Extension—Youngstown, Ohio, 113 M.C.C. 300 (303)*.

60. Commercial zones.—[Vols. 9, 11-19, 21].—See also Cannonball, Inc., Common Carrier Application case, §203(b), n. 55; Morgan Drive-Away v. Mid-States Trailer Transport case, §203(a)(10), n. 5 *Intrastate*.

In determining the limits of a commercial zone, matters of trade practices, use to which the area is put, and relevant political, geographical, and social factors are considered, but not the effect such a determination might have on the parties; a need for additional service, for example, must be established in a proper application proceeding. It would be an inversion of established principles to attempt to foster development of an area by revising its commercial zone; a commercial zone exists about a municipality as an economic fact, and the Commission's function is merely to recognize the boundaries which already exist. However, manifestations of extraordinary industrial growth can render former descriptions obsolete, and the Commission has not hesitated to revise a description that does not reflect the existing trade area.—Commercial Zones and Terminal Areas, 96 M.C.C. 538 (539-40)*; Commercial Zones and Terminal Areas—Detroit, 96 M.C.C. 709 (714)*.

Authority to serve Owensboro, Ky., includes authority to serve all points within commercial zone thereof, even though some of those points are in Indiana. Therefore, amendment at the hearing of application for authority from two Kentucky counties to points in 12 States, which substituted Owensboro as the origin points, actually enlarged applicant's origin territory to include Indiana points in Owensboro commercial zone and thereby permitted tacking of its outstanding Florida-to-Indiana authority to that granted from Owensboro at a common point in Indiana within commercial zone of Owensboro.—Carl Subler Trucking, Inc., Modification of Certificate, 99 M.C.C. 193 (196-8)*.

Operations of local truckers who provide transfer, collection, and delivery service for forwarders of used household goods (purportedly operating under the §402(b)(2) exemption) are not within partial exemption of §203(b8), even though such operations usually consist of transporting shipments for relatively short distances to and from a household at origin or destination point and often are conducted wholly within commercial zone of such point. The shipments move under a through forwarder bill of lading and local carriers' services are performed solely for, in concert with, and as an incident to, the through forwarder transportation service; moreover, all parties concerned know that the local motor services are not isolated or performed separately and apart from the overall forwarder transportation. Therefore, considered local transportation, being actually a part of a common arrangement for continuous carriage beyond a commercial zone, clearly falls within the exception to the commercial zone exemption and is, thus, subject to regulation.—Kingpak, Inc., Investigation of Operations, 103 M.C.C. 318 (336-7, 340-41)*.

Petition to enlarge the zone limits of Atlanta, Ga., to include all points within a line drawn 10 miles beyond the corporate limits of Atlanta and all of any municipality any part of which is within 10 miles of the corporate limits of Atlanta, and additionally a

United States government warehouse 12.4 miles from the corporate limits of Atlanta, denied. The application lacks sufficient information regarding the geographic, political, economic, and commercial factors of the area sought to be included. Even assuming that the entirety of the industrial districts that exist on rail and highway corridors extending from Atlanta are located within the 5-10 mile band, the districts represent less than 8 percent of the land contained therein, and only one-third of that has been developed.—Commercial Zones and Terminal Areas—Atlanta, Ga., 107 M.C.C. 690 (695).

In accordance with 103 MCC 318, which was sustained by the courts, local motor carriers and warehousemen are required to hold interstate authority for pickup and delivery service performed for exempt forwarders of used household goods because, whether such motor carrier operations are conducted within or outside a commercial zone, the §203(b8) commercial zone exemption is not available to carriers serving a forwarder (who holds no part IV authority) in the movement of through shipments in interstate or foreign commerce.—District Moving and Storage, Inc., Common Carrier Application, 107 M.C.C. 896 (899).

Removal of the partial exemption of §203(b)(8) of the act found not warranted on interstate or foreign movements within Hawaii.—Motor Carrier Operation in the State of Hawaii, 115 M.C.C. 228 (251).

Boundaries: [Vols. 15, 18, 22].—Defendant supports its contention by decision of New York commission in *Stevens* case decided March 16, 1968, that authority to serve a named county should include points within commercial zone of any city within that county, including points outside named county. *Stevens* case relied upon by defendant involved commercial zone rights across county lines for territorian descriptions of named counties. These commercial zone extensions apply to interstate and foreign commerce conducted under certificates of registration. Tacking of separate authorities to provide a through service is a permissive right grounded on the existence of a common service point; *Stevens* decision merely states that authority to serve a named county includes right to serve entire commercial zone of a city within the authorized county even if commercial zone extends beyond the boundary of the county. In absence of any evidence to the contrary, Commission cannot assume that N.Y. Commission intended to allow the tacking operations advocated by defendant. Otherwise, authorities could be tacked depending on the happenstance of whether or not there was a large city straddling boundary of 2 adjacent counties named in separate territorial grants.—Flying Freight v. Van's Auto Express, Inc., 110 M.C.C. 358 (359-61).

Extension of corporate limits of Compton, Calif., to include petitioner's industrial center does not remove such center from the Los Angeles Harbor commercial zone, as the Commission previously held in 54 MCC 288 that zone limits having been specifically fixed are not automatically changed by subsequent changes in a city's corporate limits.—Los Angeles, Calif., Commercial Zone, 114 M.C.C. 86 (88)*.

Carriers affected: [Vols. 14, 21].—Because the availability of existing motor common carrier service is not a proper issue for consideration in commercial zone proceedings, it was deemed unnecessary to discuss the various operations of carriers serving an area for which a petition was filed to incorporate it into a nearby commercial zone.—Kansas City, Mo.—Kansas City, Kans., Commercial Zone, 118 M.C.C. 462 (465)*.

Construction generally: [Vols. 16-19, 21].—See also Hayes Lines, Inc. v. Gateway Transportation Co., Inc. case, §204(c), n. 251.

Motor carrier authority to serve a particular municipality may be construed as including all points within commercial zone thereof; however, authority which is limited to a particular territory cannot be construed as implied authority for any service at any point that is, in fact, beyond the described limits even though such point is within commercial zone of a municipality in the authorized area. [Citing 54 MCC 21.] Thus, while plaintiff may serve Mycock, N.C., under its regular-route certificate authorizing service at "all points in... North Carolina" as off-route points, it cannot serve Chesapeake, Va., a point within commercial zone of Mycock but beyond the area authorized in its territorially limited certificate. Therefore, since Mycock is not a specifically authorized service point, and the authority to serve "all points in...North Carolina" precludes plaintiff from that plaintiff discontinue its service at Chesapeake, Va., is upheld. Suit dismissed, with prejudice.—R-C Motor Lines, Inc. v. United States, 350 F. Supp. 1169 (1170, 1173-4)*.

The partial and conditional exemption from regulation contained in §203(b8) embraces three categories of transportation, namely, that conducted wholly (1) within a municipality, (2) between contiguous municipalities, and (3) within a zone adjacent to and commercially a part of any such municipality. In defining commercial zones generally in 46 MCC 665, the Commission interpreted the statutory language, in view of its limited jurisdiction over foreign commerce, as referring only to municipalities in the United States, and accordingly limited the commercial zone of each municipality to (1) the base municipality itself, (2) contiguous U.S. municipalities, and (3) such other U.S. municipalities and unincorporated areas as are within a radius of the base municipality fixed by the population-mileage formula therein prescribed. Though the court in 154 F. Supp. 431 held that interpretation of no effect as to transportation in foreign commerce between the contiguous cities of Detroit, Mich., and Windsor, Ontario, which it held to be within the second category of the exemption, it did not hold that Windsor, which the Commission excluded from its definition of the Detroit zone in 48 MCC 95, was within that zone.—Commercial Zones and Terminal Areas—Detroit, 96 M.C.C. 709 (712-3)*.

However, the exemption by its terms is not applicable to transportation performed within a commercial zone or between contiguous municipalities under a common control, management, or arrangement for continuous carriage to or from a point beyond the municipalities or zone. Therefore, as to traffic moving to or from Canadian points beyond Windsor or U.S. points beyond Detroit, the U.S. portion thereof must be performed by an authorized carrier even though it is entirely within the commercial zone of the border point (Detroit) or between Detroit and Windsor. Furthermore, by participating in a joint rate with a U.S. carrier a foreign operator subjects itself to the Commission's jurisdiction and, to the extent of the joint rate, to the terms of the Act. But a common arrangement for continuous carriage means an arrangement between carriers, not between a carrier and a shipper; hence, separate arrangements made by a shipper with two carriers, one a local carter operating under the exemption, do not void the exemption provided by the Act.—Id., p. 715.

The present limits of the commercial zone of Louisville, Ky., was determined by the population-mileage formula established in 46 MCC 665 which prescribed a population-mileage formula by which to determine the limits of commercial zones of each municipality in the United States. Petitioner seeks to have the Louisville commercial zone revised to include an area known as L & N Industrial Park and its immediate environs. The park is zoned for industrial use and is located approximately 450 feet from the existing commercial zone. The utilities, such as phone, gas, and water, presently serving Louisville also serve the park. Other services such as postal delivery, news distribution and banking are performed by agencies located within the existing zone. A commercial zone exists as a economical fact by reason of trade practices, the use to which the land is put, and geographical and political considerations. The park will depend on necessary commercial services which are provided by Louisville agencies and which link the park to the economical life of Louisville. Hence, the L & N Industrial Park should be annexed to and defined as commercially a part of the Louisville commercial zone. However, the entire area encompassed by the description by petitioner should not be included in the redefinition of the commercial zone because we have no information concerning almost one-half of the territory within the proposed description; commercial zone redefined in certain respects.—Louisville, Ky., Commercial Zone, 108 M.C.C. 494 (495-7).

Petition to combine and expand now separate commercial zones of Seattle and Tacoma, Wash., into a single, enlarged zone with boundaries as indicated is denied. The record demonstrates that Tacoma maintains separate governmental facilities, separate port facilities, and draws its labor force from its present zone and is thus not interdependent on and not economically, politically, or commercially a part of the same unit as Seattle.—Seattle—Tacoma, Wash., Commercial zone, 111 M.C.C. 718 (721)*.

A commercial zone is not "established" or "created" by the Commission but already exists by reason of trade practices, the uses to which a proposed area is put, and geographic and political considerations.—Kansas City, Mo.—Kansas City, Kans., Commercial Zone, 118 M.C.C. 462 (462)*.

Contiguous municipalities: [Vols. 14, 18, 19, 21].—In holding in 154 F. Supp. 431 that transportation in foreign commerce between Detroit, Mich., and Windsor, Ontario, is within the contiguous- municipalities exemption of §203(b8), the court did not hold that Windsor is within the Detroit commercial zone, and redefinition of that zone specifically to exclude Windsor would have no effect on whether Windsor and Detroit are contiguous municipalities. To be contiguous within meaning of the statute, communities must at some place have a common border, and there must be direct communication between them by motor vehicle. Windsor and Detroit, though separated by the Detroit River, are connected by a vehicular tunnel and bridge, and thus meet both criteria. Redefinition of the commercial zone would therefore be an exercise in futility.—Commercial Zones and Terminal Areas—Detroit, 96 M.C.C. 709 (713-4)*.

Although commercial zone exemption of §203(b)(8) applies to local motor operations conducted solely between contiguous municipalities lying across the international U.S.-Canadian boundary, a New England-type town such as Massena, N.Y., is not a municipality having a commercial zone within the meaning of §203(b)(8) and the exemption will not apply to allow carriers to engage in transportation between the town and points in Canada without appropriate authority.—W. T. Byrns Motor Exp., Inc., Extension—Rooseveltown, 96 M.C.C. 765 (769).

Exemption provisions of §203(b)(8), on which petition relating to motorbus operations between Reynosa, Mexico, and Hidalgo, Tex., is premised, can be applicable only if it is shown that Reynosa and Hidalgo are contiguous municipalities; and to be contiguous within meaning of §203(b8), communities must at some place have a common border, and there must be direct communication between them by motor vehicle. Fact that there appears to be direct communication between Hidalgo and Reynosa via the international bridge does not establish requisite continuity, and petitioner did not submit any conclusive evidence showing that they have a common border; on the other hand, testimony of protestant's expert witness suggests that the Mexican government's ownership of part of the Rio Grande and a strip of land along that river would preclude any possibility that those cities could be contiguous. Thus, the transportation involved cannot be found exempt under §203(b8); and, despite limited nature of operations between international boundary and border control station, Commission authority is required.—Rio Grande Bridge System—Petition for Exemption, 103 M.C.C. 174 (180).

For local transportation between contiguous municipalities to be exempt under §203(b)(8), it must not be performed under common control, management or arrangement for continuous carriage to or from a point within such municipality, municipalities, or zones; and it must take place wholly within a municipality or between contiguous municipalities. However, said exemption is not void simply because shipment had a prior movement in interstate or foreign commerce, before moving between Laredo, Texas, and Nuevo Laredo, Mexico.—G. Arredondo Transfer Co., Inc.—Investigation, 103 M.C.C. 210 (220, 223-5)*.

Furthermore, in order for concerned municipalities to be contiguous within statutory meaning they must have a common border and there must be direct communication between them by motor vehicle. Fact that there appears to be direct surface communications between Laredo and Nuevo Laredo by means of international bridge does not establish requisite contiguity.

However, since considered exemption is clearly directed to relieving Commission of burdensome and highly expensive task of regulating purely local cartage operations and since there are many similar situations along the Mexican border (Rio Grande River), the better and more comprehensive approach is to consider in a separate rulemaking proceeding to be instituted: (1) the character of the 20-meter strip of land and portion of Rio Grande River owned by the Mexican Government, and (2) the possibility of amending or modifying the commercial zone regulations, so that transportation within considered international boundary municipalities is exempt. Accordingly, since the rulemaking proceeding will determine outcome of present proceeding, entry or order is withheld pending determination in that proceeding.—Id., 106 M.C.C. 557 (573-4, 578-9)*.

The Commission is confronted with the unique question of determining whether contiguity, in the sense of common boundaries, exists between the involved United States municipalities and the Mexican municipalities abutting the 20-meter strip of land along the south bank of the Rio Grande River. Although it appears that municipalities in Mexico abutting the strip have certain powers, responsibilities, and duties with respect to this narrow strip of land, the relationship of this 20-meter strip to such municipalities does not seem capable of precise translation into recognizable American legal terminology; and the concept of this strip of land appears to defy application in the framework of United States transportation regulation. In these circumstances and as presently informed, we cannot find that either contiguity or lack of contiguity exists between the United States and Mexican border municipalities along the Rio Grande.—Rio Grande Border—Comm. Zones & Term. Areas, 110 M.C.C. 51 (58-9).

Expansion and enlargement of limits: [Vols. 16, 21].—Petition to expand the commercial zone of Seattle, Wash., northward and southward, as indicated herein, granted as the areas involved have changed from a basically agricultural character to such a state of industrial expansion and development that they now appear to be economically and commercially a part of Seattle. But the petition to expand the commercial zone of Tacoma, Wash., denied. Those areas commercially part of Tacoma are within the present 5-mile commercial zone and land outside this zone is primarily residential and agricultural.—Seattle—Tacoma, Wash., Commercial Zone, 111 M.C.C. 718 (721-22)*.

Foreign or international boundary: [Vols. 14-19].—Provisions of the Treaty of Guadalupe-Hidalgo are inapplicable to the matter of whether petitoner can conduct motor bus operations in interstate or foreign commerce from Reynosa, Mexico, to the United States Border Control Station located in Hidalgo, Texas. The treaty provides, *inter alia,* that that part of the Rio Grande River which forms the boundary between the United States and Mexico shall be free and common to vessels and citizens of both countries. However, navigaition of the river is not involved in motor-carrier operating rights proceeding, and any relief based on that treaty must be denied. Furthermore, despite limited nature of operations between the international boundary and the border control station, which petitioner seeks to conduct, Commission authority therefore is required.—Rio Grande Bridge System—Petition for Exemption, 103 M.C.C. 174 (175, 180).

Fact that there appears to be direct surface communications between Laredo, Texas, and Nuevo Laredo, Mexico, by means of international bridge across the boundary does not establish requisite contiguity of municipalities within commercial-zone exemption. However, since that exemption is clearly directed to relieving Commission of burdensome and highly expensive task of regulating purely local cartage operations and since there are many similar situations along the Mexican border (Rio Grande River), the better and more comprehensive approach is to consider in a separate rulemaking proceeding (1) the character of the 20-meter strip of land and portion of Rio Grande River owned by Mexican Government, and (2) the possibility of amending or modifying the commercial zone regulations, so that all transportation, similar to that herein involved, within international boundary municipalities would be exempt. Rulemaking proceeding instituted for consideration of these matters.—G. Arrendondo

Transfer Co., Inc.—Petition, 106 M.C.C. 557 (573-4, 578-9)*.

This rulemaking proceeding was instituted on the Commission's own motion to determine the feasibility of amending or modifying the commercial zone regulations as they relate to municipalities situated along the international boundary between the United States and Mexico, and to determine the character ofthe 20-meter strip of land along the south bank of the Rio Grande River owned by the Federal Government of Mexico. In 54 MCC 21 it was held that the commercial zones of municipalities located at international boundary points do not extend beyond the limits of the United States. Subsequently, in 154 F. Supp. 431, the court held that the §203(b)(8) exemption is applicable to the transportation of property between contiguous municipalities even though one such municipaiity is in a foreign country. Following this case, local transportation between contiguous municipalities bordering the United States and foreign countries has been considered exempt from economic regulation under §203(b)(8), and the Commission has not since then asserted jurisdiction over such transportation.—Rio Grande Border—Comm. Zones & Term. Areas, 110 M.C.C. 51 (54-6).

Contention that motor carrier operations of the type involved herein are not subject to economic regulation by this Commission found not valid. A thorough analysis of the Act shows that Congress specifically exempted from economic regulation certain transportation activities and, having chosen specifically to exempt these activities, it must be assumed that these are the only regulatory exemptions intended.—Traf. at or near U.S.—Can. Boundary Lines, 110 M.C.C. 730 (742-3).

See also Commercial Zones and Terminal Areas—Detroit case; and W. T. Byrns Motor Exp., Inc., Extension case, §203(b), n. 60 *Contiguous municipalities.*

Intrastate transportation: [Vols. 15, 19].—In order for a passenger carrier to come within purview of the §203(b)(8) exemption insofar as interstate transportation is involved, it must show that it is also "lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction", Texas corporation seeking exemption under §203(b8) has made no such showing; in fact, certified statement of the secretary of Railroad Commission of Texas indicates that petitioner has never held any motor carrier authority in Texas. Therefore, petitioner clearly has failed to show itself entitled to operate between McAllen and Hildago, Tex., under the §203(b8) exemption insofar as interstate operations might be involved.—Rio Grande Bridge System—Petition for Exemption, 103 M.C.C. 174 (181).

Military establishment or reservation: [Vols. 17, 19].—A military reservation partly within the commercial zone of an authorized point may be served if the entrance used is within that commercial zone. However, authority to use one entrance is not authority to use another entrance outside the commercial zone.—Navajo Freight Lines, Inc., Ext.—Cannon Airforce Base, 98 M.C.C. 330 (331-333).

Municipality: [Vols. 14, 17-19, 21].—The scope of rule 4 of Ex Parte No. MC-19, 17 MCC 467, 505-506 [49 CFR 176.4], which requires motor common carriers to publish separate charges for each accessorial service rendered in connection with household goods movements where the line-haul transportation is performed by a motor carrier, is limited to areas over which the Commission has requisite jurisdiction within the purview of the exemptions prescribed under §202(c)(1) and (2) and §203(b)(8) of the Act. Considered within the context of the instant situation involving local services performed for exempt freight forwarders, such local operations would not be exempt under these sections of the Act.—United Van Lines, Inc., v. Calif. Household Goods, 329 I.C.C. 742 (748).

Applicant seeks a determination by the Commission that the Tri-City Regional Port District, Madison County, Ill., either constitutes a municipality which has a commercial zone, or is an unincorporated urban community such that carriers authorized to serve the District may also serve adjacent territory or establish a terminal area including points outside of and adjacent to the District, i.e., St. Louis, Mo.-East St. Louis, Ill., commercial zone as defined by the

Commission. The District was created by the General Assembly of the State of Illinois, and it was designated as a political subdivision, body politic, and municipal corporation for the purpose of promoting industrial, commercial, and transportation activities and has powers commensurate with these goals. However, the District does not have the usual powers or privileges normally attributable to local government of a bona-fide municipality. Therefore, the District is not a municipality of the character contemplated by §203(b)(8) of the Act and, accordingly, does not have an adjacent commercial zone.—Truck Transport, Inc., Petition for Declaratory order, 108 M.C.C. 183 (185, 187).

The District is controlled by a corporate entity, but is not self-governed like the usual unincorporated urban communities. Therefore, the Tri-City Regional Port District is not a "municipality" or an "unincorporated urban community", and authority to provide service from said District cannot be construed as authority to provide service from an area surrounding the District either as a commercial zone or as a terminal area. The authority to provide service from the District is territorial, encompassing all points within the District, but such authority cannot be construed to serve points which are beyond the defined limits of the District, even though such points are so adjacent to a municipality located in the District as to be within the commercial zone of such municipality.—Id., pp. 188, 189.

An unincorporated urban community has been construed by the Commission to mean those settlements or aggregations of homes and businesses which, although unincorporated and without local governments or definite corporate limits, nevertheless are similar from a transportation standpoint to the cities, towns, villages, and boroughs which are contemplated by the term "municipality". Within such communities and within the adjacent "terminal areas" contemplated by §202(e) transportation by motor vehicle in bona fide collection, delivery, and transfer service incidental to line-haul transportation is performed.—Id., p. 188.

As defined by the Commission, the term "municipality" refers to "any city, town, village, and borough which has been created by special legislative act or which has been, otherwise, individually incorporated or chartered pursuant to general State laws, or which is recognized as such, under the Constitution or by the laws of the State in which located, and which has a local government. It does not include a town of the township or New England type".—Adams Trucking, Inc.—Revocation of Certificates, 118 M.C.C. 567 (571).

New England-type towns: [Vols. 17-19, 21].—A town need not be located in New England to be considered a "New England-type town"; and, since Massena, N.Y., is both a New England-type town and a village within that town, authority to serve Massena includes authority to serve the entire town and not just the village and, therefore, includes Rooseveltown-Cornwall Bridge, the international boundary port of entry at the St. Lawrence River near Rooseveltown which is also in Massena. Therefore, while applicants do not need authority to operate between the village of Massena and Rooseveltown, since New England type town are not municipalities having a commercial zone within meaning of §203(b)(8), authority is required for operations between Massena and Cornwall, Ontario. Granted accordingly.—W.T. Byrns Motor Exp., Inc., Extension—Rooseveltown, 96 M.C.C. 765 (767-770).

The governmental unit known as a "town" in New England is a minor subdivision of a county and is more commonly known as a "township" elsewhere in the county. That which is known as a "town" or "village" elsewhere is commonly called a "borough" or possibly a "city" in New England. Hence, the Commission has consistently held that townships in New England (i.e., "New England-type towns") or anywhere in the country are not municipalities within the meaning of §203(b)(8) of the Act.—Adams Trucking, Inc.—Revocation of Certificates, 118 M.C.C. 567 (571).

Passenger carriers: [Vols. 16, 19, 21].—Applicant for authority to transport passengers and their baggage, in a special operation, between Chicago and Laredo, Tex., required to confine its passenger pick-up and delivery service to points within the city limits of Chicago, since authority to serve all points within a commercial zone applies only to carriers of property.—Transportes Hispanos, Inc., Com. Car. Applic., 117 M.C.C. 894 (897)*.

Population basis: [Vols. 18, 21].—A decrease in population of Wilmington, Del., to under 100,000 brought into question the continued authority of carrier to provide service within the established Wilmington commercial zone, since the population-mileage formula marks a population of 100,000 the dividing line between a commercial zone (and hence implied authority) measured 4 miles from a municipality's corporate limits and that measured 5 miles from such limits. It was held that the automatic expansion provision of the formula (in 54 MCC 21, 1952), is sufficiently broad to include contraction of a commercial zone. Therefore, 49 CFR 1048.102(b) was amended to the effect that the population of a municipality is the highest census figure since, and including, that of 1940.—Commercial Zones and Terminal Areas, 115 M.C.C. 882 (884, 889); this rulemaking proceeding instituted.—Mercer Motor Freight, Inc.—Investigation, 114 M.C.C. 447 (450).

Territorial operating authorities: [Vols. 16-19, 21].—Defendant's authority to transport general commodities between named Michigan airports, on one hand, and, on the other, O'Hare Field and Midway Airport, Chicago, Ill., is specific and unambiguous, and authorizes nothing more than freight hauling between the airports specified; it does not authorize service at nonairfield origin or destination points. Moreover, despite fact that the airfields are located within municipalities, such authority may not be implicitly read to authorize transportation to and from all points within "commercial zones" of those cities. Therefore, since defendant holds no authority to serve any municipality, its transportation of goods moving from nonairfield points in Michigan to a Chicago airport does not come within the §203(b) commercial zone exemption provision.—I.C.C. v. Howard, 342 F. Supp. 1112 (1114-5).

Unincorporated urban communities: [Vols. 14, 19, 21].—The mere presence of places of business, and a finding that they have transportation requirements, are insufficient to establish the existence of an unincorporated community. Therefore, we must conclude that Hopsons, Miss., is not an unincorporated community. Rather, it consists of a highway crossroads with 10 or 12 residences and 3 businesses and its residents depend upon Clarksdale, Miss., for all services including mail service. There is nothing in this record to indicate that Hopsons has achieved community status and thus defendant's authority to service Hopsons cannot be construed as conferring the implied right to serve Clarksdale as a point within Hopsons' "terminal area". Cease and desist order entered.—F & W Express, Inc., v. Taylor Truck Line, 118 M.C.C. 898 (901-3).

See also Truck Transport, Inc., Petition for Declaratory Order, §203(b), n. 60 *Municipality.*

Particular Zones, by Name

Albuquerque, N.M.: On reconsideration, redefinition of present zone to include proposed area, as indicated, found warranted as industrial establishments in proposed area look to Albuquerque for business needs and public utilities and residents look to Albuquerque for cultural, educational, and social needs. Proposed area is being utilized for industrial development economically and is commercially related to Albuquerque due to proximity and availability of highways and transportation facilities. Prior report 111 M.C.C. 135—Commercial Zones and Terminal Areas, 111 M.C.C. 672 (673-75)*.

Alexandria-Pineville, La.: Extension northward of boundaries of present commercial zones of the contiguous municipalities of Alexandria and Pineville for approximately 7 miles from their municipal limits is not warranted. Industrial growth relied on does not involve establishment of new industrial plants in the extended area, nor substantial increase in population and employment beyond that common to areas surrounding cities and towns generally, but concerns only the enlargement of a single manufacturing plant which has apparently existed in that area for some time; and there is no showing of any industrial, commercial, or political continuity between the existing zone and the area sought to be included.—Commercial Zones and Terminal Areas, 96 M.C.C. 538 (539, 540)*.

Atlanta, Ga.: Petition for enlargement of present zone denied. A large proportion of the proposed area was not specifically described. Evidence in support of petition is insufficient for a rational determination of the matters involved. Proposed area found to be suburbs of the main industrial and commercial area and not a part thereof.—Commercial Zones and Terminal Areas (Atlanta), 111 M.C.C. 364 (370)*.

Petitioners sought to add an approximately 8.18 square mile area located entirely within DeKalb County, Ga., to the present Atlanta commercial zone. Review Board No. 3 found (1) that a large proportion of the proposed area is not specifically described, but is alleged to be undeveloped commercially, and (2) that the evidence does not establish that the commercial enterprises in the proposed area were economically dependent upon Atlanta, and the petition was accordingly denied.—Commerical Zones and Terminal Areas, 113 M.C.C. 522 (525-26)*.

Baltimore, Md.: Present commercial zone redefined so as to include the specified area found to be economically and commercially a part of Baltimore, Md.—Commercial Zones and Terminal Areas, 113 M.C.C. 773 (775)*; Id., 111 M.C.C. 240 (242-43)*.

Beaumont, Tex.: Petition for redefinition of present zone to include the proposed area, as specified, found warranted as the proposed area is shown to be economically and commercially a part of the present zone because of the integration of geographic, demographic, and government factors; common use of public utilities; industrial interdependence; and the sharing of service and consumer industries and a common labor pool.—Commercial Zones and Terminal Areas, 110 M.C.C. 852 (854-58)*.

Chicago, Ill.: Redefinition of Chicago commercial zone to include petitioner's facilities at Burr Ridge, Du Page County, Ill. Development of petitioner's facilities tied to development of Chicago.—Chicago, Ill., Commercial Zone, 115 M.C.C. 71(73)*.

Cincinnati, Ohio: Present commercial zone extended northward to encompass a site now under development as an industrial park immediately north of and adjacent to current zone boundary; considered area is economically and commercially part of Cincinnati and its present zone. Public utilities serving Cincinnati also serve considered area; a well-developed highway system provides ready access between this area and Cincinnati and points in the present zone. Furthermore, while considered industrial site has not yet been developed, lack of total development, of itself, should not militate against an otherwise warranted extension of present zone.—Cincinnati, Ohio, Commercial Zone, 106 M.C.C. 267 (268-70)*.

Present commercial zone redefined so as to include the indicated area, and a future plant site of petitioner as record shows that such area is economically and commercially a part of Cincinnati, O. However, petitioner's request to withdraw its expansion petition was granted in all other respects, and order entered.—Id., 112 M.C.C. 112 (113)*.

Petitioner sought inclusion of certain specified areas in Ohio and Kentucky adjacent to the limits of the Cincinnati, Ohio, commercial zone. Review Board Number 3 found (1) that the proposed areas in Ohio were not economically and commercially a part of Cincinnati, (2) that the area surrounding the Greater Cincinnati Airport in Boone County, Ky., and Cold Spring, Ky., are economically and commercially related to Cincinnati, (3) that past Commission interpretations required the construction that the entire city of Covington, Ky., including the area it recently annexed by expansion of its municipal boundaries, is within the zone, and (4) that the remaining areas in Kentucky received no evidentiary support and will not be included within the zone.—Id., 113 M.C.C. 430 (434)*.

Present commercial zone of Cincinnati, Ohio redefined so as to include the specified areas of Boone County and Florence, Ky.—Id., 113 M.C.C. 760 (760-1)*.

Cleveland, Ohio: Present commercial zone of Cleveland, Ohio redefined so as to include (a) all points in Cuyahoga County, Ohio, and (b) all points in Wickliffe, Willoughby Hills, Waite Hill, Willoughby, Willowick, Eastlake, Lakeline, Timberlake, and

Mentor, Lake County, Ohio.—Cleveland, Ohio, Commercial zone, 118 M.C.C. 524 (529-30)*.

Detroit, Mich.: Redefinition of the commercial zone either to include or specifically exclude Windsor, Ontario, Canada, is not warranted when neither action would affect the exemption of Detroit-Windsor traffic as flowing between contiguous municipalities within the meaning of §203(b8). Though the number of shipments moving to and from United States and Canadian points, whether Windsor and Detroit or points beyond has increased over the past 10 years, neither the volume thereof nor other considerations justify removal of exemption of the Detroit-Windsor movement in whole or in part.—Commercial Zones and Terminal Areas—Detroit, 96 M.C.C. 709 (714, 716-17)*.

Petition for redefinition of present Detroit, Mich., commercial zone so as to include specified section of Farmington, Mich., denied. Evidence lacks specific information as to such necessary elements for redefinition as geography, labor markets, public utilities, and other such commercial and economic factors. Need for additional carrier service is not determinative in these proceedings but should be established in a proper application proceeding.—Commercial Zones and Terminal Areas—Detroit, 111 M.C.C. 119 (121-22).

Indianapolis, Ind.: The city of Indianapolis, which was abolished by the Legislature of Indiana on Jan. 1, 1970, in favor of the Consolidated City of Indianapolis (to include, with certain exceptions, all of Marion County, Ind.), was redefined to include the Consolidated City of Indianapolis, Ind., itself, and all of any municipality wholly surrounded, or so surrounded except for a water boundary, by the Consolidated City of Indianapolis. 49 CFR 1048.41 amended effective Oct. 1, 1972.—Indianapolis, Ind., Commercial Zone, 115 M.C.C. 893 (895).

Kansas City, Mo.-Kansas City, Kans.: Commercial zones adjacent to and commercially a part of the city, contemplated by §203(b8), redefined.—Kansas City, Mo.—Kansas City, Kans., Commercial Zone, 110 M.C.C. 136 (136)*.

Upon unopposed petition, present zone redefined to include Bonner Springs, Kans., and Loring, Kans., and areas adjacent to the latter point as specified as such areas are shown, in fact, to be economically and commercially part of Kansas City, Kans., by the testimony of the supporting witnesses.—Id., 111 M.C.C. 131 (131-32)*.

Inclusions of portions of Olathe, Kans., and specified areas adjacent to Olathe within present zone found justified. Olathe and Kansas City, Kans., are connected by highway and use same utilities, police service, and street numbering system. Olathe is within Kansas City Metropolitan Planning Region and relies on Kansas City for labor, purchase of material, professional services and organizations. Olathe is shown economically and commercially a part of Kansas City. However, inclusion of Olathe Naval Air Base within the expanded zone was found not justified as it is beyond that portion of Olathe not sought for inclusion herein due to lack of industrial development.—Id., 112 M.C.C. 103 (106-07)*.

The commercial zone of Kansas City, Mo.—Kansas City, Kans., was extended to include Blue Springs, Mo., and specified areas adjacent thereto.—Id., 118 M.C.C. 462 (465)*.

Memphis, Tenn.: Petition to extend the present commercial zone of Memphis, Tenn., to include the proposed area denied for lack of specific evidence. A significant area between the petitioner's industrial development and the existing zone is industrially undeveloped and appears, from available evidence, to be farmland and not part of the Memphis Commercial zone. Thus, the entire area does not warrant inclusion within the Memphis commercial zone.—Commercial Zones and Terminal Areas, 110 M.C.C. 863 (866)*.

Minneapolis-St. Paul, Minn.: Present zone redefined to include the city of Bloomington and the southeatern quadrant of the village of Plymouth.—Commercial Zones and Terminal Areas, 107 M.C.C. 473 (476)*.

Limits of present commercial zone redefined so as to include those areas specified herein, which are found to be so economically and commercially related to the Twin Cities area as to be factually part of the present zone. Those areas not found to be part of the zone are rejected as they are basically agricultural or residential and are suburbs of the present zone.—Commercial Zones and Terminal Areas, 110 M.C.C. 872 (876-77)*.

New Orleans, La.: Petition to extend the limits of the present New Orleans, La., commercial zone to include Slidell, La., and specified adjacent areas denied. The Commission concluded that Slidell is an independent municipality near a larger city which location results in a flow of goods and services between them but is not an integrated part of the New Orleans commercial sphere.—Commercial Zones and Terminal Areas, 110 M.C.C. 887 (889-90)*.

New York, N.Y.: Commission redefined commercial zone of New York, N.Y. to include the TOFC terminals of petitioner railroad. Petitioner is only major rail line serving this area whose TOFC terminals are outside present exempt zone which places it at a competitive disadvantage and restoration of such exemption is found necessary for establishing an adequate rail transportation system in accord with the national transportation policy. Petitioner's commercial relation to New York City is manifest by our fifth supplemental report in Ex Parte No. MC-37.—New York, N.Y., Commercial Zone., 111 M.C.C. 123 (128)*.

Present commercial zone redefined to include petitioner railroad's TOFC terminal at Port Reading, N.J. as petitioner is the only major rail line serving New York City whose terminal facilities fall outside the exempt zone which fact places petitioner at a competitive disadvantage that adversely affects the public interest.—Id., 112 M.C.C. 203 (207)*.

Petitioner railroad sought inclusion of its TOFC terminal within the New York City "exempt zone". The Commission found that petitioner was the only major rail line serving New York whose terminal was outside such zone which fact placed petitioner at a competitive disadvantage. Zone redefined to include said terminal—Id., 113 M.C.C. 891 (893-94)*.

St. Louis, Mo.-East St. Louis, Ill.: Present commercial zone redefined.—St. Louis, Mo.-East St. Louis, Ill., Commercial Zone, 106 M.C.C. 844 (845)*.

Present zone not found to include the proposed specified area, findings in 106 MCC 844 unchanged.—Id., 107 M.C.C. 696 (701)*.

Petition to extend present zone to include specified area west of the present zone limits denied. Only about one-quarter of the proposed area is under industrial development and no clear indication is given as to the uses to which the remaining area will be put. Commission, therefore, cannot conclude that the proposed area, considered as a whole, is part of the existing commercial zone.—Id., 110 M.C.C. 868 (871)*.

Upon joint petition, present zone redefined as indicated. Although no representations were filed in this hearing, statements contained in said petition are sufficient to warrant such redefinition.—Id., 111 M.C.C. 88 (89)*.

Present zone redefined to include proposed area herein specified. All petitioners have or are planning new plants in proposed area, proposed area is served by same utilities as St. Louis at no additional cost, and petitioners conduct large volume of business in St. Louis. Proposed area shown economically and commercially part of St. Louis commercial zone.—Id., 111 M.C.C. 325 (326)*.

Petition of redefinition and enlargement of the present zone denied. Petitioner railroad sought redefinition in order to utilize the services of unregulated carriers operating between the proposed area and the present zone. The record is so lacking in substance as to geographic, political, economic, and commercial factors as to not warrant consideration.—Id., 111 M.C.C. 415 (417)*.

Sioux City, Iowa: Present commercial zone redefined to include the Port Neal Industrial District. The resultant zone will more accurately reflect the economic reality of the area.—Sioux City, Iowa, Commercial Zone, 110 M.C.C. 448 (450)*.

Syracuse, N.Y.: The commercial zone of Syracuse, N.Y., was redefined to include those points in Lysander, N.Y., not within 5 miles of the corporate limits of Syracuse, in addition to previously specified points.—Syracuse, N.Y., Commercial Zone, 117 M.C.C. 393 (394)*.

Warren, Ohio: Since it appears that such portion of Lordstown Township, Trumbull County, Ohio, as is not already within the

Warren commercial zone as determined under the population-mileage formula is in fact economically and commercially a part of Warren, the Warren zone is redefined to include the entire Township of Lordstown.—Commercial Zones and Terminal Areas. 96 M.C.C. 799*.

Washington, D.C.: Extension of present zone to include specified area of State of Virginia approved. Portion of proposed area lies within present zone. Proposed area provides Washington with labor, equipment, and supplies for governmental and nongovernmental entities. Proposed area relies on Washington for professional services, labor, supplies, equipment, and market outlets. Both areas share public utilities and are economically interdependent. Inclusion of Dulles International Airport in expanded zone is approved. Federal Aviation Administration states that said airport has no independent commercial existence apart from present zone, which testimony is supported by Washington origin of most passengers and airport concessionaires.—Washington, D.C., Commercial Zone, 111 M.C.C. 400 (402-4)*.

Wilmington, Del.: See §203(b), n. 60 population.

61. Interstate transportation by carriers also engaged in intrastate transportation. —[Vol. 9].—See J & J Trucking Co., Inc., §203(a)(15), m. 1.

Regulations of the Commission

33 FR 9661, July 3, 1968, Part 1048: Commercial Zones, §1048.26 Minneapolis- St. Paul, Minn., commercial zone limits redefined, effective July 18, 1968.

34 FR 4892, March 6, 1969, Part 1048: Commercial Zones, §1048.37 Louisville, Ky., new paragraph describing Louisville commercial zone, added, effective March 31, 1969.

34 FR 8117, May 23, 1969, Part 1047: Exemptions, §1047.20 through §1047.23 Transportation and Notice Thereof by Agricultural Cooperative Associations, added, effective July 7, 1969.

34 FR 9870, June 26, 1969, Part 1048: Commercial Zones (Rio Grande Border Municipalities), §1048.101 Commercial zones determined generally, with exceptions, amended by deleting therefrom the words "within the United States" in paragraphs (b) and (c), and the words "United States" in paragraph (c), effective July 12, 1969.

34 FR 12041, July 17, 1969, Part 1048: Commercial Zones, §1048.101 Commercial zones determined generally, with exceptions, effective date of order of May 7, 1969 (34 FR 9870) postponed to Sept. 8, 1969, effective July 10, 1969.

34 FR 12221, July 24, 1969, Part 1048: Commercial Zones, §1048.8 Kansas City, Mo.—Kansas City, Kans., commercial zone redefined to include an area not now within limits thereof, effective Aug. 22, 1969.

34 FR 14174, Sept. 9, 1969, Part 1048: Commercial Zones, §1048.101 *Commercial zones determined generally, with exceptions*, (Rio Grande Border Municipalities), effective date of order of May 7, 1969 (34 FR 9870) further postponed to Oct. 8, 1969.

34 FR 15482, Oct. 4, 1969, Part 1048; Commercial Zones, §1048.101 (Rio Grande Border Municipalities), effective date of order of May 7, 1969 (34 FR 9870) further extended to Nov. 10, 1969.

34 FR 16623, Oct. 17, 1969, Part 1048: Commercial Zones, §1048.3 St. Louis, Mo.-East St. Louis, Ill., commercial zone redefined, effective Nov. 17, 1969.

34 FR 17063, Oct. 21, 1969, Part 1048: Commercial Zones, §1048.38 Sioux City, Iowa, commercial zone redefined, effective Nov. 24, 1969.

34 FR 600, Jan 16, 1970, Part 1048: Commercial Zones, §1048.26 Minneapolis-St. Paul, Minn., description of commercial zone revised, effective Feb. 9, 1970.

35 FR 2727, Feb. 7, 1970, Part 1048: Commercial Zones, §1048.3 St. Louis, Mo.- East St. Louis, Ill., commercial zone redefined, effective March 12, 1970.

35 FR 2992, Feb. 13, 1970, Part 1048: Commercial Zones, §1048.39 Beaumont, Tex., specifically defining Beaumont commercial zone limits, added, effective Feb. 6, 1970.

35 FR 2995, Feb. 13, 1970, Part 1048: Commercial Zones, §1048.39 Beaumont, Tex., effective date of order (35 FR 2992) fixed as March 3, 1970.

35 FR 3290, Feb. 21, 1970, Part 1048: Commercial Zones, §1048.1 New York, N.Y., commercial zone limits redescribed, effective March 23, 1970.

35 FR 3290, Feb. 21, 1970, Part 1048: Commercial Zones, §1048.8 Kansas City, Mo.-Kansas City, Kans., commercial zone limits revised, effective March 23, 1970.

35 FR 4963, Mar. 21, 1970, Part 1048: Commercial Zones, §1048.21 Baltimore, Md., commercial zone limits revised, effective April 22, 1970.

35 FR 6004, Apr. 11, 1970, Part 1048: Commercial Zones, §1048.3 St. Louis, Mo.-East St. Louis, Ill., commercial zone limits revised, effective May 13, 1970.

35 FR 6651, Apr. 25, 1970, Part 1048: Commercial Zones, §1048.4 Washington, D.C., commercial zone limits revised, effective May 22, 1970.

35 FR 7701, May 19, 1970, Part 1048: Commercial Zones, §1048.3 St. Louis, Mo.-East St. Louis, Ill. commercial zone limits redescribed, effective May 13, 1970.

35 FR 9213, June 12, 1970, Part 1048: Commercial Zones, §1048.14 Albuquerque, N. Mex., commercial zone limits revised and redescribed, effective July 27, 1970.

35 FR 10662, July 1, 1970, Part 1048: Commercial Zones, §1048.24 Seattle, Wash., commercial zone expanded and limits redefined, effective Aug. 10, 1970.

35 FR 12764, Aug. 12, 1970, Part 1048: Commercial Zones, §1048.24 Seattle, Wash., inadvertent errors in paragraph (c) of redefined commercial zone (35 FR 10662) corrected.

35 Fr 13368, Aug. 21, 1970, Part 1047: Exemptions, §1047.40 Motor transportation of property incidental to transportation by aircraft, paragraph (d) Exempt zones and operations—(a) Weir Cook Municipal Airport and (b) Atlanta Municipal Airport, added, effective Sept. 28, 1970.

35 FR 14552, Sept. 17, 1970, Part 1048: Commercial Zones, §1048.8 Kansas City, Mo.-Kansas City, Kans., commercial zone limits revised, effective Oct. 16, 1970.

35 FR 14553, Sept. 17, 1970, Part 1048: Commercial Zones, §1048.26 Minneapolis-St. Paul, Minn., effective date of order of Dec. 24, 1969 revising commercial zone limits (35 Fr 600) fixed as Sept. 30, 1970.

35 FR 14931, Sept. 25, 1970, Part 1048: Commercial Zones, §1048.7 Cincinnati, Ohio, commercial zone limits revised and redescribed, effective Oct. 26, 1970.

35 FR 16406, Oct. 21, 1970, Part 1048: Commercial Zones, §1048.1 New York, N.Y., amended so as to restore commercial zone exemption as to defined New Jersey areas, effective Nov. 6, 1970.

36 FR 3515, Feb. 26, 1971, Part 1048: Commercial Zones, §1048.39 Metropolitan Government of Nashville and Davidson County, Tenn., commercial zone, added, effective April 8, 1971.

36 FR 4505, Mar. 6, 1971, Part 1048: Commercial Zones, §1048.39 (36 FR 3515) having been incorrectly designated, is redesignated §1048.40 Metropolitan Government of Nashville and Davidson County, Tenn.

36 FR 7011, Apr. 13, 1971, Part 1048: Commercial Zones, §1048.40 Metropolitan Government of Nashville and Davidson County, Tenn., commercial zone, effective date of order (36 FR 3515) postponed to May 25, 1971, effective on date of order.

36 FR 9022, May 18, 1971, Part 1047: Exemptions, §1047.2 Motor vehicles employed solely in transporting school children and teachers to or from school, added, effective July 2, 1971.

36 FR 13997, July 29, 1971, Part 1048: Commercial Zones, §1048.7 Cincinnati, Ohio, commercial zone limits redefined, effective Sept. 1, 1971.

36 Fr 18735, Sept. 21, 1971, Part 1048: Commercial Zones, §1048.7 Cincinnati, Ohio, commercial zone limits redefined, effective Nov. 1, 1971.

36 FR 18736, Sept. 21, 1971, Part 1048: Commercial Zones, §1048.21 Baltimore, Md., commercial zone limits redefined, effective Nov. 1, 1971.

36 FR 19909, Oct. 13, 1971, Part 1048: Commercial Zones, §1048.1 New York, N.Y., commercial zone limits redefined, effective Nov. 10, 1971.

36 FR 20878, Oct. 30, 1971, Part 1048: Commercial Zones, §1048.5 Los Angeles, Calif., and contiguous and adjacent municipalities, commercial zone limits redescribed, effective Dec. 3, 1971.

36 FR 21452, Nov. 10, 1971, Part 1048: Commercial Zones, §1048.20 Syracuse, N.Y., commercial zone limits redescribed, effective Dec. 31, 1971.

37 FR 5252, March 11, 1972, Part 1047: Exemptions, §1047.45 Motor transportation of passengers incidental to transportation by aircraft, paragrahh (d) amended by addition of subparagraph (2) Savannah, Ga., Airport, effective Feb. 14, 1972.

37 FR 5953, March 23, 1972, Part 1048: Commercial Zones, §1048.2 Chicago, Ill., commercial zone description revised, effective May 29, 1972.

37 FR 5953, March 23, 1972, Part 1048: Commercial Zones, §1048.2 Chicago, Ill., commercial zone description revised, effective May 29, 1972.

37 FR 9420, May 10, 1972: Administrative Ruling No. 119; Supplements Ruling Nos. 107 and 110. Provides a list showing the status of various commodities under the §203(b6) exemption of agricultural commodities entitled Composite Commodity List.

37 FR 15701, Aug. 4, 1972, Part 1048: Commercial Zones, §1048.102 Controlling distances and population data, paragraph (b) amended, effective Sept. 11, 1972.

37 FR 15995, Aug. 9, 1972, Part 1048: Commercial Zones, §1048.41 Consolidated City of Indianapolis, Inc., defining commercial zone limits of the recently created Consolidated City, added, effective Oct. 1, 1972.

37 FR 25023, Nov. 25, 1972, Part 1048: Commercial Zones, §1048.21 Baltimore, Md., commercial zone redefined and extended to include an area not now within limits thereof,effective Nov. 1, 1972.

38 FR 7809, March 26, 1973, Part 1048: Commercial Zones, §1048.27 New Orleans, La., commercial zone limits redefined and extended, effective May 11, 1973.

38 FR 15963, June 19, 1973, Part 1048: Commercial Zones, §1048.22 Cleveland, O., commercial zone description revised, effective Aug. 1, 1973.

38 FR 19046, July 17, 1973, Part 1048: Commercial Zones, §1048.8, Kansas City, No.-Kansas City, Kans., Commercial zone revised, effective Aug. 1, 1973.

38 FR 24368, Sept. 7, 1973, Part 1048: Commercial Zones, §1048.8, Kansas City, Mo.-Kansas City, Kans., commercial zone revised, effective Aug. 1, 1973.

38 FR 9831, Mar. 14, 1974, Part 1048: Commercial Zones. Miscellaneous corrections in §§1048.1(b)(1) at 36 FR 19909 and 1048.2 at 37 FR 5963.

39 FR 18768, May 30, 1974, Part 1048: Commercial Zones. Defining the zone adjacent to and commercially a part of Lexington-Fayette Urban County, Ky., at §1048.42, effective July 1, 1974.

Section 203. (c) [§*303(c) U.S.C.*] Certificate or permit.—[Unchanged. See vol. 18, p. 14274.]

Notes of Decisions

Volume 19—p. 15506; Volume 21—p. 17084.

2. Construction and interpretation.—[Vols. 19, 21].—Complainants sought intervention of Commission based on alleged violation of §203(c) of the Act. Defendant had substituted water for motor transportation when it was no longer possible to utilize ferry service. Complaint dismissed.—Wold Storage & Transfer, Inc. v. Alaska Transfer, Inc., 115 M.C.C. 288 (293).

3. For-hire transportation business.—[Vols. 19, 21].—See also Personnel Service, Inc.—Investigation, at §203(a)(17), n. 5; United States v. Chartered Bus Service, Inc., at §222(h), n. 5; United States v. Webb, at §222(c), n. 5; and Uxbridge Motor Lines, Inc.—Investigation of Operations, at §212(a), n. 35.

Where an individual orally leased drivers and equipment to shipper, and individual retained control over equipment and hired drivers who were responsible to him, operation found to constitute unauthorized for-hire transportation. Cease and desist order entered.—Snyder's Wholesale Liquors, Inc., Petition, 113 M.C.C. 528 (529-30).

Since corporate respondents, who are commonly owned, customarily transport their goods in the same vehicle at the same time, the venture results in for-hire carriage performed by each for the other; mutual reimbursement of expense constitutes the element of compensation, and the simultaneous carriage of more than one participant's freight precludes the company who is in nominal control of the vehicle from meeting the "primary business" concept embodied in section 203(c). Further, the Commission is not required to disregard the separate corporate entities because of their common ownership for the purpose of exempting such transportation from regulation.—Leitchfield Mfg. Co., Inc.—Investigation, 106 M.C.C. 648 (652, 653)*.

On further hearing, following remand, instant proceeding does not present the factual grounds which caused the courts to hold that operations considered in 81 MCC 337 were not for-hire carriage. Unlike situation in that case, wherein respondents dealt in bulk commodities and were transporting "in bulk" sugar as part of their overall activities, respondent is a cookie distributor and has no connection with or overall knowledge of the sugar distribution business; it does not warehouse sugar nor assume any warehousing risk or cost, and it has never sustained a loss in its sale of sugar. While it is the nominal owner of sugar being transported, it buys sugar only in response to preexisting orders in conjunction with use of its own equipment to pickup cookies at bakeries which supply it and which buy the sugar at prices including the equivalent of a transportation charge. Respondent's sugar transportation is not part of its primary business as a distributor of cookies nor within scope of and in furtherance of a primary sugar business; thus, it constitutes unlawful for-hire carriage.—Shelby Biscuit Co. Investigation of Operations, 106 M.C.C. 79 (83-5)*.

Operations of shipper-petitioners, under their "joint venture" agreement (involving joint leasing of vehicles, joint hiring of drivers, and an equitable division of costs thereof) found to constitute for-hire carriage subject to regulation, rather than *bona fide* private transportation, when, in substance, they are providing motor carrier service for each other with the reimbursement of expenses constituting "compensation" within statutory definition of both common and contract carriers. Also, while the disputed operations have many of the hallmarks of genuine equipment-leasing and employment arrangements, the evidence is convincing that petitioners have so far divested themselves of the characteristic transportation burden as to render considered transportation, in substance, that which the court said in 368 US 370, constitutes "a departure from the statutory design."—Keller Industries, Inc.—Declaratory Order, 103 M.C.C. 520 (527-9)*.

Under the plan involved, petitioners have been free from the burden of large capital investments in vehicles, the risk of premature depreciation or catastrophic loss, and the risk of nonutilization of high-priced equipment; and those factors alone, and on balance with other considerations, might not be sufficient to establish their operations as other than *bona fide* private carriage. However, the presence of one additional factor, i.e., the failure of any participant therein to shoulder the burden of a nonproductive backhaul, tips the scales conclusively against lawfulness of disputed arrangement. Therefore, considered joint operations of petitioners, in performance of alleged private motor carrier operations, constitute for-hire carriage for which authority is required by the Act.—Id., pp. 529-31.

On reconsideration, upon determining an issue of general transportation importance to be involved, prior findings that petitioners' operations under a "joint venture" arrangement for interstate transportation of their goods constituted unlawful "for-hire" carriage, affirmed. While the prior decision of unlawfulness was premised, in part, on the failure of any participant to assume the characteristic transportation of a nonproductive backhaul, additional factors conclusively show that considered operations are not *bona fide* private carriage. Record is clear that dominant petitioner would not hesitate to solicit other shippers whose inbound shipments coordinated with its outbound movements; however, solicitation activities are irreconcilable with the concept of private carriage since the statute, while confirming a shipper's right to transport his own goods, denies him the right to solicit participation of others in joint activities which result, in fact, in their providing for-hire transportation for each other. Exemption from licensing requirements of the act must be strictly construed; and shippers' motivations must give way when they conflict with the clear purpose of regulation.—Id., 107 M.C.C. 75 (76-8)*.

Proposed operations are those of a for-hire motor carrier, since they are performed as a hauling service for compensation, notwithstanding the flat fee applicant levies for its complete storage and delivery service. In addition to warehousing proposal includes: (1) less-than-truckload shipments with multiple deliveries; (2) deliveries made upon instruction from shipper; (3) deliveries timed and scheduled so as to coordinate delivery with receiving departments of consignees; and (4) loading or delivery performed 7 days a week at odd hours, so that the delivery can be effected when needed or to meet any special emergency.—Parkway Expediters, Inc., 103 M.C.C. 441 (443-5).

Respondent found to be providing unlawful for-hire transportation of asphalt from Baltimore, Md., and Springdale, Pa., to points in West Virginia. Elements which distinguish these operations from his lawful operations as petroleum products distributor are that he transports only products for which he has preexisting orders; that supplier makes price concessions necessary for sale; that his mark-up depends primarily on distance traversed and is competitive with charges of authorized carriers; that he assumes no risk of price fluctuation when he takes title to asphalt, which moves from origin to destination without intermediate storage; that petroleum products distributor is not required in effecting sales and distribution; and that although he has a substantial investment in transportation equipment, storage facilities and inventory, he ordinarily uses only transportation oriented part of his investment in this service. In addition although considered transportation enables him to employ drivers and equipment on a year-round basis, economic benefit accruing to his noncarrier business is too remote to place such transportation within regulatory exemption accorded private carriage.—Garland—Investigation of Operations and Practices, 102 M.C.C. 437 (453-4).

It is well established, see 27 MCC 191 and 78 MCC 161, that the two significant instrumentalities of commerce with respect to motor carriage are (1) the equipment by which the transportation is accomplished, and (2) the driver of the equipment. A lease of equipment with drivers by a person (or persons acting in concert) to a shipper will establish a presumption that transportation is being furnished by such person (or persons) as a for-hire carrier.—Empire Truck

U-Drive-It, Inc., Investigation, 96 M.C.C. 29 (41).

To determine whether a particular leasing arrangement is private carriage or for-hire transportation, the status of each operation is a question of fact that must be determined in each individual proceeding, and, as was held in 368 US 370, the Commission may properly look to the substance of the arrangements underlying purported private carriage in determining whether for-hire transportation is actually being provided under the guise of an equipment leasing plan; and this determination may be made by looking to whom has the right to control the transportation provided in leased vehicles or by looking to other factors—Id., p. 41.

Considered transportation constitutes for-hire and not private carriage. Although respondents point to the fact that the rental agreement stipulates that the shipper is in exclusive control of equipment leased from it, and argue that consideration must be given to the fact that not all drivers furnished by respondent personnel registry are used in vehicles leased by respondent equipment lessor, in fact, latter frequently leases vehicles not driven by drivers supplied by the personnel registry; however, these considerations are not material. It is clear that respondents regularly cooperate to provide both vehicles and drivers to a substantial number of shippers. Furthermore, an examination of the entire leasing operation shows that a shipper can in advance arrive at a cost for the services provided by vehicle lessor and furnisher of drivers, and may divert its shipment to authorized carriers without having to give consideration, as businessmen engaged in legitimate private carriage must, to whether the use of such carriers will oblige them to bear the cost of having expensive motor carrier equipment stand idle.—Id., p. 41-3.

A bona fide lessor of equipment must always avoid, either directly or in combination with another, providing drivers along with the equipment leased by it; and, as far as long term leases are concerned, a realistic guaranteed minimum charge for the period of the lease should be imposed. Although such a provision is impractical with respect to trip leases, and the commission is unwilling to interfere with what might be established practices of legitimate equipment rental agencies solely on the basis of the instant record, it is evident that a lessor of trip-leased equipment does not consistently hire the same drivers for return trips that have been used by the shipper on the outbound movement. Additionally, other indicia of the bona fides of such arrangements will be considered, as for example, establishment by lessor of substantial maintenance facilities at branch offices, and the imposition of different levels of rentals where a vehicle does not move in a round trip.—Id., p. 44.

5. Primary business test.—[Vols. 19, 21].—Since respondent Johnson holds both interstate and intrastate motor carrier authority, since his employees, except a bookkeeper, primarily drive his vehicles, and since his motor vehicles constitute most of his assets, except for some land and buildings, which are also used in his trucking operations, considered interstate transportation of salt is conducted as part of his transportation business. Additional considerations include facts that Johnson purchases salt only after his bid is accepted, that he at no time pays out any money for the salt, and that predominant difference between his cost and his bid stems from the transportation costs involved. Favorable factors to Johnson's argument that he was in the business of selling salt, transportation being only incidental to his primary noncarrier business, are his apparent taking of title to the salt and his limited use of warehousing, in order to have a supply on hand when mine is closed on weekends. However, these factors are insufficient to conclude that considered operation is part of Johnson's noncarrier business. Cease and desist order entered.—Johnson and Independent Salt Co.—Investigation, 96 M.C.C. 164 (171-2).

It is unlawful for any person to transport property by motor vehicle in interstate or foreign commerce, unless such transportation is authorized by the Commission, or unless such transportation is within scope, and in furtherance, of a primary business enterprise other than transportation. And since the sole issue in this proceeding is whether challenged transportation is private or for-hire motor carriage, respondent's operations are given a detailed and comprehensive evaluation; and in light of past Commission and court decisions, considered transportation is a separate for-hire transportation business. Cease and desist order entered.—Garland-Investigation of Operations and Practices, 102 M.C.C. 437 (443, 455).

Evidence of record, viewed in light of 102 MCC 437, discloses that considered transportation services are not rendered in furtherance of respondent's primary business, but as related and secondary unauthorized enterprise. Respondent's customers are able to and do purchase considered products at the same price, f.o.b. the mine, as respondent pays; respondent's markup remains constant; respondent assumes no risk of price fluctuations when it takes title to the commodities; respondent provides no real service other than that of transportation; and the function of respondent as distributor, jobber, or dealer is not required either in effecting sales of products or for their intermediate storage and distribution. Thus, although it is prudent for a businessman engaged in *bona fide* distributing operations to use all legitimate means to enhance his profit and to minimize losses, when all risks are eliminated, combined with the rendition of a transportation service and the receipt of an assured return, the basic nature of the transportation service provided is that of a for-hire carrier rather than that of a bona fide distributor.—T & T Supply, Inc.—Investigation of Operations, 103 M.C.C. 946 (951, 954-5).

Respondent parent corporation found not in violation of the act, because considered transportation was conducted in furtherance of its primary business: the manufacture, sale and distribution of frozen foods. Parent transports supplies (retaining title) to its processing subsidiary corporations and, although parent bills and is paid by these processors for said transportation, it ultimately pays this cost, since it is included in cost of processing. These movements, therefore, are performed for neither compensation nor profit. In addition, evidence also establishes another subsidiary as parent's selling agent and parent as title holder of commodities consigned to this agent during transit; and, absent evidence to the contrary, the Commission must assume, that these commodities, although consigned to selling agent, are owned by parent who, in delivering them to its customers, is acting in furtherance of its primary business.—Winter Garden Freezer Co., Inc., Investigation, 103 M.C.C. 513 (517-9).

Simultaneous carriage of goods in the same vehicle by three commonly owned corporations precludes the participant having nominal control over the leased vehicle from meeting the primary business concept, since the Commission is not required to disregard the separate corporate entities to exempt from regulation transportation which would otherwise be subject to the Act.—Leithchfield Mfg. Co., Inc.—Investigation, 106 M.C.C. 648 (652-653)*.

On reconsideration, proposed transportation of radioactive waste found to be for-hire transportation as evidence of record shows that considered movements are not in furtherance of any primary business other than transportation. Fact that applicant assumes ownership of such waste during transportation, standing alone, is not probative evidence of authenic private carriage, as distinguished from 99 MCC 109, as relied upon by applicant.—Long Island Nuclear Service Corp. Com. Car. Applic., 110 M.C.C. 398 (402-3)*.

Transportation activities of petitioner church for itself and its church affiliates were found to be operations performed for a single entity whose "primary business" is furtherance of the church mission which is plainly a legitimate non-transportation enterprise and therefore all such activities constitute legitimate private carriage of property exempt from economic regulation under the statute.—Status of Certain Church Transportation, 112 M.C.C. 59, (62-3).

Respondents' transportation of lumber under so-called buy-and-sell arrangements found to be within the scope and in furtherance of their primary nontransportation enterprises.—Hansen—Investigation of Operations, 113 M.C.C. 362 (368).

Respondents' transportation of asphalt is neither "within the scope" nor "in furtherance" of a primary nontransportation enterprise, but is unauthorized for-hire carriage, when, among other things, they transport only that which is purchased under preexisting orders, have a substantial investment in transportation equipment, and the only identifiable service actually performed for the ultimate purchaser of the asphalt, and from which they derive profit, is transportation, for which they receive the difference between agreed price paid by them for the asphalt and the price agreed on for its sale at destination. Cease and desist order entered.—Whitehurst Paving Co.—Investigation of Operations, 113 M.C.C. 390 (394, 405)*.

See also Clearfield Cheese Company v. United States, at APA, 5 USC, judicial Review and Shelby Biscuit Co., Investigation of Operations, at n. 3 above.

Section 204. (a)(1) [§*304 (a)(1) U.S.C.*] Powers and duties of Commission—(a) Powers and duties generally.—[Unchanged. See vol. 9, p. 7905.]

Historical notes, see vol. 9, p. 7905; vol. 11, p. 9377; vol 12, p. 10360; vol. 13, p. 11054; vol. 14, p. 11572; vol. 15, p. 12174; vol. 16, p. 12814; vol. 17, p. 13505; vol. 19, p. 15514; vol. 21, p. 17102.

Notes of Decisions

Volume 9—p. 7905; Volume 11—p. 9378; Volume 12—p. 10360; Volume 13—p. 11054; Volume 14—p. 11572; Volume 15—p. 12174; Volume 16—p. 12814; Volume 17—p. 13505; Volume 18—p. 14275; Volume 19—p. 15514; Volume 21—p. 17102.

1. Construction and interpretation.—[Vols. 9, 11-16, 18, 19, 21].—Opponents of the proposed rule challenge the Commission's power to institute a rulemaking proceeding such as the one herein which involves the licensing of involved carriers without specific showings of need for service. Such arguments are not valid as they are based upon a misconstruction of the purpose of this proceeding which explicitly states that only a general finding of public convenience and necessity is considered and the involved operations must continue to be authorized by the "appropriate procedures" dictated by the Interstate Commerce Act.—Traf. at or near U.S.—Can. Boundary Lines, 110 M.C.C. 730 (739-40)*.

Commission must regulate various modes of transportation impartially but also in a manner recognizing and maintaining inherent advantages of each mode. Thus, rulemaking proceeding herein is limited to motor carriers as their inherent advantages, especially flexibility, renders them particularly suited to transport the rural-area, small-shipment traffic whose adequate transportation is the main target of this proceeding.—Restrictions on Service by Motor Common Carriers, 111 M.C.C. 151 (162-3).

Commission, pursuant to §204(a)(1), herein instituted a rulemaking proceeding to require motor carriers of property to publish tariffs which conform strictly to their operating authority and to nullify all self-imposed service restrictions on certain types of traffic. The Commission, in implementing the national transportation policy, has a duty to remedy troublesome situations through such reasonable regulations as the public convenience and necessity may require.—Id., p. 163-4.

Rulemaking proceedings are aimed at general situations, not at particular persons, and to approach the involved problem herein of self imposed service restrictions on a case basis would be time-consuming and ineffective in alleviating the general situation caused by wide-spread nature of such restrictions.— Id., p. 164-7.

Commission, citing 110 MCC 730, has jurisdiction to make a general finding of public convenience and necessity in an appropriate rulemaking proceeding, with interested persons thereafter taking advantage of such finding through individual applications and appropriate proof of fitness.—Motor Service on Shipments of New Furniture, 114 M.C.C. 144 (160).

5. State regulation.—[Vols. 9, 11, 16, 18, 21, 22].—In establishing its motor carrier safety regulations, the Commission did not intend or attempt to occupy the field either exclusively or in such detail as to supersede or duplicate local driving regulations; in lieu of detailed regulations, the Commission prescribed 49 CFR.3 which requires motor vehicles to be driven in accordance with laws, ordinances, and regulations of the jurisdiction in which they are being operated. Insofar as alleged violations by defendant of Wisconsin statutes and regulations relating to leases of equipment, registration of vehicles, and to reciprocity with other States as to such registration, are concerned, those state regulations are not within the scope of §192.3 of the Commission's safety regulations; they have no relation to the safe driving of vehicles, but are largely State revenue or tax measures, and therefore cannot be found to be embraced within the purview of §192.3.—Wisconsin Public Service Comm. v. Ace Doran, 96 M.C.C. 347, (354-5).

In considering the validity, scope and applicability of §192.3 of the safety regulations, the Commission has said, see 72 MCC 659, that it regards a State's weight regulations as they affect vehicles operating in interstate commerce, as an exercise of the police power of the State designed to protect their highways against unsafe and unreasonable use, having a clear and definite relationship to safety of operation upon its highways; furthermore, the Commission has concluded that §212(a) gives it the power to revoke or suspend an interstate carrier's certificate for violation of State size and weight regulations if the circumstances so dictates.—Id., p. 355.

10. Safety of operation and equipment.—[Vols. 9, 11-19, 21, 22].—Evidence that motor transportation of any explosive or blasting agent is constantly subject to fire hazards from several potential sources, including tires of the vehicle itself, justifies implementation of recommendations by Chief of the Section of Motor Carrier Safety that the Commission develop regulations concerning (1) the condition, size, inflation standards, and periodic inspection of tires used in transporting such commodities; (2) periodic inspection of vehicles, with specific reference to tires, by a competent official of the operating carrier; (3) initial instruction and periodic examination of drivers respecting their attitude toward laws and regulations, their knowledge of requirements for tire inflation and need for periodic inspections en route, and their knowledge of regulations that vehicles must not be left unattended and must constantly display signs indicating nature of the content; (4) certification by a responsible officer or agent of the carrier as to examination and satisfactory qualifications of such drivers; and (4) equipment of vehicles transporting explosives and other highly reactive commodities with devices enabling driver to remove tires when they become underinflated or overheated.—Accident Near Marshalls Creek, Pa., 96 M.C.C. 783 (793-4, 795).

20. Accidents and accidents reports.—[Vols. 9, 11, 16-19, 21, 22].—Accident involving a vehicle operated by a private carrier, which resulted in death of 6 persons and injury to 13 others, as well as some $600,000 property damage, was caused by explosion of heated or burning dynamite on a trailer laden with dynamite, nitro-carbo-nitrate, and electric blasting caps, which was left unattended adjacent to a public roadway. The fire resulted from heat generation in one of the two right tires, and the severe consequences of the detonation are directly traceable to fact that carrier's agent and driver, with full knowledge of explosive nature of the cargo, left the vehicle totally unattended and without display of "explosives" signs on its side and rear. As the vehicle was equipped with such signs when it left origin, and it is doubtful that they could have fallen off in transit, it is apparent that the driver willfully left the vehicle unattended and without identification, in violation of the Commission's regulations, compliance with which could have prevented or minimized the resulting injuries and deaths, since the firemen and bystanders would have been warned of the dangerous cargo.—Accident Near Marshalls Creek, Pa., 96 M.C.C. 783 (784, 794).

21. Reports, generally; contents; proof.—[Vols. 15, 16].—See also Annual Reports of Motor Carriers of Property, at §220(a), n. 5.

In granting the requested certificate the Commission requires applicant to report its success in meeting shipper's needs in a "Performance Report" at the close of each full year for a period of 3 years so that the Commission can be satisfied that the author-

ity granted is utilized to a reasonable degree. Each "Performance Report" should include sufficient and pertinent information concerning applicant's multiple delivery shipments and its actual performance under the certificate issued.—West Brothers Inc., Extension, 106 M.C.C. 792 (799-800).

30. Carriers otherwise exempted under the Act.—[Vols. 9, 19, 21].—See Refiners Transport & Term. Corp.—Purchase—Mitchell Case, §5(3), n. 10.

Regulations of the Commission

33 FR 14413, Sept. 25, 1968, Part 1003: List of Forms, §1003.1 Motor Carrier and Broker Forms (b) Insurance and Surety Bond Forms, B.M.C. 83 Motor common carrier cargo liability surety bond, revised, effective Jan. 1, 1969.

34 FR 8118, May 23, 1969, Part 1003: List of Forms, §1003.1 Motor Carrier and Broker Forms. (a) Application forms, BOp 102 Notice of intent to transport for certain nonmembers, to be used by §203(b5) cooperative associations or federations of such associations.

35 FR 4754, March 19, 1970, Part 1003: List of Forms, §1003.1(a) further amended by adding thereto form BOp 103 Summary of information for shippers of household goods, effective May 1, 1970.

35 FR 17264, Nov. 10, 1970, Part 1060: new Part 1060 Special Relief for Motor Carriers Affected by a Temporary Highway Closing, §1060.1 Special relief for motor carriers affected by temporary closing of West Virginia Highway 2, added, effective upon publication in the Federal Register.

36 FR 21596, Nov. 11, 1971, Part 1062: Special Regulations for For-Hire Motor Carriers Engaged in the Transportation for Recycling or Reuse of "Waste" Products in futherance of Recognized Pollution Control Programs, New Part 1062 setting forth special procedures, added, effective Dec. 15, 1971.

36 FR 22579, Nov. 25, 1971, Part 1061: Limitation of Smoking on Interstate Passenger Carrier Vehicles, new Part 1061 governing smoking on interstate buses added, effective Jan. 6, 1972.

36 FR 23391, Dec. 9, 1971, Part 1062: Special Regulations for For-Hire Motor Carriers Engaged in the Transportation for Recycling or Reuse of "Waste" Products in Furtherance of Recognized Pollution Programs, effective date of regulations indefinitely postponed by order of Nov. 30, 1971.

37 FR 5700, March 18, 1972, Part 1061: Limitation of Smoking on Interstate Passenger Carrier Vehicles, petitions for reconsideration having been denied, effective date of order of Nov. 8, 1971 (36 FR 22579) is fixed as Apr. 17, 1972.

37 FR 20695, Oct. 3, 1972, Part 1206: Common and Contract Motor Carriers of Passengers, accounting regulations, insofar as they apply to the investment tax credit, amended to bring them into compliance with the Revenue Act of 1971 (Pub. Law 92-178), effective on publication in the Federal Register.

37 FR 21999, Oct. 18, 1972, Part 1003: List of Forms, §1003.1 Motor Carrier and Broker Forms, BOC 101 revoked and new BOp 101 and BOp 106 added, effective Nov. 2, 1972.

37 FR 22621, Oct. 20, 1972, Part 1062: Special Regulations for For-Hire Carriers Engaged in Transportation for Recycling or Reuse of "Waste" Products in Furtherance of Recognized Pollution Control Programs, effective date of regulations fixed as March 20, 1972, by order dated Feb. 15, 1972.

38 FR 6828, March 13, 1973, Part 1003: List of Forms, §1003.1 Motor Carrier and Broker Forms, amended by revoking all references to forms B.M.C. 4 and B.M.C. 5, and replacing said matters with OP-OR 11, effective Apr. 2, 1973.

38 FR 10445, Apr. 27, 1973, Part 1003: List of Forms, §1003.1 Motor carrier and broker forms, subhead OP-95 revised to read OP-MCB-95 (revised 1972), effective May 28, 1973.

38 FR 32451, Nov. 26, 1973, Part 1207: Uniform System of Accounts—Class I and Class II Common and Contract Carriers of Property, Commission promulgated rules for classification of revenue and expense accounts, effective Jan. 1, 1974.

39 FR 5766, Feb. 15, 1974, Parts 1240 & 1249: Classes of Carriers; and Reports of Motor Carriers. Revisions of Parts 1240 & 1249 of 49 CFR, as regards Quarterly Financial Report of Motor Carriers of Property.

39 FR 7301, Feb. 26, 1974, Part 1207: Class I and Class II Common and Contract Carriers of Property. Publication of the new Uniform System of Accounts for Motor Carriers of Property, effective Jan. 1, 1974.

Section 204. (a)(2) [§*304 (a)(2) U.S.C.*] Contract carriers.—[Unchanged. See vol. 9, p. 7919.]

Notes of Decisions

Volume 9—p. 7919; Volume 11—p. 9382; Volume 12—p. 10361; Volume 14—p. 11575; Volume 17—p. 13507; Volume 18—p. 14277; Volume 19—p. 15518; Volume 21—p. 17110.

Section 204. (a)(3) [*§304(a)(3) U.S.C.*] Private carriers.—[Unchanged. See vol. 11, p. 9382.]

Amendment, see footnote, vol. 11, p. 9383.

Notes of Decisions

Volume 9—p. 7921; Volume 11—p. 9383; Volume 12—p. 10362; Volume 13—p. 11056; Voluem 14—p. 11576; Volume 16—p. 12818; Volume 17—p. 13507; Volume 18—p. 14278; Volume 19—p. 15519; Volume 21—p. 17111.

1. Construction and interpretation.—[Vols. 8, 11-14, 16, 19, 21].—Commission found that while its authority under the Transportation Act is ample, §§204(a), 220(a), and 224 of the Interstate Commerce Act confer additional authority for the prescription of regulations requiring private motor carriers transporting explosives and dangerous articles to file reports and bear identification markings as herein specified.—Transportation of Explosives—Private Motor Carriers, 329 I.C.C. 411 (412-13)*.

10. Safety of operation and equipment.—[Vols. 19, 21].—See also Accident Near Marshall Creek, at §204(a)(1), n. 20.

On reconsideration, Commission herein modified orders prescribed in 329 ICC 376 as to identification requirements for private motor carriers of explosives and dangerous articles to prevent misinterpretation when vehicles are used for other purposes and also to define the proper forum for prosecution of violations of such orders.—Transportation of Explosives—Private Motor Carriers, 329 I.C.C. 411 (413-4)*.

Section 204. (a)(3a) [*§304(a)(3a) U.S.C.*] Migrant farm workers.—[Unchanged. See vol. 17, p. 13507.]

Notes of Decisions

Volume 18—p. 14278; Volume 21—p. 17113.

10. Safety of operation and equipment.—[Vols. 18, 21].—See Bracero Transp. Co., Inc., Extension, at §203(a)(15), n. 1.

Section 204. (a)(4) [§*304(a)(4) U.S.C.*] Regulation of brokers.—State; exemption. —[Unchanged. See vol. 9, p. 7924.]

Notes of Decisions

Volume 9—p. 7924; Volume 11—p. 9384; Volume 12—p. 10363; Volume 13—p. 11056; Volume 15—p. 12176; Volume 16—p. 12819.

10. Practice of brokers.—[Vols. 9, 11-13, 15].—See Gray Line National Tours Corp. Broker Application, at §211(b), n. 3 fitness.

Section 204. (a)(4a) [§*304(a)(4a) U.S.C.*] Operation within a single State; exemption.—[Unchanged. See vol. 11, p. 9386.]

Notes of Decisions

Volume 11—p. 9388; Volume 12—p. 10363; Volume 13—p. 11056; Volume 14—p. 11576; Volume 15—p. 12178; Volume 17—p. 13507; Volume 19—p. 15520.

1. Construction and interpretation.—[Vols. 11-15, 17, 19].—Although the Commission exercises a stringent policy of control over the transportation of explosives, operation by applicant (a small intrastate contract motor carrier of electric blasting caps) is of such nature, character or quantity that granting certificate of exemption under §204(a)(4a) would not substantially affect or impair uniform Commission regulation of motor carriers engaged in interstate or foreign commerce.—Explosives Supply Co., Inc., Exemption Application, 98 M.C.C. 443 (445-446).

Generally the Commission grants certificates of exemption only when the operations are relatively small from the standpoint of both territory and operating revenue and hence of little consequence to other carriers fully subject to regulation. In the instant proceeding, although the New York City area involved is physically small, it is one of the most important economic areas in the country. In addition, 30 trucks would be used, a number higher than that of many regulated carriers; the traffic involved immediately would be of substantial volume and it would move on a fairly regular basis; and finally the operations would produce estimated annual, gross revenue of $100,000, far too large an amount to be considered as having an insignificant effect on transportation in the area. Denied.—Knickerbocker Warehousing Corp., 99 M.C.C. 293 (295-298).

5. Hawaiian carriers.—[Vol. 19].—There is no legal basis for concluding that the exemption under §204(a)(4a) of motor carriers operating solely within the State of Hawaii, 84 MCC 5, embraces or should be extended to include either Hawaiian operations of mainland applicants for household-goods authority or those of Hawaii-based carriers who conduct operations beyond the State, either directly or through commonly controlled affiliates; thus, Hawaiian-based applicants who conduct operations beyond the State, either directly or through affiliates, or who participate in joint-rate arrangements with mainland carriers, clearly are not within that exemption. However, two Hawaii-based applicants operating under the exemption, and not affiliated with any multi-State carrier, may continue household-goods operations they currently conduct in their own right or under agency contracts with mainland carriers without a grant of interstate authority; as the Commission has held with respect to carriers exempt under the former §206(a)(1) second proviso, applicants' elegibility under the §204 (a)(4a) exemption is not destroyed by their agency relationships with various mainland carriers.—Burham Van Service, Inc., Extension, 103 M.C.C. 372 (388-91*.

Transportation of household goods as defined by the Commission by motor carriers in interstate or foreign commerce solely within the State of Hawaii found to be of such nature, character, or quantity that exemption of such carriers from regulation under part II of the Interstate Commerce Act would substantially affect or impair uniform regulation by the Commission in effectuating the national transportation policy. Modification of the regulation creating the exemption promulgated.—Motor Carrier Operation in the State of Hawaii, 115 M.C.C. 228 (255).

Regulations of the Commission

37 FR 10505, May 24, 1972, Part 1050: Motor Carrier Operation in the State of Hawaii, §1050.5 Motor carriers operating solely in Hawaii exempt, amended to read as set forth, effective May 30, 1972.

Section 204. (a)(5) [*§304(a)(5) U.S.C.*].—[Unchanged. See vol. 9, p. 7927, 7928; vol. 11, p. 9389.]

Section 204. (a)(6) [*§304(a)(b) U.S.C.*] Administration.—[Unchanged. See vol. 9, p. 7928.]

Historical Note

On August 9, 1973, the Commission recommended to Congress legislation to amend §§12 (1), 204(a)(6), 304(a), and 403(a) of the Interstate Commerce Act to enable the Commission to exempt certain transportation from regulation upon a finding that the regulation is not necessary in order to effectuate the National Transportation Policy and that regulation would serve no public purpose. (S. 2458). Annual Report, 1974, p. 84.

Notes of Decision

Volume 15—p. 12178; Volume 16—p. 12819; Volume 19—p. 15521; Volume 21—p. 17114.

2. Construction and interpretation.—[Vols. 15, 16, 19, 21].—See also Joray Trucking Corp., at §202(a), n. 2; Loss and Damage Claims, at §12(1), n. 40; Removal of Truckload Restrictions, at §208(a), n. 2; and Restrictions on Service by Motor Common Carriers at §204(a)(1), n. 1.

Commission herein instituted a rulemaking proceeding pursuant to its duty to prescribe rules and regulations for enforcement of part II of the Act, to determine whether public convenience and necessity, considered on a national level, require all motor common carriers of property involved in the considered operations to be authorized by the appropriate procedures to conduct such operations. Because of the general lack of interest in or support for the proposed rule by parties most affected, the Commission found the proposed rule not justified.—Traf. At or Near U.S.—Can. Boundary Lines, 110 M.C. 730 (740-2).

Since the Commission concluded that a general finding of public convenience and necessity for the considered operations has not been proven at the present time, the filing of individual applications for the necessary operating authority will continue to be required. Should present methods of certification appear in future to obstruct involved operations, further consideration will be given to proposals herein.—Id., p. 743.

Commission has authority to make a general finding of public convenience and necessity in appropriate rulemaking proceedings, with interested persons thereafter filing individual applications (see 110 MCC 730). The emergency transportation situation described herein necessitates such a finding and, as consideration of each carrier's situation is unduly burdensome and would create delay contrary to the public interest special procedures are hereby promulgated to enable affected carriers to operate under one special certificate on public convenience and necessity.—Special Relief for Motor Carriers, 112 M.C.C. 323 (326-9).

Commission instituted special regulations for motor carrier licensing insofar as they relate to for-hire transportation of "waste" products for reuse under authority granted in Act to regulate transportation of property. Such products, as defined herein, are considered property as they will become vital elements in the manufacturing process in which they are to be utilized, thus becoming subject to Commission's economic regulation.—Transportation of "Waste" Products for Reuse, 114 M.C.C. 92 (104-5)*.

Regulations of the Commission

35 FR 17264, Nov. 10, 1970, Part 1060: new Part 1060 Special Relief for Motor Carriers Affected by a Temporary Highway Closing, §1060.1 Special relief for motor carriers affected by temporary closing of West Virginia Highway 2, added, effective upon publication in the Federal Register.

36 FR 1337, Jan. 28, 1971, Part 1055: Discrimination in Operations of Interstate Motor Common Carriers of Passengers, regulations contained in Part 1055 [formerly Part 180a] restated in more concise form, without any substantive change,effective on date of order.

Section 204. (a)(7) [§*304(a)(7) U.S.C.*] Inquiry into management; recommendations.—[Unchanged. See vol. 11, p. 9389.]

Amendments, see footnotes, vol. 11, p. 9389.

Section 204 (b) [§*304(b) U.S.C.*] Classification of motor carriers.—[Unchanged. See vol. 11, p. 9390.]

Amendment, see footnote, p. 9390.

Notes of Decisions

Volume 9—p. 7929; Volume 11—p. 9390; Volume 12—p. 10365; Volume 13—p. 11057; Voluem 14—p. 11577; Volume 15—p. 12178; Volume 16—p. 12820; Volume 17—p. 13508; Volume 18—p. 14280; Volume 19—p. 15522; Volume 21—p. 17116.

1. Construction and interpretation.—[Vols. 9, 11, 13-18, 21].—See also §203(a) (15), n. 1.

In distinguishing "mixed-shipment" from "mixed-load" restrictions, it was held that a "mixed- shipments" restriction requires that both classes of commodities be tendered by the same shipper, on the same bill of lading, to the same consignee, but the "shipment" may consist of more than a single truckload. Under a "mixed-loads" restriction, however, each truckload transported by the carrier must contain two or more types of commodities, which may be tendered by the same shipper or by different shippers. This distinction may result in a substantial overlapping of terms.—East Express, Inc., Ext.—High Point, 117 M.C.C. 383 (387)*.

6. Types of property-carrier services.—[Vols. 9, 11-19, 21].—Commission found that true substituted rail-for-motor is provided under MLRC (multi-level rail car) open-tariff provisions, and joint intermodal service under MLRC joint-rate or negotiated rate tariffs. MLRC service is by nature substantially different from TOFC (trailer-on-flatcar) service so that criteria utilized in plan identifications of TOFC cannot be applied. Therefore, rules and regulations prescribed in Ex Parte No. 230 (322 ICC 301) are only partially applicable to MLRC service and partially inapplicable.—Substituted Service—Piggyback, 337 I.C.C. 5 (9-11).

The grant of general-commodity authority to a contract carrier does not contravene the provisions or spirit of the act; also, §204(b) specifically provides that the Commission may establish reasonable classifications for common or contract carriers as it deems necessary or desirable in the public interest. As shown by 2 MCC 703, it was determined very early that contract carriers may be licensed to transport general commodities; however, such a commodity description should be awarded to contract carriers only, in the most compelling circumstances. Such a situation is present where supporting contract shipper is a large and diversified company which presently manufactures and ships more than 500 different products, and receives a wide variety of commodities. Moreover, record indicates that shipper's research facilities are engaged constantly in the development of new products. It would be difficult and structurally awkward, if not impossible, to frame grants of authority that would encompass shipper's diverse products mix, and still permit applicants to provide it with a complete service; general-commodity authority granted.—Gypsum Haulage, Inc., Extension, 108 M.C.C. 314 (325-6, 328).

Initial movements, defined in Administrative Ruling 75, embrace transportation of new motor vehicles from place of manufacture or assembly, specifically authorized to be served as a point of origin by the originating carrier's certificate or permit, to any on such carrier's authorized route or within its authorized territory for delivery to consignees or connecting carriers. Any other transportation of a motor vehicle is a secondary movement. A chassis is a motor vehicle and, therefore, movement of a chassis from points of manufacture or assembly to shippers' facilities is an initial movement of a motor vehicle. Any further movement of a chassis is a secondary movement unless chassis undergoes a conversion process resulting in creation of an essentially new and different vehicle. Mounting of a motor home body on a chassis manufactured elsewhere does not result in a new motor vehicle, and outbound movement of completed motor home is a secondary movement.—American International Driveway, Ext.—Hawaii, 117 M.C.C. 63 (69).

Intermodal containerized movements require a greater flexibility than regular-route motor carriers are efficiently capable of providing. In the instant proceeding protestants lack the capacity to serve broad territorial areas and do not transport loaded containers from the involved ports of entry to inland break-bulk points and must interline to pickup or deliver shipments beyond the scope of their limited authorities and shippers have found such interline service unsatisfactory. It is the policy of the Commission to promote containerization and, therefore, authority was granted to transport general commodities, with exceptions, in containers, and empty containers on return, between ports of entry located in California, Oregon, and Washington, on the one hand, and, on the other, points in United States, except Hawaii, restricted to the transportation of traffic having a prior or subsequent movement by water.—IML Freight, Inc. Ext.—Containerized Freight, 118 M.C.C. 31 (32).

A chassis is a motor vehicle; and, therefore, the movement of chassis from points of manufacture or assembly to the facilities of the shipper is an initial movement of a motor vehicle. Any further movement of these chassis constitutes a secondary movement unless they undergo a conversion process which results in the creation of an essentially new and different vehicle within the meaning of administrative ruling No. 75.—Nationwide Petition for Declaratory Order, 118 M.C.C. 468 (475).

The mounting of a motor home body on a chassis manufactured elsewhere does not result in the manufacture or assembly of such a new or different motor vehicle as would make the outbound movement of the completed motor home an initial movement. This is true where the chassis, as modified to some degree short of such extensive changes to result in a new and radically different vehicle. To the extent that the chassis and the motor home itself are manufactured at the same point, motor carriers will require "initial movement" authority in order lawfully to transport such motor homes from that point.—Id. (476).

Heavy haulers: [Vol. 16].—See also Ace Doran Hauling & Rigging Co., Investigation, at n. 7 heavy hauler, below.

Resolution of the broader question as to heavy haulers' rights to transport explosives generally, raised for the first time in investigation involving narrow issue of whether 500 and 750-pound bombs are covered by "size and weight" authority, requires a balanced consideration of the type and sphere of service provided by motor carriers of explosives vis-a-vis that of carriers of size and weight commodities. And, considered in light of 103 MCC 91 and 79 MCC 335, the background of heavy-hauler service and its evolution from an operation described in terms of type of commodity transported to one described mainly by reference to the type of service performed, together with other historical factors outlined and discussed, although not sufficient to render the two areas of service mutually exclusive, are sufficient to create a presumption that a "class A or class B explosive" is beyond the purview of "size and weight" authority, and to place on a heavy hauler proposing to transport such commodity, shipped individually or palletized, the burden of showing a sound basis for a contrary conclusion.—International Transport, Inc.—Investigation, 108 M.C.C. 275 (283-6, 292-3)*.

7. Classification of carriers; commodity basis.—[Vols. 9, 11-19, 21].—

Acids: [Vol. 21].—Dry animal and poultry feeds are excluded from the acids and chemicals classification by common usage.—Stearns Common Carrier Application, 96 M.C.C. 627 (628).

Airplanes, parts, etc.: [Vols. 18, 19, 21].—In light of 86 MCC 327, authority to transport "aircraft and aircraft parts" does not authorize the transportation of missiles, spacecraft, and satellites.—U.S.A.C. Transport, Inc., Extension—Missiles, 103 M.C.C. 23(30).

Alcoholic and malt beverages: [Vols. 16-18, 21].—The description "beverages, carbonated or noncarbonated" is equivalent to one reading simply "beverages" inasmuch as the phrase "carbonated or noncarbonated" is all inclusive. Because all beverages, irrespective of how they are produced, fit into one of those two categories, the considered commodity description plainly authorizes the transportation of beverages without limitation. And since the Commission has frequently recognized that beer is a beverage, it was found that respondent was authorized to perform the initial out-bound movement of the involved commodity and in consequence to return the shipment upon its rejection by the consignee.—Hilt Truck Line, Inc.—Investigation of Operation, 117 M.C.C. 9 (22-3).

Automobiles, etc.; parts, accessories: [Vols. 9, 11, 12, 14-19, 21].—See also AAA Con Drivers Exchange Common Carrier Application case, §207(a), n. 6; and Morrison Application case, §207(a), n. 25 *Existing carriers*.

Authority to transport "trailers designed to be drawn by passenger automobiles" embraces the transportation of "house trailers designed to be drawn by passenger automobiles" as well as the transportation of "office" trailers, which are essentially nothing more than house trailers or mobile homes without any interior furnishings or fixtures. However, considered authority does not authorize the transportation of "double-wide" trailers, which can be best described as sectionalized prefabricated buildings because this type of structure does not retain its mobile characteristics after being emplaced.—National Trailer Convoy, Inc., Extension—Initial movements, 100 M.C.C. 101 (106).

The phrase "parts thereof" in protestant's authority does not include transportation of parts independently of the class commodity specified. Modifying adverb "thereof" connotes an idea of movement related to or in connection with transportation of some other commodity (see 51 MCC 363). Application granted for transportation of motortruck seat cabs.—Kenosha Transport Auto Corp. Ext.—Seat Cabs, 111 M.C.C. 52 (54-5)*.

Protestant's claim that its authority to transport automobiles and "parts thereof" authorizes transportation of parts independently of the basic commodity specified found not valid. The modification of protestant's certificate in 1968 by moving the phrase "parts thereof" was for the sole purpose of rendering the commodity descriptions therein more sensible and readable and had no effect on the meaning of the phrase at issue.—Kenosha Auto Transport Corp. Ext.—Seat Cabs, 112 M.C.C. 244 (247-9)*.

Applicant's authority to transport "farm" or "agricultural" tractors found to be subject to an "intended use" test as cited previously in 76 MCC 363, and applicant is authorized to transport tractors meeting criteria of such test, as detailed herein, in order to enable it to perform a complete service for the supporting shippers.—Diamond Transp. System, Inc., Ext.—Tractors, 113 M.C.C. 733 (740)*.

The commodity description "passenger automobiles" encompasses certain vehicles which conceivably could be used as buses or trucks, specifically, the Volkswagen Microbus, Ford Econoline, and Econovan. The term "automobiles," however, does not include buses, trucks, or other vehicles specifically excluded from that interpretation in various other Commission proceedings.—Aaacon Auto Transp.—Petition for Declaratory Order, 117 M.C.C. 402, (403-404).

Building materials, roofing: [Vols. 9, 17-19, 21].—Protestant's authority to transport "building materials" permits it only to transport cement intended for use in a building; accordingly, it can not meet shipper's needs for transportation of cement for dam and highway construction.—Transport, Inc., Extension—Ex-Rail Cement, 96 M.C.C. 671 (680).

Respondent's authority to transport "building materials utilized and for use only in logging, mining, and contracting operations" is patently ambiguous. The first portion, "building materials," is a generic classification construed to allow transportion only of those commodities which at time of movement are intended for use as building materials, while the second portion indicates that respondent may only transport building materials intended for use in connection with logging, mining, and contracting operations. Since the terms used in respondent's authority are ambiguous and do not reflect Commission's original intention, the authority is redescribed to avoid future interpretive difficulties to read "Logging, mining, and contractors' materials and supplies". In this light respondent is authorized to transport various metal articles consigned to a mechanical contractor who assembled component parts of heating systems, fencing consigned to a farm supply dealer, and blasting sand used by a painting contractor in preparing structural metal for painting at a construction site.—Zirbel Transport, Inc.—Investigation of Operations, 100 M.C.C. 307 (309-10, 313).

Authority to transport "building materials", an intended-use commodity description, generally includes any commodity which at the time of transportation is, without further processing or manufacture, in a form or condition to be used in the construction or repair of a building and, at the time of transportation, intended with reasonable certainty to be so used. The subject cooling towers, are building materials when affixed with reasonable permanence to buildings and when performing functions as a component part of a building. However, cooling towers which are installed as part of a dam, mine, tunnel, subway or a temporary structure, for example, are not used in construction or repair of a building, and, in these instances, are not building materials. Therefore, protestant may transport within the scope of its authority those cooling towers which actually will be used as building materials.—C & H Transportation Co., Inc., Extension—Stockton, Calif., 108 M.C.C. 395 (399-400)*.

Bulk commodities: [Vols 21].—Protestant's authority to transport "such bulk commodities as are susceptible of being transported in dump trucks between points in..." was interpreted to mean that under it pig iron in dump vehicles could not be carried because pig iron is not a bulk commodity.—Tajon Trucking Co. Extension—Specified Commodities, 96 M.C.C. 591 (594-5).

Canned goods: [Vols. 11, 14-19, 21].—See also *Preserved foodstuffs*, below.

"Canned goods" authority permits the transportation of canned nonalcoholic carbonated beverages placed in hermetically sealed containers for preservative purposes; that term has been used in operating authorities to describe foods or various potable liquids which have been so processed by the canning industry. Beverages in issue have nutritional and energy-giving value and are produced by a cannery engaged not only in the manufacture of such products, but also of canned fruits and vegetables, unlike those commodities such as canned beer or petroleum products in sealed cans produced by manufacturing companies not commonly considered to be members of the canning industry.—Stevens Truck Lines, Inc., Extension—New England, 95 M.C.C. 63 (68-9).

Cement, products: [Vol. 21].—"Cement" relates only to various dry. powdered compounds of calcium and does not embrace related cementing materials such as gypsum, lime, asphalt cement, or glues.—Transport, Inc., Extension—Ex-Rail Cement, 96 M.C.C. 671 (682).

Chemical: [Vols. 17-19, 21].—See also *Liquid chemicals*, below.

Dry animal and poultry feeds are excluded from the acids and chemicals classification by common usage.—Stearns Common Carrier Application, 96 M.C.C. 627 (628); and authority to transport chemicals in bulk does not include authority to transport salt, salt products, or mineral mixtures.—Schwerman Trucking Co. Extension—Dry Chemicals. 98 M.C.C. 350 (353-4).

The definition of "liquid chemicals" as "substances or materials resulting from chemical or physical change induced by processes employed in the chemical industry, including uniting, mixing, blending, and compounding" in 88 MCC 127, has been extended by analogy to include more general term "chemicals" as well, excepting those products excluded from such definitions by common usage. Osseine results from a physical change of animal bones by an acid treatment, falls within the generic description "chemicals," and has not been excluded by common usage. Protestant's dry chemical authority authorizes transportation of osseine. Despite its high moisture content, osseine is considered to be a "dry" chemical as the term "liquid chemical" has been restricted (see 63 MCC 677) to "those substances moving in liquid form, in bulk, in tank vehicles," and osseine, by nature of its physical characteristics, does not fit such description.—Bonded Freightways, Inc., Ext.—Osseine, 111 M.C.C. 137 (140-2, 142-3).

Lime found to be a chemical, as it meets the criteria for defining chemicals set forth in 88 MCC 127 and extended in 91 MCC 683.—Cobo, Inc., Common Carrier Application, 111 M.C.C. 200 (208-9)*; and printer's ink found to be a chemical, as it meets the definition of "liquid chemicals" set forth in 88 MCC 127.—Ecoff Trucking, Inc., Extension—Buffalo, N. Y., 111 M.C.C. 395 (397-8).

Dangerous articles: [Vols. 15, 18, 21].—See also International Transport, Inc.—Investigation case, §204(b), n. 7 *Heavy haulers*.

Authority to transport "explosives," "dangerous explosives," "high explosives," or "classes A and B explosives" includes authority to transport jet thrust units, as defined in the Safety Regulations Governing Motor Carrier Transportation of Explosives and Other Dangerous Articles.—Munitions Carriers Conference, Inc., Petition, 102 M.C.C. 174 (176).

In view of the industry's understanding, "blasting supplies" should be given the elasticity necessary to enable established carriers of explosives to continue in their traditional field of service, without additional grant of authority; thus, applicant's authority to transport "blasting supplies" includes transportation of oxidizing agents, such as considered nitro carbo nitrate.—H. Messick, Inc., Extension—Explosives, 102 M.C.C. 492 (508)*.

Feeds; ingredients: [Vol. 19].—Dry animal and poultry feeds are excluded from the acids and chemicals classification by common usage.—Stearns Common Carrier Application, 96 M.C.C. 627 (628).

Protestant's authority to transport "prepared animal and poultry feed" ingredients does not allow it to transport soybean meal, which shipper considers to be a feed ingredient rather than a feed, needing to be mixed with other ingredients before it can properly be considered a prepared food, although it is sometimes sold as feed. From the record it also appears that it is more suitable for use as, and generally is used as, a feed ingredient; therefore, "prepared animal and poultry feed" cannot be construed to include soybean meal.—Dahlsten Extension—Soybean Meal, 99 M.C.C. 553 (555).

Petitioner's present authority to transport "grain and animal feeds" does not include all of the commodities embraced in the term "animal and poultry feed and animal and poultry feed ingredients". The distinction between animal feeds and poultry feeds is long recognized, and, although grain is a prime ingredient of both types of feeds, it by no means embraces all ingredients used in animal and poultry feeds. Morevoer, there are some ingredients used in such feeds which have little or no nutritive value and which could not by themselves be used as a feed.—Strang Transp., Inc., Modification of Certificate, 99 M.C.C. 364 (366).

The term "feedstuffs" is, with respect to matter suitable for animal or livestock consumption, analogous to the commodity description "foodstuffs" which implies to edible matter (food or food ingredients) for human consumption.—Feed Transports, Inc., Extension-Three States, 113 M.C.C. 763 (767)*.

Foodstuffs: [Vols. 18, 19, 21].—Authority to transport "foodstuffs, raw and manufactured" authorizes transportation of canned soft drinks consisting of water which is flavored, sweetened, and charged with carbon dioxide to cause effervescence; the Commission had previously found "flavored or phosphated beverages" to be embraced within such commodity description. A similar conclusion is warranted with respect to canned soft drinks under consideration here.—Stevens Truck Lines, Inc., Extension—New England, 95 M.C.C. 63 (67, 68).

The examiner held that protestant's authority to transport "prepared and preserved foodstuffs" did not include the right to transport sugar. Protestant's authority includes the word "prepared" which refers to a process of manufacture, and a prepared food is one that has been converted from its natural state into a form that is ready to eat. The examiner's ruling is in error on this point, and protestant may transport sugar under its existing authority.—Bilyeu Refrigerated Transp. Corp. Ext.—Baltimore, 108 M.C.C. 238 (242)*.

Commodity description in petitioner's certificate authorizing carriage of "food products" found to include "processed meats," when fit for human consumption, but not to include "fresh meats," as these two commodities are defined in 74 MCC 667.—Hilt Truck Lines, Inc., Petition for Interpretation, 113 M.C.C. 784 (793-8).

So long as a commodity is fit for human consumption as a food, its actual use is immaterial to a determination that such commodity may be transported pursuant to "food products" authority. Therefore, despite fact that respondent knew that five challenged sugar shipments were destined for consumption by animals, the involved transportation was permissible under said authority since the sugar was fit for human consumption.—Hilt Truck Line, Inc.—Investigation of Operations, 117 M.C.C. 9 (19).

Frozen foods, vegetables: [Vols. 16, 18, 19, 21].—In light of 64 MCC 455, which held that orange juice is a manufactured product of the orange, applicant's authority to transport "frozen and processed fruits, berries, and vegetables" does not authorize it to transport frozen juices and concentrates. —Exley Exp., Inc., Extension—Storage in Transit, 100 M.C.C. 284 (287).

Gases, compressed, etc.: [Vols. 19, 21].—The transportation characteristics and requirements of liquefied petroleum gas are not the same as those of liquid ethylene; therefore the authority to transport the former does not include authority to transport the latter.—Matlack, Inc., Extension—Ethylene, 113 M.C.C. 201 (203)*.

General commodities; [Vols. 9-16, 18, 19, 21].—Motor common carrier applicants' authority to transport general commodities, restricted against the transportation of "articles of unusual value," permits the transportation of commodities of "high value" including certain aerospace parts and items, chemicals and dyes, communications equipment, drugs and pharmaceuticals, electric and electronic equipment and components, fabricated metal products, industrial control equipment, optical and photographic equipment and materials, radios and tape recorders, refractory metals, and scientific equipment and instruments. However, the transportation of silver bullion and the other commonly known "precious metals" (gold and platinum) is beyond the scope of such restricted operating authorities.—Garrett Freightlines, Inc.—Modification, 106 M.C.C. 390 (400).

In a decision of general transportation importance, and agricultural cooperative operating pursuant to provisions of 203(b)(5) of the Act was granted a certificate of convenience and necessity as a common carrier to transport general commodities, including explosives, for the Department of Defense.—American Farm Lines Common Carrier Application, 114 M.C.C. 30 (41-42)*.

See also C & H Transp. Co., Inc., Petition for Interpretation, §204(b), n. 7 *Heavy hauler;* Daily Exp., Extension—Cooling and Heating Equipment case, §207(a), n. 25 *Commodity.*

Groceries: [Vols. 11, 12, 14-19, 21].—See also *Canned Goods, Foodstuffs,* above.

"Groceries" authority limits all transportation to "articles for human consumption which are customarily served as food, or which are used in the preparation of food".—Interstate Grocery Distribution System Ext.—Paper, 98 M.C.C. 546 (548); and includes Coca Cola syrup, which is "a beverage preparation intended for human consumption," both in 1-gallon jugs and 54-gallon drums, despite fact that the syrup in larger than 1-gallon containers is not sold in grocery stores, since it would be administratively undesirable to find that 1-gallon containers are grocery while syrup in larger containers is not.—Bird Trucking Co., Inc., Extension—Darien, 110 M.C.C. 416 (419-20); and also includes wine, so, since the construction of "groceries" authority does not entail application of "intended use test," respondent's delivery of wine to an alcoholic beverage wholesaler was permissible.—Hilt Truck Line, Inc.—Investigation of Operations, 117 M.C.C. 9 (11, 13).

Heavy haulers: [Vols. 9, 11, 15, 17-19, 21].—Commission decision that under the *Dillner* rule, 79 MCC 35, plaintiff heavy hauler may not transport aluminum billets and ingots weighing 6 to 50 pounds each, bundled and wrapped on pallets weighing about 2,000 pounds, is based on a conclusion that those items are susceptible, if shipped individually, of being loaded or unloaded manually and nothing indicates they cannot be wrapped individually or in smaller lots so as not to require the use of special equipment for handling. The Commission's determination, after adopting examiner's factual findings of necessity for the aggregation on pallets, that it would be physically possible to handle the articles manually is entirely theoretical; evidence does not show that they are ever manually loaded or separately packaged. Moreover, *Dillner* was a refinement of a rule in 64 MCC 433, which rule was reaffirmed as a limited exception to be maintained. In instant case, however, there is no evidence to support the Commission's refusal to apply that exception to considered commodities, while evidence to support application of the 64 MCC 433 rule is substantial.—Aero Trucking, Inc. v. United States, 346 F. Supp. 826 (827-9)*.

Evidence shows that inherent nature of the commodities requires aggregation and palletization, i.e., the varying chemical compositions and alloys require separation; the soft, fragile and easily abraded quality of individual articles require palletizing; palletized packages must be wrapped for protection from corrosive atmospheric conditions; customers will not accept the ingots and billets loose; and separate packing of each individual article would be inconvenient, expensive, and not acceptable to the customer. In adopting a rule which uses the possibility that articles could be individually and manually loaded, in fact of all the evidence to the contrary, the Commission relied solely on a presumption and ignored uncontradicted evidence showing a sound basis for finding that inherent nature of considered commodities requires that they be aggregated, bundled on pallets, and wrapped so as to require special equipment for handling. Thus, the Commission's determination that those commodities are not within plaintiff's heavy-hauling authority is not based on substantial evidence to support its findings; order set aside and annulled.—Id., pp. 829-30.

The certificate in question was found to be clear and unambiguous on its face. The modifying clause "which because of size or weight require special equipment or specialized handling" applies solely to the last antecedent "boats". Such interpretation of the certificate is consistent with the usual rules of grammar and punctuation. A contrary interpretation requires a strained and illogical construction of the certificate and would necessitate resort to matters extrinsic to the certificate itself.—Road Paving Materials between Points in New England, 329 I.C.C. 199 (203)*.

In view of the decision in 214 F. Supp. 34 rejecting the 15,000 pound test, developed as an "interpretive rule" in order to permit heavy haulers to continue to compete for traffic historically transported by them, that test can have no further validity. Accordingly, the Commission is impelled to conclude that that test, as heretofore applied, must be rejected. Defendant's heavy-hauler authority does not permit transportation of considered military cargo trucks which, though weighing from 9 to 10 tons each, were loaded and unloaded under their own power and were transported on defendant's flat-bed trailers of ordinary design; transportation of those cargo trucks in manner described does not require special equipment for loading, unloading, or over-the-road movement.—United Transports, Inc., v. Gulf Southwestern Transportation Co., 95 M.C.C. 443 (446-9)*.

Individual oversize glass panes, known as lights, which require special handling for loading and unloading by their very nature can be transported under petitioner's heavy hauler authority as well as under a general commodities authority, provided that under the latter service is limited to over-the-road transportation. However, where the inherent nature of the individual lights does not require special handling they cannot be transported under petitioner's heavy hauling authority. The fact that certain states require special oversize permits to transport loads of aggregated lights is not in itself determinative of the authority required.—C & H Transp. Co., Inc., Petition for Interpretation, 99 M.C.C. 603 (612-614).

A commodity that requires special equipment or special services for loading or unloading, or both, and only ordinary equipment for over-the-road movement is within the authority of a heavy hauler irrespective of whether the carrier is required to provide such special equipment or service. And in determining whether such special equipment is required, the Commission must consider the individual commodity, as contrasted to a bundled, packaged, or otherwise aggregated shipment. But where it is essential to bundle items because of their "inherent nature" for protection or necessary handling, and not for economy or efficiency, then the minimum bundle required may be considered in deciding whether any necessity exists for the use of special equipment.—Aetna Freight Lines, Inc.—Investigation of Operations, 100 M.C.C. 88 (94)*; heavy-hauler authority held by petitioner does not authorize the transportation of palletized or bundled commodities, if such commodities considered individually do not require the use of special equipment.—W.J. Dillner Transfer Co.—Petition for Modification, 99 M.C.C. 485 (489).

On reconsideration following court review, any determination that a given commodity is susceptible of manual handling should be premised on record evidence that, in fact, it has been or as a practical matter could be handled in that way; an abstract possibility of manual handling will not suffice. Therefore, since record in embraced proceeding, in addition to the requirement of special equipment because of aggregation, does not conclusively establish the practicability of manual handling, respondent heavy hauler is not shown to have exceeded the scope of its authority in transporting considered 231-pound steel bars.—Moss Trucking Co., Inc., Investigation of Operations, 103 M.C.C. 91 (95-7, 110-11)*.

In addition, industry practice must be taken into account in deciding whether special equipment is required to transport a given commodity; the Commission must consider not whether manual handling is possible, but whether it is "reasonably practical". In that light, military cargo-type vehicles (loaded and unloaded by crane because of safety considerations) and 788-pound rolls of wire mesh, crated aluminum tanks, and steel bars (loaded by crane due to impracticability of manual loading) "require" the use of special equipment, and are within respondent's heavy-hauling authority. To assert that inherent nature of wire in question does not require rolls of such size would be an unwarranted intrusion into managerial prerogatives; and since a reel of wire is a single length, not an aggregation of individual units, the *Dillner* criteria as to palletization do not apply. However, transportation of considered farm tractors which, as a matter of fact, are pushed manually on flat-bed trailers from a loading platform, is not embraced in respondent heavy hauler's authority.—Id., pp. 108, 111-3.

This proceeding embraces two applications for authority to transport nuclear and by-product materials, radioactive materials and related reactor experiment equipment and component parts. Protestants all hold heavy-hauler authority. Protestants contend that the involved commodities may be handled under their heavy-hauler authority. A portion of the service entails the use of an entire truck to ship individual articles weighing from a few ounces to 150 pounds, and truckload lots comprised exclusively of non-size and weight articles. Although such shipments may be loaded with forklift trucks, the containerized shipments weighing 150 pounds are not within the purview of heavy-haulers authority. The use of such devices is clearly a matter of operating convenience, and the weight factor in and of itself is sufficient to indicate something more than an abstract possibility of manual handling.—Tri-State Motor Transit Co., Extension—Radioactive Materials, 108 M.C.C. 228 (234, 235).

Pleadings in, and events leading up to institution of, investigation to determine whether 500- and 750-pound bombs are covered by "size and weight" authority having raised broader implications regarding heavy haulers' rights to transport explosives generally—a question never presented before—resolution thereof requires consideration of historical and case precedents and, also, of type and sphere of service provided by heavy haulers and carriers of explosives.

Background of heavy-hauling service and, when considered in light of 103 MCC 91 and 79 MCC 335 the relevant and historic factors outlined and discussed, through not sufficient to render the two fields of operation mutually exclusive, are sufficient to create a presumption that a commodity described as a class A or class B explosive is beyond the purview of "size and weight" authority, and to place on a heavy hauler who proposes to transport such article the burden of providing a sound basis for a contrary conclusion.—International Transport, Inc.—Investigation, 108 M.C.C. 275 (283-92)*.

While showing necessary will vary materially from case to case, in order to establish a class A or B explosive as within the heavy-hauler domain, tradition and precedent require something more than showing (for example) that aggregation or palletization represents industry practice; that that is the most efficient, economical, and expeditious means of handling; that technological developments have rendered hand labor obsolete; or that, when individually shipped, the article is not susceptible to manual lifting by the celebrated "97-pound weakling." Therefore, considered 500- and 750-pound bombs are presumed to be outside the scope of heavy-hauler authority; and showing of record as to size and weight thereof, standing alone, falls far short of overcoming the presumption created by uncontraverted historical status of such articles as traffic peculiarly within the sphere of explosives carriers and in no way a part of heavy-hauling service. Respondent's transportation of palletized shipments of such bombs which moved in standard equipment, and were loaded and unloaded by forklift trucks furnished by shipper, was beyond scope of its heavy-hauler authority.—Id., pp. 279, 292-4.

Applicants holding size and weight commodity authority to transport iron and steel articles weighing 2,000 pounds or more to the single piece are not thereby authorized to transport aggregated shipments of the same commodity. The evidence of the supporting shippers does not give any consideration to the inherent nature of the commodities, nor does such evidence indicate whether aggregation is required as a matter of practical reality. Therefore, the presumption found in 79 MCC 335 that the individual commodity itself, and not the aggregation, is the controlling consideration as respects a carrier's authority to handle such traffic, absent a sound basis for concluding to the contrary, prevails and is not rebutted by the findings in 103 MCC 91 that consideration must be given to whether manual handling is reasonably practical rather than theoretically possible.—Roy L. Jones, Inc., Extension—Iron and Steel, 108 MCC 424 (429-30).

There is a distinction between the use of the phrase "commodities which because of size or weight require the use of special equipment" in a certificate authorizing heavy-hauler service as contrasted with its use as an exception to a grant of authority. When used as a positive grant of authority, the phrase describes a type of service, and it indicates the type of commodity offered and shipped by persons who require this particular type of service. See 91 M.C.C. 91, 100. When this descriptive phrase is used as an exception in a grant of authority, it is designed to preclude the performance by the carrier of a heavy-hauler type of service. A heavy-hauler type of service is normally provided in special equipment. A carrier restricted from providing this type of service may not use specialized equipment for the transportation of commodities which would otherwise be within the scope of its operating authority if transported in ordinary equipment. Consequently, a heavy-hauler restriction in a certificate relates to the equipment which may be used as well as the commodity transported.—Herr's Motor Express, Inc., Extension Wheeling Steel 108 M.C.C. 626 (631, 632)*.

While relatively few articles are at issue in investigation into lawfulness of respondent heavy-hauler's transportation of certain tractors, trailers, etc., proper resolution of their status under such rights has implications that affect the scope of size and weight authorities generally, i.e., question of the activities which may lawfully be conducted under authority to transport "commodities which by reason of size or weight require the use of special equipment," or a substantially similar phrase. Also, review of the prior report as well as other developments in heavy-hauling field since 103 MCC 91 shows a pronounced uncertainty as to intended effect of that decision on the competitive balance between heavy haulers and nonsize-and-weight carriers. Accordingly, resolution of the conflict depends on balanced consideration of not only 103 MCC 91 in its entirety, but also certain other case and historical precedents; however, in light of the numerous thorough reviews of growth of heavy-hauler service, discussion of the precedents is confined to considerations of fundamental significance.—Ace Doran Hauling & Rigging Co. Investigation, 108 M.C.C. 717 (718-31)*.

Delineation in reasonably clear terms of the operations permissible under the imprecise heavy-hauler commodity description is far from an easy task, especially in view of the obligation (under Commission decisions) to bear in mind two overriding and apparently contradictory purposes: (1) the need to preserve the historically recognized limits of heavy-hauler service and (2) necessity for sufficient flexibility in heavy-hauling operations as to permit their use by shippers whenever transportation of a commodity requires that specialized type of service. Nevertheless, the Commission's mandate under the national transportation policy places on it a clear responsibility to resolve the controversy in such a manner that, with as little overlap as possible, heavy haulers, on the one hand, and, on the other, ordinary common carriers, whether of general or specifically described commodities, can grow and prosper within their specialized spheres of service.—Id., pp. 731-2.

The requisite clarity and stability of heavy-hauler rights cannot be achieved through principles of construction that accord sole or controlling weight to industry practice nd such related concepts as economy and efficiency; at the other extreme, a construction that would place undue stress on the theoritical possibility of manual handling of an article must be avoided; however, a solution is available within the framework of the numerous Commission decisions on the subject, including 103 MCC 91 and 79 MCC 335. Based upon comprehensive review of those precedents, the most practicable and readily available solution to the question of whether a commodity requires special equipment lies in a balanced application of established tenets of heavy-hauler case law. Concepts discussed and summarized, i.e., (1) the 79 MCC 335 presumptions and related general principles, (2) prevailing industry practice, (3) historic methods of handling, and (4) traditional sphere of carriage (field of service), properly implemented, will assure maximum fulfillment of the basic regulatory purposes to be achieved.—Id., pp. 732-43, 757-8.

Applying those principles and concepts as guidelines in instant proceeding, therefore, respondent's heavy-hauler certificate covers the transportation of (1) aggregated shipments of steel blanks, tubing, structural steel angles, roof joists and decking, tile roofing sheets, and 282-pound gauge steel plates, (2) 4-inch and 5-inch wrought steel pipe (threaded), (3) steel bars, (4) hot top slabs, (5) highway guard rails, and (6) 240-pound corrugated culvert pipe; however, a properly weighted application of the guidelines to remaining commodities under investigation necessitates a different conclusion and those commodities are found to be beyond the scope of its heavy-hauling authority.—Id., pp. 743-57.

Carriers holding heavy-hauler authority may not transport a consignment solely because it is handled, as a matter of shipper practice, through use of automated equipment. Thus, such authority does not authorize the carriage of plywood and other lumber products which do not by reason of their inherent properties require mechanized handling but are tendered in aggregated form principally for reasons of economy and efficiency. Likewise, transportation of vehicular commodities such as snowmobiles, which can be moved on ordinary flat beds and can be loaded and unloaded under their own power, is not within the purview of heavy hauling authority; and the same is true as to foodstuffs, beer, paper, and other general commodities traditionally regarded as outside the heavy haluing field.—Dealers Transit Inc., Extension—Eight Western States, 110 M.C.C. 317 (338-9)*.

Commission herein reaffirmed and utilized the principles to be applied in construing certificates authorizing carriage of "commodities the transportation of which by reason of size or weight requires use of special equipment" (i.e., heavy hauler rights) as they were summarized in 108 MCC 717, especially the *Dillner* criteria (79 MCC 335) regarding aggregated commodities. Given application of these criteria, the iron and steel articles, including lightweight fence posts and roof decking, are not shown to require special equipment are thus not within protestant's heavy hauler authority. Application granted to extent specified.—Steel Haulers, Inc. Ext.—Tulsa, Okla., 110 M.C.C. 612 (617-620)*.

Commission first summarized the tenets of law applicable herein including the presumption enunicated in the prior report, 108 MCC 275, the so-called *Dillner* rule, 69 MCC 335, 358, whereby aggregated commodities generally are presumed to be outside the size and weight orbit in the absence of a sound basis arising from the article's inherent nature for concluding to the contrary, and the guidelines discussed in 108 MCC 717. Applying such principles to the instant controversy the report, although conceding that since 1966, 500 and 750-pound bombs had almost universally been shipped in palletized form and mechanically loaded and unloaded, found such procedures attributable primarily to factors of economy and efficiency and placed the current bomb model outside the pole of heavy hauler rights. A cease and desist order was entered.—International Transport, Inc.—Investigation, 118 M.C.C. 536 (556-58)*.

See also Case Driveaway, Inc., Petition for Modification, §212(a), n. 30; Daily Exp., Inc., Extension—Cooling and Heating Equipment case, §207(a), n. 25 *Commodity;* Heavy Duty Haulers, Inc. v. United States case, §212(a), n. 1.

Household Goods: [Vols. 11-16, 18, 19, 21],—The scope of motor carrier authority to transport household goods and the distinction, if any, between the broader commodity description "Household goods" as used in certificates and the description "used household goods" as used in exemption provisions of §402(b), discussed.—Routed Thru-Pac, Inc., Freight Forwarder Application, 332 I.C.C. 352 (365-7)*.

Applicant's authority to transport household goods does not include the transportation of new furniture; items of new furniture for shipment from factory to dealers and institutions are not household goods; nor can new home furnishings be transported from a factory or store under household goods authority unless they have been purchased by a householder who intends to use them in his dwelling and who arranges for their transportation as an incident of his moving from one dwelling to another.—Ferree Moving & Storage, Inc., Contract Carrier Applic., 99 M.C.C. 454 (457).

Iron and steel articles: [Vols. 12, 15, 17-19, 21].—See also Smith's Truck Lines Ext.—Iron & Steel Articles case, §207(a), n. 25 *Commodity description.*

In accordance with the decision in 85 MCC 440, authority to transport "iron and steel articles" or "iron and steel products" includes the transportation of rolling mill rolls, except those more complicated rolls or machines which contain gears, valves, wiring and motors; however, stamping dies are not included in such authority, because they are not mentioned in the *Descriptions* case, 61 MCC 209, and because they are not finished products of uncomplicated design and at a stage of manufacture just beyond the in-the-rough or semifinished state when they are shipped.—Charles J. Rogers Transp. Co.—Investigation, 99 M.C.C. 351 (357, 359).

In view of the lack of trade meaning, respondent's authority to transport "steel articles, fabricated beyond the primary stage" is synonymous with the term "manufactured beyond the primary stage," which the evidence shows is the production from the furnace of steel ingots. Therefore, considered authority permits the transportation by respondent carrier of steel plates, steel sheets, steel coils, steel bars, and steel beams.—Aetna Freight Lines, Inc.—Investigation of Operations, 100 M.C.C. 88 (89, 93-4)*.

Liquid chemicals: [Vols. 18, 19, 21].—Citing 88 MCC 127, the Commission found that protestant's authority to transport "liquid chemicals" permits it to transport, in bulk, printers' ink. The policy behind 88 MCC 127 is to allow motor carriers holding said authority to provide a complete service to the chemical industry and thus, insofar as is possible and practical, to embrace all "liquid chemicals" without regard to their ultimate intended use or application. In order that this purpose not be frustrated, the Commission's application of the common usage concept has been limited to products such as liquid potables and, conversely, commodities such as paints, varnishes, and lacquers are included in the "liquid chemicals" classification by common usage when they are shipped, in bulk, to industrial users. Thus, since it appears that printers' ink is produced by chemical companies in their capacities as producers of chemicals and chemical by products, that it is sold in bulk for use in the printing industry, and that it has overall characteristics similar to paints and varnish, printers' ink may properly be classified as a "liquid chemical" for transportation purposes.—Ecoff Trucking, Inc., Extension—Ink, 105 M.C.C. 829 (832-3)*.

Lumber: [Vols. 9, 15-19, 21].—Although flakeboard may be transported under some lumber tariff classifications, respondent's authority to transport lumber does not authorize it to transport flakeboard, a product manufactured by the Formica Corporation (subsidiary of American Cyanamid Company) from wood chips bonded together with synthetic resin and pressed into sheets or boards.—Barnes Truck Line, Inc., Investigation & Revocation, 102 M.C.C. 281 (286-7).

Since laminated wood flooring is of a plied or laminated wood composition similar in construction to regular plywood, and since both plywood and wood flooring have long been included under "lumber" authority, the authority to transport lumber includes the authority to transport laminated wood flooring.—Poole Truck Line, Petition for Declaratory Order, 118 M.C.C. 817 (821).

Machinery, machinery parts: [Vols. 11, 16-19, 21].—See also Roy L. Jones, Inc., Ext.—Earth Drilling Equipment case, §207(a), n. 25 *Commodity description.*

Farm tractors, which are the primary commodity involved here, have consistently found not to be "machinery". See 62 MCC 555. Respondents' contention that its predecessors were granted authority under a "grandfather" certificate to transport farm tractors is invalid as an examination of the relevant proceedings shows that said predecessors were "heavy machinery" haulers which differs from respondents' authority to carry "machinery".—Agricultural Implements, Midwest to Oreg. & Wash., 337 I.C.C. 611 (614-21).

Since respondent's authority to transport (1) road building machinery and equipment which because of size or weight requires the use of special equipment and (2) road building machinery and equipment requiring special equipment is governed by reference to intended future use of such commodities, it does not authorize transportation of items clearly not related to or connected with road construction work; respondent's argument that words "road building" modify only "machinery" and not "equipment" is invalid. Under that authority respondent may transport machinery and equipment requiring special equipment and predominantly used in road construction without investigating as to ultimate use thereof, so long as it has no knowledge or notice that such items are likely to be used in another endeavor; however, if some knowledge or notice of another use is present, respondent has the burden of acquiring knowledge of actual intended use and, if such use is for other than in road construction, then the shipment would be beyond the scope of its pertinent authority.—Heavy Duty Haulers, Inc., Investigation of Operations, 99 M.C.C. 578 (579, 581-2, 584)*.

Protestant has authority to transport machinery, heavy machinery, and building materials. Supporting shipper ships cooling towers used by chemical processing plants, the petroleum industry, the airconditioning industry and power generating stations. Protestant contends that it may transport "cooling towers" under its authority. Division 1 cited *Eclipse Motor Lines, Inc., Interpretation of Certificate,* 52 MCC 391 which concluded that a refrigerator is a composite of metal products and machinery which assembled has a name, character, use and thereby a distinct commodity identity separate from its components. Cooling towers when sold as complete units either in assembled form or in packaged sections ready to be erected have an independent identity, although components thereof include motors and blowers, and cannot be transported as machinery or heavy machinery.—C & H Transportation Co., Inc., Extension—Stockton, Calif., 108 M.C.C. 395 (398, 399)*.

Materials, construction, etc.: [Vol. 19].—See also *Supplies*, below.

While "construction materials" are interpreted by the Commission to mean materials used by a building or construction contractor which are to become permanent parts of a building or other construction project, and "construction supplies" to include only those items which are used or consumed in a contractor's work other than those destined to become part of the structure, the very fact that applicant has been transporting building stone and lumber under its Idaho intrastate authority to transport construction supplies without apparent objection strongly suggests that that State regulatory body places a broader construction on "supplies" than does the Commission. Since a carrier may engage in interstate operations under registered authority to the same extent, in same manner, and subject to same limitations as its lawful intrastate operations under the underlying State authority, scope of such interstate operations is governed by interpretation placed on the intrastate authority by the issuing agency.—Statewide Transport, Inc., Extension—Idaho, 96 M.C.C. 57 (63-4).

Citing 61 MCC 329 (333) and 53 MCC 530 (533), the Commission reaffirmed its distinction between the terms "supplies" and "materials": the term "supplies" means those things consumed in, or necessary to, the maintenance and operation of a plant, factory, or business other than the raw materials or ingredients which go into the finished product or structure, whereas "materials" means those things used as ingredients or parts of the finished structure or product. The term "supplies" has a very broad meaning and should not be confused with "materials" or "ingredients". It embraces those things furnished for the purpose of operation as distinguished from "materials," which are furnished for original construction.—Hilt Truck Line, Inc.—Investigation of Operations, 117 M.C.C. 9 (14).

Meats, packinghouse products: [Vols. 11-13, 15, 17-19, 21].—Protestant's authority to transport "such commodities as are usually dealt in, or used by, meat, fruit and vegetable packinghouses" clearly limits it to transportation of products "usually dealt in" by meat, fruit and vegetable packinghouses; and since meat packinghouses normally deal in a wide variety of dairy products, concerned dairy products may be transported by protestant regardless of identity of consignor or consignee.—Curtis, Inc., Extension—Dairy Products, 102 M.C.C. 388 (391-2).

Respondent's authority to transport "packinghouse products, and supplies, restricted to items incidental to and directly connected with the business of the slaughtering of animals and the preservation and sale of meats but not including dairy products" does not authorize it to transport cheese, candy, calendars, pickles in barrels, chemicals, or picture cards. Herein the Commission also notes that although a business might preserve and sell meats, this does not necessarily mean that the business, in a substantive sense, qualifies as a packinghouse; however, if the business does none of these things, it is not a packing house.—Commercial Freight Lines, Inc.—Investigation, 103 M.C.C. 683 (684, 689-90).

"Scrap materials" is a term which is sufficiently broad to include scrap meats. The word "scrap" denotes such items as small trimmings or wastematerial being discarded because they are not suitable for the use (i.e., as human food) to which they normally would be put. The items included by that description would not be junk or trash of no value, but rather a commodity which is fit only for other uses thant the human consumption for which the basic cut of meat or offal involved is ordinarily suitable. However, authority to transport "scrap materials" does not include the right to handle every commodity classified as "inedible meat" and "offal". Some items that are classified as offal—such, for example, as beef hearts and edible livers—have substantial nutritional value as human food and thus clearly could not be considered as "scrap meats".—Hilt Truck Line, Inc.—Investigation of Operations, 117 M.C.C. 9 (20-21).

Oilfield commodities: [Vols. 15-19, 21].—See also Home Transp. Co., Inc.—Purchase—Fuchshuber case, §5(2), n. 110 *Certificate under §207.*

Applicant's *Mercer* description authority to transport commodities used in oil and gas industries does not authorize them to transport "anti-pollution systems" and related "equipment, etc." as such commodities are not readily identifiable with the oil and gas industries.—Jones, Inc., Ext.—Antipollution Control Commodities, 118 M.C.C. 253 (271-73).

Paper, paper articles, products: [Vols. 11, 15, 17-19, 21].—"Paper mill material and supplies" authority does not include the transportation of corrugated paper boxes, unless such transportation is to a paper mill to be used as part of the mill's supplies. —Ullery Contract Carrier Application, 99 M.C.C. 86 (91).

Petroleum, petroleum products: [Vols. 9, 14-19, 21].—See also Delaware Exp. Co. Extension case §207(a), n. 25 *Commodity description*, Matlack, Inc., Extension—Ethylene case, §204(b), n. 7 *Gasses*.

Respondent's transportation of kymane and plasticizers was unauthorized under its authority to transport petroleum products; although a small percentage of total composition might have been derived from a recognized petroleum product such as anhydrous ammonia, products containing any amount of petroleum or petroleum derivatives are not automatically classifiable as petroleum products (95 MCC 394). Fact products contain only 1.23 percent of a possible petroleum derivative militates against the possibility of their being classified as petroleum products for transportation purposes.—Zirbel Transport, Inc.—Investigation of Operations, 100 M.C.C. 307 (312).

Although liquid gilsonite asphalt sealer is not listed in the appendix to the report in the *Description* case, 61 MCC 209, on further hearing liquid gilsonite asphalt sealer was found to be a petroleum product because the manner of processing, other than handling in solid form and dewatering, and the refining technique used in processing gilsonite industrially is identical to that used for petroleum and the refining of gilsonite by the usual petroleum refinery processes produces similar refinery fractions. Thus, carriers authorized to transport "petroleum products" may transport liquid gilsonite asphalt sealer.—W. S. Hatch Co. Extension—11 States, 108 M.C.C. 853 (858, 859)*.

Pipe: [Vols. 16-19].—Authority to transport "pipe, pipeline material, machinery, and equipment incidental to and used in connection with the construction, repairing, or dismantling of pipelines" embodies an intended use test and does not include the transportation of waste disposal pipe and pipe fittings because such pipes are service or connecting pipes and not a means by which water, gas, oil, or other liquids are conveyed from one place to another.—C & H Transp. Co., Inc., Extension—Tyler, Tex., 99 M.C.C. 112 (115).

Prefabricated buildings: [Vols. 16, 18, 21].—The Commission's conclusion that plaintiff's certificated authority to transport "prefabricated buildings" and "buildings, complete, knocked down, or in sections" does not authorize it to transport single-unit mobile homes is based on its finding of a valid distinction between the terms "mobile home" and "prefabricated building" as used in commodity descriptions, and that finding is supported by substantial evidence of record. Accordingly, considered order of the Commission on further hearing, being founded on substantial evidence, is sustained.—Pre-Fab Transit Co. v. United States, 321 F. Supp. 1147 (1148-50, 1152)*.

Under its authority to transport buildings, complete, knocked down, or in sections, including all component parts, materials, supplies, and fixtures, protestant is only authorized to transport "component parts, materials, supplies, and fixtures" of those types of buildings which are capable of being so transported, although they may be transported either independently of, or in connection with, transportation of such buildings.—Owens Contract Carrier Application, 95 M.C.C. 586 (588, 590)*.

Protestant's authority to transport "prefabricated house and building sections," and "prefabricated house and building panels" has been consistently considered by the Commission to include paneled, sectional, or knocked-down buildings that retain their character as buildings; and therefore, its authority does not permit transportation of precast concrete slabs and beams, because, as distinct from prefabricated section or panels, they are not assembled or fabricated from recognized component building parts and they require extensive fabrication and finishing in place before a complete and functional section or panel of a building is created. Herein the shipper's products are of such size and construction that they are not complete; they are merely building materials that have been manufactured from basic raw materials.—White Bros. Trucking Co. Extension—Dayton, Ohio, 99 M.C.C. 389 (394-396).

Commodity descriptions in defendant's certificate for transportation of (a) Prefabricated and precut buildings or houses, etc., and (b) Buildings, complete, knocked-down, or in sections, etc., are closely related and are governed by "intended use test" which defines commodities carrier is authorized to transport in terms of their intended use. And, unquestionably, the Commission properly may identify commodities to be transported in terms of their use or intended use, in cases where need is shown for grant of authority whereby carrier may perform a complete service in a select field and, at the same time, be restricted to that field. In determining whether particular shipments are intended for use in required manner, carrier may presume they will be so used if the commodities are of a type predominantly used in that manner and it may transport them without further investigation if it has no knowledge of a contrary intent; on the other hand, if commodities involved have general utility in other fields, they may be transported only if carrier establishes that they are intended for the use required by its authority.—Miami Transp. Co. of Indiana v. Pre-Fab Transit, 107 M.C.C. 383 (387-8)*.

Defendant's specific authority to transport "prefabricated and precut buildings or houses, complete, knocked-down, or in sections, and all component parts necessary to the construction, erection, or completion of such buildings or houses, when shipped with same," does not embrace transportation of considered ornamental iron columns, in cartons, since the columns are generally not intended for use in prefabricated or precut structures and they do not qualify as "component parts" thereof because they were not moved with such a structure. Nor does the second portion of defendant's certificate, which authorizes transportation of "buildings, complete, knocked-down, or in sections, including all component parts, materials, supplies, and fixtures, and when shipped with such buildings, accessories, used in the erection, construction, and completion thereof, authorize it to transport considered shipment because, whether ornamental iron columns are handled in independent movement or not, they were not intended for use in the "buildings" which defendant may transport.—Id., pp. (388-390)*.

See also National Trailer Convoy, Inc., Extension—Initial Movements case, §204(b), n. 7 *Automobiles*.

Rejected shipments: [Vols. 19, 21].—See J & J Trucking Co., Inc., Contract Carrier Application, §209(a)(1), n. 25.

Stock-in-trade of drugstores, etc.: [Vols. 17, 18].—By applying the intended use test (96 MCC 522), the Commission determined that under its authority to transport "stock in trade of drug stores" respondent may handle shipments where the consignee is a drug store or the drug department of another store. In order to qualify as a drug store or drug department, the consignee must be actually engaged in dispensing drugs. If the shipment is merely consigned to an intermediary or to a storage facility, then it must be earmarked for eventual delivery to and sale in a drug store or the drug department of another store. On the other hand, a shipment not consigned to a drug store or drug department, and consisting of commodities not peculiar to, or predominantly a part of, the stock in trade of such consignee (such as alcoholic beverages or candy), could not be transported under the authority in question unless the ultimate consignee can be identified at the time the shipment is tendered to respondent for movement.—North Central Truck Lines, Inc., Invest. & Revoca., 117 M.C.C. 180 (194).

Respondent's refusal to operate within the limits of its authority to transport "stock in trade of drugstores," despite Supreme Court ruling that the commodity description is not ambiguous (355 US 554), resulted in cease and desist order, and an acknowledgement that continued violation may result in suspension or revocation of the authority.—Id. pp. 184, 195.

Store; equipment, supplies: [Vols. 17, 18, 21].—Neither bicycles nor plywood are commodities commonly or ordinarily dealt in either by retail and wholesale grocery houses across the country as a whole or by food business houses in the area of respondent's operations and are therefore not within the scope of respondent's authority to transport "such merchandise as is dealt in by wholesale, retail, and chain grocery and food business houses"; however, nails, staples, fencing and fencing wire are commonly offered for sale by retail and wholesale grocery houses in the area of respondent's operation, and may be transported under respondent's certificates.—Wiley & Sons, Inc.—Investigation and Revocation, 106 M.C.C. 686 (690-91).

The Commission decided in 94 MCC 663, 668, that the terms "office" and "store" are not synonymous. Therefore, applicant's authority to transport "uncrated store fixtures and store equipment" does not include authority to transport such commodities intended for use or future use in nonstore areas within these places.—North American Van Lines, Inc. Ext.—Overall, 107 M.C.C. 750 (761).

Petitioner's proposed interpretation of inherent restrictive terms of "store fixtures and store equipment" to all transportation of such commodities to any establishment without regard to ultimate intended use test was denied. In interpreting operating rights, actual terms of carrier's certificate must be construed, and descriptive language questioned herein is clear, intelligible, and suggests a single meaning.—Mural Transport, Inc., Interpretation, 111 M.C.C. 637 (640-1)*.

Supplies: [Vols. 12, 14, 16, 18, 19, 21].—Citing 61 MCC 329 (333) and 53 MCC 530 (533), the Commission reaffirmed its distinction between the terms "supplies" and "materials": The term "supplies" means those things consumed in, or necessary to, the maintenance and operation of a plant, factory, or business other than the raw materials or ingredients which go into the finished product or structure, whereas "materials" means those things used as ingredients or parts of the finished structure or product. The term "supplies" has a very broad meaning and should not be confused with "materials" or "ingredients". It embraces those things furnished for the purpose of operation, as distinguished from "materials", which are furnished for original construction.—Hilt Truck Line, Inc.—Investigation of Operations, 117 M.C.C. 9 (14).

If it had been the Commission's intent, when the considered rights first were issued, to grant to respondent's predecessor authority to transport the full range of commodities dealt in by grocery stores, appropriate language was readily available and in current usage at the time. Hilt argues that "grocery store supplies" must be regarded as such terminology, but the gap between the terms "supplies" and "commodities dealt in by retail grocery stores," the meaning of which when used in Commission certificates and permits being well established, is far too great. The only interpretation which validly may be accorded that commodity description ("grocery store supplies") limits the carrier to the transportation of those items which are used by grocery stores in the performance of such functions as the maintenance of their premises, recordkeeping, and accounting, and does not permit the movement of commodities to be offered for resale.—Id., pp. 16, 17.

Tractors: See Diamond Transp. System, Inc., Ext.—Tractors case, §204(b), n. 7 *Automobiles*.

Waste Products: Commission defined "waste" products as any product which has been or would ordinarily be discarded as worthless, defective, or of no use, including materials having undergone initial processing such as grinding, crushing, or compacting prior to involved transportation.—Transportation of "Waste" Products for Reuse, 114 M.C.C. 92 (107-9)*.

Woodchips: Commodity description "woodchips" in respondent's common carrier certificate found to authorize transportation of "woodshavings" as the dictionary descriptions of "chips" warrants inclusion of "shavings".—Puget Sound Truck Lines—Investigation & Revocation, 114 M.C.C. 25 (28-9).

Regulations of the Commission

35 FR 4754, Mar. 19, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, entire Part, §1056.1-§1056.18, revised, effective May 1, 1970.

35 FR 5551, Apr. 3, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, miscellaneous corrections of revised regulations (35 FR 4754).

35 FR 7123, May 6, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.6 Determination of weights, new subparagraph (e) *Exception*, added, effective June 1, 1970.

35 FR 8890, June 9, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.1(c) and §1056.12(a) modified, effective June 1, 1970.

35 FR 16935, Nov. 3, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.4 Accessorial or terminal services, etc., Order of Dec. 5, 1969 (335 ICC 698) reinstated and modified so as to become effective Dec. 1, 1970.

35 FR 19077, Dec. 17, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.11 Vehicle-load manifest; information required, amended by addition of new paragraph (b)(13), effective November 1970 [sic].

36 FR 158, Jan 6, 1971, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.4 Accessorial or terminal services, etc., order served Oct. 29, 1970 (35 FR 16935) modified so as to become effective on Feb. 1, 1971.

36 FR 21358, Nov. 6, 1971, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.6 Determinations of weights, paragraphs (b) and (3) modified, effective 30 days after date of publication in Federal Register.

36 FR 22579, Nov. 25, 1971, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.6(d) and §1056.7 amended, effective Jan. 1, 1972.

37 FR 7159, Apr. 11, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.3 amended by adding paragraph (d), §1056.7 summary added, and §1056.12(b) amended by adding a new last sentence, effective April 28, 1972.

37 FR 12324, June 22, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.10 Receipt or bill of lading; information thereon, revised, and §1056.20 Responsibilities and liabilities of principal carriers, added, effective July 31, 1972.

FR 14589, July 21, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce; reservation of vehicle space by shippers. Proceeding reopened for further consideration of rule prohibiting carriers from making estimates and/or charges based on vehicle space reservation, but solely with respect to shipments of the particular type of articles defined in §1056.1(a) (2) and (3); orders of Feb. 28, 1971 and Apr. 27, 1971 remain in full force and effect as to all other shipments. Effective on date of order.

37 FR 14308, July 19, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.19(a) corrected.

37 FR 17838, Sept. 1, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.9 (c) *Waiver of order for service*, added, effective Oct. 5, 1972.

38 FR 6992, March 9, 1973, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.6(d) *Reweighing of shipment*, corrected by amending first sentence.

Section 204. (c) [§ *304 (c) U.S.C.*] Investigation of complaints; orders.—[Unchanged. See vol. 11, p. 9391.]

Amendment, see footnote, p. 9392; historical notes, vol. 13, p. 11058, vol. 14, p. 11580.

Notes of Decisions

Volume 9—p. 7936; Volume 11—p. 9392; Volume 12—p. 10367; Volume 13—p. 11058; Volume 14—p. 11580; Volume 15—p. 12184; Volume 16—p. 12831; Volume 17—p. 13519; Volume 18—p. 14310; Volume 19—p. 15552; Volume 21—p. 17157.

25. Scope of issues.—[Vols. 9, 11, 12, 14, 17, 19, 21].—See Gateway Transp. Co., Inc., Investigation and Revocation case, §5(2), n. 50; Carl Subler Trucking, Inc., Modification of Certificate case, §212(a), n. 10.

26.—Moot questions.—[Vols. 12, 14-19, 21].—See Ben Blinder, Extension—Alternate Routes case, §207(a), n. 6 *Truckloads.*

27. —General-revenue cases.—[Vols. 12, 15-18].—Respondents' selection of 79 cost study carriers based on their percentage of the aggregate involved tariff revenues was in harmony with our usual order for proofs, but anticipated increases in expenses were computed voluntarily by 51 of the 79 carriers representing less than 57 percent of said revenues. Commission may reasonably infer that these 51 carriers restating expen-

ses were those in most need of increased rates and are thus not representative. Additionally, respondents' data as to affiliate transactions, traffic movement, revenue needs, and carrier efficiency were not sufficiently detailed or representative. Increased rates ordered canceled.—General Increase, Middle Atlantic and New England, 332 I.C.C. 820 (834-39).

Respondents have failed to show their proposed increases to be just and reasonable inasmuch as the "master frame" of 62 representative carriers was made on a contention that such carriers would carry 90 percent of total involved traffic but respondents conceded that they had no knowledge what such a total would be; moreover, both interstate and inapplicable intrastate traffic are commingled. Respondents' studies also lacked controls, audit provisions, and corrections to reflect interlining due to mergers. Such record fails to be representative of situation or to justify increases. Additionally, respondents' cost studies are defective for insufficient data on carriers involved and methods used, absence of supporting working papers, carrier affiliate data in an unacceptable summary form only, and failure of probative analysis of data regarding debt and equity capital.—Increased Rates and Charges, Pacific Inland Terr., 332 I.C.C. 845 (855-60).

Evidence herein proved respondents operate pursuant to efficient management but that such efficiencies have not produced adequate cost savings to preclude need for a rate increase. Proposed 5 percent increase on minimum charges and shipments under 1,000 pounds which will reduce already negative operating ratios but will not produce profitable ratios below 100 percent (the break-even point) were approved. But proposed rate increases of 3 percent on shipments of 1,000 to 5,000 pounds and over 5,000 pounds, applicable solely between certain territories, not approved as they are discriminatory because such increase is applied to traffic which is more profitable than rates between other territories and disrupts relatively equal interterritorial competitive situation without any appreciable improvement in operating ratios.—Increased Rates and Minimum Charges, South, 335 I.C.C. 77 (98-105)*.

Commission prescribed new rules applying to proposals by member carriers of 10 named rate bureaus for general increases or general adjustments of rates where the proposal would result in an increase of $1 million or more in annual operating revenues. Included are rules requiring that carriers' supporting evidence be filed and served concurrently with filing of the proposed schedule; such schedules must have an effective date 45 days after filing; and service of evidential support must be made on all parties participating in last formal general rate increase proceeding in affected territory. Rules were also prescribed for development of cost and traffic data, revenue need information, and affiliate data as specified in appendix II.—New Procedures in Motor Carrier Rev. Proc., 339 I.C.C. 324 (326-340).

Commission affirmed conclusions in prior report, 339 ICC 324, making the new procedures promulgated therein as to general revenue proceedings applicable to member carriers of 10 named rate bureaus. Many of these members are Instruction 27 carriers, and they account for approximately 90 percent of all revenues earned by all Instruction 27 carriers nationwide. The action of these carriers determines prevailing rate level, including amount of general rate increases on general freight. Commission modified its regulations for development of carriers' traffic study. The study group of carriers shall consist of those Instruction 27 and 9002 carriers which earn $1 million or more in annual operating revenues from issue traffic, or 1 percent or more of the total annual operating revenues of all carriers from issue traffic. Updating is not required for every individual increase or reduction but only those changes having substantial effect on revenues.—New Procedures in Motor Carrier Rev. Proc., 340 I.C.C. 1 (4-5, 9-10)*.

Cost study requirements modified to enable carriers to present cost data on a combined carrier basis inasmuch as prior regulation requiring disclosure on an individual carrier basis might adversely affect a carrier's competitive position. Also, procedures modified to permit updating of cost data on either an individual or composite carrier basis utilizing carriers whose revenues from issue traffic amount to 50 percent or more of their total revenues. Similarly, Commission modified its requirements as to data on carriers' revenue needs so that disclosure on an individual carrier basis is not required but authentication of data by underlying individual carrier data will be required as previously indicated. Also, a showing of carriers' present financial condition will be required. With regard to notification of public, both in respect to reaching of all interested parties, and in a timely manner, Commission concluded that compliance with Rule 22 of the General Rules of Practice requiring "simultaneous service" will be adequate and prior regulations in 339 ICC 324 modified to reflect this conclusion.—Id., pp. 12-17.

Commission herein instituted a proceeding with a view to modification of present regulations (49 CFR §§1102, 1104, 1105, 1303, and 1306) governing the filing and posting of notice and furnishing of data to the general public of proposed general increases in freight rates and passenger fares by rail and motor carriers.—Notice of Increases in Frt. Rates and Pass. Fares, 341 I.C.C. 589 (590-94).

See also General Increase, East-South Territory case, and General Increase-Rocky Mountain Territories case, §216(g), n. 65.

50. Evidence; admissibility, in general.—[Vols. 9, 11-19, 21].—In line with the rule enunciated in 353 US 657, which was explicitly held applicable to civil proceedings such as administrative hearings in 258 F. 2d 403, failure of the Bureau of Inquiry and Compliance to make available to respondents the requested reports and memoranda prepared by the Commission's district supervisor at the time of his investigation and which recorded events that were the subject of his testimony for possible use in impeaching the witness, is fatal to the witness' testimony and therefore renders it inadmissible. The application of the Jencks rule (353 US 657) is an absolute requirement, and leaves nothing to the discretion of the judge or the hearing officer to deny inspection when the witness does not use his memoranda in the hearing room. Only the defense is adequately equipped to determine the effective use of these reports and memoranda for the purpose of discrediting the government's witness and thereby furthering the defense. Therefore, it has the right to see the reports and memoranda in order to determine what use may be made of them.—Empire Truck U-Drive-It, Inc., Investigation, 96 M.C.C. 29 (33).

While 80 percent of the materials requested by respondents were lost or destroyed before completion of their cross-examination of the witness, and some of requested materials apparently were not prepared by the witness or do not constitute reports by him reflecting the events or activities which were the subject of his testimony, and, therefore, do not fall within scope of the Jencks rule, the loss of those materials and inability of the Bureau to make them available to respondents rendered witness' testimony inadmissible. Although upon further hearing it might be determined whether the 20 percent which were still in existence include in their entirety the pertinent memoranda and reports of the witness, the damage done cannot so easily be repaired since the greater part of the materials requested by respondents were prepared by witness in the course of his investigation. In the circumstances, even if the Bureau could assure that the witness's reports were entirely embraced by the 20 percent still extant, respondents could not be certain that this was the case. The loss of these materials and the inability of the Bureau to make them available rendered that testimony inadmissible.—Id., pp. 33-4.

Although it is frustrating to foreclose consideration of an extensive part of the evidence on the basis of a single point of law, the Jencks rule is an important safeguard of the respondents' rights and is essential to procedural fair play which is inherent in the very nature of administrative proceedings; like the courts, the primary interest of the regulatory agencies must be that justice is done. The fact that in an investigation proceeding it is often necessary to make a principal witness of the individual who conducted the Commission's preliminary investigation, creates unusual problems for the defense because there is sometimes a tendency to give undue importance to the testimony of the investigator. This situation underlines the importance of the Jencks rule as a safeguard of the respondents' right to an impartial hearing, and, although the Jencks rule may be considered a handicap to the government in its case, there are no corresponding special rules of evidence to enhance the testimony of the investigator by making testimony by him admissible where it otherwise could not be admitted.—Id., p. 34.

Where one of respondents' own witnessess testified it had discontinued providing service at involved Kansas points on l.t.l. traffic, all such traffic being interlined with other carriers and only volume shipments made in company-owned equipment, evidence is more than sufficient to justify examiner's findings as to respondents' cessation of service at involved points; therefore, it is unnecessary to discuss alleged inadmissibility (on grounds of hearsay) of testimony of Bureau of Inquiry and Compliance witness.—Pacific Intermountain Exp. Co.—Investigation, 96 M.C.C. 604 (606-7).

Jencks Rue's applicability in administrative proceedings was not overruled by 224 F. Supp. 457, nor was it repealed by Jencks Act, which applies only to criminal cases. Such rule requires the government to make available to defense reports and memoranda prepared by its witnesses recording events which are subject of their testimony, for possible use by defense in impeaching said witnesses. Thus, Jencks rule does not impugn the witnesses' veracity, but is primarily a check on reliability of their memory. Therefore, failure of the Bureau to make available to respondent those reports and memoranda made by witness to record events to which he testified renders his testimony inadmissible; and, although it might have been feasible to cure Bureau's refusal to provide reports and memoranda if foundation had been laid to show that they were destroyed in accordance with routine administrative practice (323 F. 2d. 818), no such foundation has been provided. Consequently questioned testimony is not considered.—Barnes Truck Line, Inc., Investigation & Revocation, 102 M.C.C. 281 (283-5).

The Commission disagreed with the administrative law judge's ruling that struck from the record reference to all service refusals or failures on respondent's part which occurred more than a year prior to the date of hearing. Violations should be subject to action on the part of the Commission regardless of their having occurred more than a year previous to the date of the hearing.—Braswell Motor Frt. Lines, Inc., Investigation, 118 M.C.C. 392 (397).

See also United Buckingham Freight Lines v. United States case, §216(b), n. 102.

51. Application of principles of res judicata and stare decisis.—[Vols. 13-19, 21].—Though the doctrine of *stare decisis* does not apply to decisions of administrative bodies, consistency of administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily. However, there is no inconsistency between the Commission's conclusion that plaintiff's certificate authorizing it to serve all points in North Carolina as off-route points—but not specifically restricted against service outside that State—did not authorize any service at Chesapeake, Va., and its position in earlier cases wherein the certificates issued were specifically restricted against service across state lines. The presence or lack of such a specific restriction in the certificate does not extend or decrease the territory carrier may serve; thus, it is immaterial that plaintiff's certificate contained no such restriction, since it was limited territorially either with or without specific words of limitation.—R-C Motor Lines, Inc. v. United States, 350 F. Supp. 1169 (1172-3)*.

52. Complaints.—[Vols. 17, 18, 21].—Supporting shipper, manufacturer of chemicals and fertilizers, has supported 26 applicants for authority to transport chemicals and fertilizers. Shipper now supports applicant because it alleges that many of the authorized carriers do not have proper equipment available to transport its commodities. A shipper that supports a successful applicant should not be foreclosed from obtaining adequate transportation services elsewhere if it can show that the carrier granted authority has not produced the expected service and that a need still exists. However, the fact that a shipper successfully supports the granting of authority to 26 carriers and still does not obtain service to its satisfaction, raises a question as to the efficacy of our application procedures. While we are not persuaded that the shipper has a need for additional service, we will direct our field staff to investigate the unsubstantiated allegations of the shipper with a view to determining whether a formal investigation proceeding should be instituted, and whether there has been a trifling with our application procedures. — Umthun Trucking Co., Extension—Colorado, 108 M.C.C. 669 (674-5)*.

53. Consolidation of proceedings.[Vols. 15-19, 21]—In suit to set aside Commission order denying plaintiff's application for common carrier authority, plaintiff's argument that, due to fact that 32 applications for similar authority were consolidated and considered in a joint proceeding, the Commission failed to consider its case on its merits, misinterprets the nature of the one single consolidated proceeding to which plaintiff was a party. To require the Commission to conduct separate proceedings in such a situation would be to saddle it with an unworkable burden. Moreover, there is much to be gained in a consolidated proceeding; not only does the Commission benefit in having the various applications for similar authority in an area joined together, but the parties benefit as well in that they may interrogate witnesses who might not otherwise be present; also, it serves to accommodate the convenience of all the parties and to make a great deal of relevant testimony available to the Commission, thus leading to a more rational decision based on as much evidence as is feasibly obtainable.—Mississippi East, Inc. v. United States, 301 F. Supp. 1332 (1334-5)*; Yourga Trucking, Inc. v. United States, 308 F. Supp. 625 (628)*.

Appearance by a person in one proceeding, heard with another on a consolidated record, does not confer on that person the status of a party to all the embraced proceedings; this can only be accomplished by compliance with provisions of the Commission's Rules of Practice.—S & C Transport Co., Inc., Investigation and Revocation, 96 M.C.C. 642 (644).

Commission denied protestant's request that its application for authority essentially identical to authority sought herein by applicant be consolidated in this proceeding. Commission's right to consider applications separately or in combination is a well established matter of administrative discretion, and denial herein is based upon concept of fairness of opportunities to all parties, effective Commission procedures, and the public interest. Commission rejected protestant's claim that applications for identical motor operating rights must be consolidated in a single proceeding. Protestant's reliance on this doctrine is based on 326 US 327, but such reliance is ill-founded as applications for motor operating rights, unlike those of the same radio station rights (at issue in the Supreme Court case), are seldom mutually exclusive, as this Commission may authorize any number of motor carriers to perform a service upon a showing of public need.—Texas-Oklahoma Express, Inc. Ext.—Oklahoma Points, 110 M.C.C. 769 (773).

See also Lake Shore Motor Freight Co. v. United States case, APA, 5 USC, *Procedure.*

55. Full hearing.[Vols. 9, 11-14, 16-18, 21].—See United Buckingham Freight Lines v. United States case, §204(c), n. 215.

60. Parties and notice.—[Vols. 13-19, 21].—See Carl Subler Trucking, Inc., Modification of Certificate case, §212(a), n. 10; Oil Country Iron or Steel Pipe, Midwest to Okla. & Tex. case, §13(1), n. 37.

75. Official notice.—[Vols. 9, 11-19, 21].—The Commission, in interpreting a carrier's Keystone commodity description, may take official notice of common knowledge that there are numerous specific items which wholesale and retail concerns in a particular line of business handle. However, the Bureau of Enforcement's apparent reliance on common knowledge that certain articles are not ordinarily carried by such concerns is negated by respondent's affidavits that several of the items in question are, in fact, commonly offered for sale in the type of business involved in the area of respondent's operations, and as to them the bureau has failed to meet its burden of proof. However, where there is no common knowledge to enable to Commission to take official notice, and the respondent's specific evidence is not persuasive, it is clear that such commodities are not commonly or ordinarily dealt in by the particular wholesalers or retailers, and thus are not within respondent's authority.—Wiley & Sons, Inc.

—Investigation and Revocation, 106 M.C.C. 686 (689-90).

120. Motions.—[Vols. 12, 16, 18, 19, 21].—By letter treated as a motion to strike, applicant urges that protestant's reply to its exceptions is in essence a challenge to the examiner's findings and conclusions, hence constitutes late-filed exceptions. That contention is without merit, since review of the examiner's recommendations on exceptions is de novo; motion to strike denied. However, protestant's characterization of the motion as having "gone beyond the bounds of propriety" is unwarranted, and request for censure of applicant's counsel is denied as calling for extreme action by the Commission, which is clearly unnecessary.—D & M Taxi Co., Inc., Common Carrier Application, 96 M.C.C. 439 (440).

126. Burden of proof.—[Vols. 15-19, 21].—Protestant motor carrier association has met burden of proving respondents' rates on shipments of chemicals, drugs, and related articles from New Jersey and New York to Chicago unlawful as the assailed rates do not cover respondents' out-of-pocket costs for the service rendered. The burden of proof now shifts to any respondent who would make a contrary showing.—Chemicals, Drugs, and Related Articles, 335 I.C.C. 601 (606).

Complainants have failed to sustain their burden in attempting to show that defendant irregular-route carrier unlawfully provided regular-route service; their reliance on 47 MCC 23 is not well placed, since distinction therein between regular and irregular-route service applies to the operation of irregular-route carriers of general or diverse commodities. And while defendant's *Mercer* description embraces many commodities, it is tailored to meet requirements of the gas and oil field industry and, therefore, is not within purview of the *Brady* criteria, 47 MCC 23. Furthermore, fact defendant transported substantial less-than-truckload traffic does not alter situation because "even if an operation involves the handling of a large proportion of less-than-truckload shipments for a number of shippers it may properly be considered an irregular-route service where the particular needs of the shippers necessitate such a service". Complaint dismissed.—Western Truck Lines v. J. H. Rose Truck Line, Inc., 100 M.C.C. 350 (353-4).

The burden of proof is upon complainant to establish material allegations of the complaint; it is not relieved of this burden by defendants' failure to submit sworn testimony or defendants' refusal to admit or deny the allegations of the complaint. However, should complainant establish a prima facie case, defendants would receive an unfavorable decision which could entail an order requiring them to cease and desist their unauthorized operations. Here complainants have made their prima facie case by showing that defendant A-1 Coach has not restricted the performance of its broker operations to Brooklyn, but has established offices in Manhattan where it has been holding itself out to engage, and has engaged, in the arrangement and sale of transportation not authorized by its license; the evidence also establishes that Sheldon Goldman and Travelers' Bus Service, Inc., individually and collectively, have been holding themselves out to engage in broker operations, and that Travelers' Bus Service, Inc., has actually performed such operations without authority. Cease and desist order entered.—Allied Bus Corp. v. Goldman, 103 M.C.C. 559 (568-9).

The burden of proof is on complainant to show that the considered traffic is intrastate in character and this complainant has not done; it has failed to show that defendant is or has been transporting essentially intrastate traffic marked as interstate traffic. This conclusion, with respect to many doubtful shipments, is largely due to insufficient evidence. Fact that defendant holds no intrastate authority for certain considered movements should not of itself condemn what appears, as a result of the out-of-state routing, to be ostensibly interstate movements, and lead to characterization of the traffic as intrastate.—Missouri Pub. Ser. Comm. v. Missouri Arkansas Transp. Co., 103 M.C.C. 641 (647-9).

The burden is on the carrier and shipper interests seeking modification of a minimum rate order to show through material and convincing evidence that such modification is justified. Broad general statements pertaining to transportation and competitive conditions surrounding movement of considered traffic do not establish that application thereto of the minimum rate order is unjustified, nor do they show competitive disadvantage to the parties; on the contrary, it is clear that the requested modification would vitiate the benefits resulting from the order. However, since the record warrants some modification of considered minimum rate order and since the granting of such relief would not affect the beneficial results of the order, it is further modified by removing from requirements thereof the commodities specified.—Oilfield Equipment to and between the Southwest, 106 M.C.C. 298 (309-10)*.

The Bureau of Enforcement fails to meet its burden of proof when it apparently relies on common knowledge that certain items are not ordinarily carried by wholesale, retail, and chain grocery and food business houses, since respondent negates this reliance by establishing through affidavits that these items are, in fact, commonly offered for sale by such businesses in the area of respondent's operations, and are accordingly within the scope of respondent's certificate.—Wiley & Sons, Inc.—Investigation and Revocation, 106 M.C.C. 686 (689).

See also International Transport, Inc. v. United States case, APA, 5 USC, *Burden of proof.*

145. Presumptions.—[Vols. 14, 19].—See Winter Garden Freezer Co., Inc., Investigation, §203(c), n. 5.

205. Proposed reports.—[Vols. 14, 15, 17, 19, 21].—Exceptions to examiner's statement of facts directed to his employment of terms such as "assert" and "claim," etc., and to his failure to make positive findings of facts in treating the testimony of certain witnesses are unfounded. An examination of the examiner's report reveals that he so characterized certain testimony where he entertained some doubt concerning its reliability, and that in his further consideration of this testimony he resolved his doubts and indicated what he considered as the true facts, at least as they bear on the outcome of this proceeding. Thus, considered in the context of his entire report, the examiner did make positive findings of facts, and has supplied an objective and comprehensive statement which has provided an ample basis for consideration of the issues raised on exceptions.—Empire Truck U-Drive-It, Inc., Investigation, 96 M.C.C. 29 (34-5).

See also Carl Subler Trucking, Inc. v. United States case, APA, 5 USC, *Procedure.*

206. Exceptions.—[Vols. 15-19, 21].—Different attorneys for respondent filed separate exceptions to examiner's report; while this method of pleading is not specifically prohibited by the Rules of Practice, language of rule 1.96 clearly contemplates that only one set of exceptions be filed by each party. However, since the second exceptions filed raise no new issues and are directed solely to the examiner's ultimate conclusions, no useful purpose would be served by excluding them.—Iron and Steel Articles, Wilmington to Points in N.C., 323 I.C.C. 740 (741)*.

Those portions of applicant's exceptions which cite rates of protestants and of automobile rental agencies are not supported by any evidence in the record and therefore are stricken; however, the reference to transportation of repossessed automobiles by protestants contains no claim of the truth of any facts outside of the record, and is allowed to stand.—Autocar Shipping Co. Common Carrier Application, 96 M.C.C. 357 (360).

Protestant's exceptions filed by its counsel, who owns 50 percent of its stock, are intemperate in accusing the hearing examiner of bias and prejudice, when that grave allegation is completely unsupported by the record and no serious effort is made in the exceptions to support it. However, the legitimate arguments raised therein on protestant's behalf will be considered in order not to penalize it for the inexcusably overzealous pleading of its counsel, notwithstanding his stock interest.—D & M Taxi Co., Common Carrier Application, 96 M.C.C. 439 (440).

215. Modified procedure.—[Vols. 17-19, 21].—See also Ashworth Transfer, Inc. v. United States, at §206(b), n. 25; Carl Subler Trucking, Inc., Extension, at §206(b), n. 22 evidence; Howard Hall Co. v. United States, §206(b), n. 25; and T. J. Claveau Transp., at 28 USC §2325, n. 7.

The Commission's Rules of Practice as to modified procedure, admittedly, are not inflexible and can be administered liberally; and, in action to set aside orders in complaint proceeding (assailing certain motor rates) handled under modified procedure, it would be unjust to affirm the commission's orders on the basis of its modified procedure rules when liberal administration of those rules would have permitted reception of evidence on the basic issue to be decided. An administrative agency must be permitted to terminate its proceedings at some time, but it should not do so by decision and order on an issue as to which a party was denied opportunity to present evidence; rules of procedure, whether modified or not, should never be used to defeat or even to modify justice. Administrative agencies, as the sole representative of the public, must see that all pertinent facts are adduced when the parties fail to put them in evidence. Commission report and orders vacated and annulled; case returned to the Commission for a full hearing as to compensativeness of assailed truck rates.—United Buckingham Freight Lines v. United States, 288 F. Supp. 883 (886-7)*.

While validity of the Commission's modified procedure rules on appropriate applications is not questioned in action to set aside considered orders in Commission proceeding, handled under modified procedure, on defendant carrier's application for operating authority between Belle and Lamar, Mo., the Commission is authorized to issue rules and regulations only as provided by statute; and, not more than three States being involved, provisions of §205(a) required that the application be referred to a joint board composed of a representative of State of Missouri for appropriate proceedings. Therefore, the Commission's denial of petition by plaintiff (protestant) for referral of the application to a joint board and its disposal thereof under modified procedure, when highly controversial facts were in dispute, was arbitrary and without a rational basis. Commission orders under review are set aside and annulled; the Commission should proceed to consider defendant carrier's application in accordance with requirements of the Act.—Jones Truck Lines, Inc. v. United States, 321 F. Supp. 821 (824-6, 829)*.

In action for vacation of Commission order granting operating authority in an application proceeding which was assigned for disposition under modified procedure by the Commission's review board, although the board accepted as true the charges leveled against applicant for a certificate to operate in two States, inasmuch as there were bona fide issues as to applicant's fitness and the need for its service, the Commission had a statutory duty to refer the application to a joint board for determination; and, in absence of such referral, order granting the certificate must be annulled.—Land-Air Delivery, Inc. v. United States, 327 F. Supp. 808 (811)*.

250. Investigations by Commission.—[Vols. 14, 15, 17-19, 21].—See also Greyhound Lines, Inc., v. Allen, at §202(b), n. 20; Murphy Motor Freight Lines, Inc.—Investigation, at §204(e)(f), n. 12; and Uxbridge Motor Lines, Inc.—Investigation of Operations, at §212(a), n. 35.

Investigation proceeding appealed from was instituted by the Commission, on its own motion, under §§204(c) and 212(a) into intervening defendant's carrier operations, the order stated that investigation was instituted to determine if carrier was conducting operations not authorized by its certificates, and the carrier (who proceeded at every step on advice of counsel) conceded that it had notice of the investigation and that it was aware of prior proceeding interpreting considered certificate—then held by its predecessor—as not permitting cross-hauling; thus, it cannot be argued that defendant carrier did not have notice that proper scope of the investigation might extend to extraneous matters including inadvertent issuance of a prior certificate. Therefore, the Commission's actions (1) in interpreting considered certificate (which, through inadvertence, incorrectly described the predecessor's rights succeeded to by defendant carrier) as permitting cross-hauling and (2) then discontinuing the investigation, without further findings, are procedurally deficient.—Akers Motor Lines, Inc. v. United States, 286 F. Supp. 213 (222, 223-4)*.

Commission construction of, together with the inadvertent issuance of, the certificate in question had the effect, albeit indirectly, of conferring on the carrier operating rights it did not acquire from its predecessor and which, pursuant to the prior proceeding, it was foreclosed from exercising; however, neither the substantive nor procedural requirements of relevant statutes have been conformed to. Since the Commission made no finding as to need for the cross-haul service carrier is now free to perform, and stated it was not deciding whether the certificate could be modified on the basis of inadvertent issuance because such action would require opportunity for notice and hearing, it acted in disregard of its statutory mandate in discontinuing the investigation with the result that carrier is permitted to cross-haul. Order set aside and case remanded for further proceedings in accordance with the court's instructions.—Id., pp. 222-3, 225-6.

Although respondents' operations in foreign commerce to and from Mexico were unauthorized under its certificates of registration issued pursuant to §206(a)(7), the investigation proceedings are discontinued since it has not been shown conclusively that respondents continued such operations other than in good faith and under color of right, and since there is a finding in the extension proceedings that certificates of public convenience and necessity should be granted to respondents authorizing such operations.—Imperial Truck Lines, Inc.—Common Carrier Application, 106 M.C.C. 741 (751, 753-54).

In view of the corrective measures taken by L & M Express (Investigation into its operations and its application for extended authority were heard on a consolidated record), cease and desist order not entered, because, although found to have been operating in violation of §206(a) of the Act and in violation of the Commission's regulations governing bills of lading, drivers' logs, and extension of credit, at the time of the hearing it appeared to be operating in substantial compliance with the Act and related regulations. However, L & M is admonished to take immediately any steps which may be necessary in order to remove opportunities for recurrence of any improper practices. Investigation discontinued.—L & M Express Co., Extension, 106 M.C.C. 334 (338-9).

This investigation was instituted to determine whether respondent's transportation of edible gelatin violates its authority to transport meat, meat products and byproducts from meat packinghouses. Respondent made a motion to dismiss the investigation on ground that even though the shipper for which it transports gelatin is not a packinghouse it is an integral part of its parent company which is a meat packinghouse. Upon Commission's overruling of this motion, respondent ceased questioned service and applied for appropriate authority to transport edible gelatin. Such facts convince us that questioned service was performed in good faith and under color of right; investigation discontinued.—Rowley Interstate Transp. Co., Inc.—Investigation, 110. M.C.C. 285 (291).

Investigation of respondent shippers transportation operations showed that such operations were bona fide private carriage as defined by §203(a)(17) and exempt from this Commission's regulation. Investigations discontinued as the Commission found no justification for establishing general standards for defining private carriage as such standards would be very difficult to formulate and possibly misleading.—Personnel Service, Inc.—Investigation, 110 M.C.C. 695 (711).

Investigation of respondent's transportation of "woodshavings" found not to be unauthorized transportation as commodity description "woodchips" in respondent's common carrier certificate was found to embrace "woodshavings". Investigation discontinued.—Puget Sound Truck Lines —Investigation & Revocation, 114 M.C.C. 25 (29).

Upon investigation, Commission instituted a rulemaking proceeding to determine the effect of a population decrease of a municipality on the implied motor carrier authorities to serve the base municipality. Order in instant case withheld pending outcome of this rulemaking proceeding.—Mercer Motor Freight, Inc.—Investigation, 114 M.C.C. 447 (449-50).

In an investigation initiated by the Commission, it was held that the operations of Skyline Transport, Inc. were in violation of

§206(a) of the Act, and the terms, conditions, and limitations of the certificate of public convenience and necessity theretofore issued. Cease and desist order issued.—Skyline Transport, Inc.—Investigation & Revocation, 115 M.C.C. 807 (827).

While the Commission recognizes that it is prudent for a businessman engaged in bona fide lumber brokerage operations to use all legitimate means to enhance his profits and to minimize his losses, the virtual elimination of all risks through the rendition of a transportation service and the receipt of an assured return persuaded the Commission that the transportation service provided must be considered that of a for-hire carrier. Cease and desist order issued.—Boucher—Investigation of Operations, 117 M.C.C. 480 (486).

In an investigation instituted on the Commission's motion into former illegally performed operations, respondents were issued a cease and desist order even though there was no indication of bad faith or willful misconduct, or of any intention to resume participation in illegal operations. Cease and desist orders are corrective in nature, and are a necessary prerequisite for further enforcement action should the involved violations either continue or be resumed.—Collins, Ford, Longacre, Patterson—Investigation, 117 M.C.C. 628 (631-2).

251. Entry of order.—[Vols. 19, 21].—See also E. A. Gallagher & Sons v. Cleveland General Transport, at §212(a), n. 10.

A cease and desist order will be entered against respondent's principal stockholder as well as against respondent corporation and respondent personnel registry. Stockholder's claim that considered leases were entered into by respondent corporation and that he has participated in the activities under investigation solely as an employee of that respondent is unfounded; he has had long experience in transportation and in the leasing business prior to the institution of operations under consideration, and has been respondent's sole manager since its inception. It is evident that he has the ability to conduct similar unlawful operations himself, through respondent, or through new corporate entities in the future.—Empire Truck U-Drive-It, Inc., Investigation, 96 M.C.C. 29 (45).

Since respondent association is found not to be a lawfully constituted agricultural cooperative within requirements of the Agricultural Marketing Act and therefore not entitled to operate under exemption of §203(b5), and the other respondents have benefited from its unlawful transportation operations as either employees, members, or nonmember shippers, cease-and-desist order is entered against all respondents. And though such order may be directed only against persons who were made parties respondent to the investigation, the association's non-respondent members and shippers are admonished to refrain from participation in any future unlawful operations by it.—Agricultural Transp. Assn. of Tex. Investigation, 96 M.C.C. 293 (304)*.

The examiner found that respondent has been conducting unauthorized transportation of new store fixtures under its household goods authority in violation of §206(a) of the Act, and recommended the entry of a cease and desist order contingent and effective upon any subsequent denial of the application for and the termination of temporary authority operations corresponding to those found to be unauthorized under the presently held authority of respondent. After notice and hearing in an investigation proceeding, upon finding that a motor carrier has not complied with the provisions of part II of the Act, we have duty, under §204(c) of the Act, to issue an appropriate order to compel the carrier to comply therewith. Inasmuch as the entry of a cease and desist order herein against the unauthorized transportation of new store fixtures under household goods authority will not preclude respondent from lawful operations under any temporary authority and its certificates, the effect of the order will not, as recommended by the examiner, be contingent or conditioned upon the ultimate disposition of any other proceedings. Cease and desist order entered.—American Red Ball Transit Co., Inc.—Investigation, 108 M.C.C. 774 (775, 777).

Entry of order in instant proceeding withheld pending final determination of rulemaking proceedings herein instituted to deter-

mine the proper interpretation of defendant's authority to serve points within 10 miles of Nashville, Tenn., in light of changed political circumstances resulting in formation of new municipality embracing said city.—Hayes Lines, Inc. v. Gateway Transportation Co., Inc., 111 M.C.C. 778 (780-1)*.

Transportation of college students having been found to be unauthorized for-hire transportation, a cease and desist order was entered against such operations and investigation discontinued.—Dorsey Bus Co., Inc.—Investigation of Operations, 113 M.C.C. 574 (578).

Transportation of rolls of newspaper inserts in continuous rolls printed on one side only found to be unauthorized interstate transportation as such commodity does not fall under the §203(b7) exemption for "carriage of newspapers". A cease and desist order was accordingly entered as to such operations.—Southern Express, Inc., Investigation of Operations, 113 M.C.C. 628 (632).

Section 204. (d) [§*304(d) U.S.C.*] Application of sections 14 and 16(13) of this title.—[Unchanged. See Vol. 11, p. 9393.

Amendment, see footnote, p. 9393.

Notes of Decisions

Volume 9-p. 7939; Volume 11—p. 9393; Volume 12—p. 10369; Volume 13—p. 11060; Volume 14—p. 11583; Volume 15—p. 12187; Volume 16—p. 12835; Volume 17—p. 13527; Volume 18—p. 14323; Volume 19—p. 15565; Volume 21—p. 17177.

1. Reports of the Commission.—[Vols. 9, 12-15, 17, 18, 19, 21].—See also Carl Subler Trucking, Inc. v. United States, at APA, 5 USC, Reports; HC & D Moving & Storage Co., Inc. v. United States, at 28 USC §2325, n. 40; Mississippi East, Inc. v. United States, at §206(b), n. 25; and National Trailer Convoy, Inc. v. United States, at §207(a), n. 24.

In suit to set aside Commission decision denying multiple extension applications (heard on a consolidated record and the subject of a single report) the Commission is under no duty to make specific findings with regard to each individual applicant. The Commission is required to file a written report disclosing the conclusions along with its findings and order; also, the law requires that it make findings on those issues of fact and law which are material to the case, but not necessarily on every subordinate contention submitted to it. Decision under review has been compiled with more than adequate definitiveness to inform the parties to instant suit of the basis for the Commission's findings and conclusions with respect to all relevant matters in the suit, and it is in conformity with the evidence before the Commission; entire order of the Commission is sustained.—Lake Shore Motor Freight Co. v. United States, 310 F. Supp. 957 (960, 961)*.

Plaintiffs' contention that the Commission's "DANDO" procedure, used in application proceeding under review, denied them (protestants in Commission proceeding) due process of law, found to be without merit. Use of the "Short Form Decisional Process"—referred to as "DANDO"—is discretionary with the Commission and has been held by many courts to be permissible. Also, as seems to be settled law, where the Commission finds no material error in the statement of facts and conclusions by the hearing examiner, it is not required to prepare a detailed report but may affirm and adopt that of the examiner as its own. However, when "DANDO" procedure is used, it means that the Commission's action stands or falls on the examiner's report.—Carolina Freight Carriers Corp. v. United States, 323 F. Supp. 1290 (1296)*.

Section 204. (e), (f). [§*304(e), (f) U.S.C.*] Use of motor vehicles not owned by motor carriers.—[Unchanged. See volume 17, p. 13527.]

Cross Reference

See §202(a), n., 10, vols. 15-17, established Note Numbers before §204(e), (f) was enacted.

Historical Note

The Commission recommends that §204(e) be amended to grant standby authority to the Commission to regulate fuel compensation provisions of owner-operator contracts in transportation emergencies.—Annual Report, 1975, p. 77.

Notes of Decisions

Volume 18—p. 14324; Volume 19—p. 15566; Volume 21—p. 17178.

2. Construction and interpretation.—[Vol. 21]—The Commission has always recognized the legitimate needs of motor carriers to lease equipment from others so as to enable them to operate to the full extent of their authority. What is illegal and has always been condemned is the subterfuge of a lease of equipment when, in fact, the so-called lessor is actually the carrier performing the transportation service. When the lessor is merely using the operating rights of the lessee and paying the lessee for such use, it is an unauthorized lease of operating authority.—Tanksley Transfer Co., Ext.—Points in Four States, 110 M.C.C. 674 (676).

Rules governing the leasing of equipment by motor carriers of property were established in 68 MCC 553, 559, and these rules are codified at 49 CFR 1057. Subject to certain exceptions, the regulations require that a lease specify the period for which it applies and that there must be a period of at least 30 days during which the equipment is to be operated for the lessee by the lessor. The purpose here is to assure that the operations are actually those of the lessee.—Id., p. 677.

The instant proceeding is a typical example of a nominal attempt at compliance with lease and interchange rules resulting in an operation which violates the basic underlying principles of the regulations. The lessor is the party in control of the equipment, and applicant admits the described arrangement is nothing more than a lease of operating authority. Applicant's past unlawful operations, however, were not performed in such disregard of the regulations as to merit a finding that it is not fit to perform the service required by public convenience and necessity. Respondents admonished; extension granted.—Id., pp. 677-9.

10. Leasing and interchange of vehicles.—[Vols. 18, 19, 21].—See also Keller Industries, Inc.—Declaratory Order, at §203(c), n. 3; Owens Contract Carrier Application, at §203(a)(15), n. 1; Point Transfer, Inc., Extension, at §207(a), n. 25 existing carriers; United States v. Webb, at §222(c), n. 5; and Uxbridge Motor Lines, Inc.—Investigation, at §212(a), n. 35.

Respondent Murphy's lease agreement, under which shipments are transferred at break-bulk points to "cartage operators" for ultimate delivery over Murphy's authorized routes to consignees at small nearby communities, is not unlawful; since Murphy has direct, primary, and continuing responsibility to the public from origin to destination, the agreement is not in violation of Murphy's duty to the public. Under this lease the lessor (cartage operator) agrees to (1) lease specific vehicles to lessee (Murphy), (2) maintain, service, and keep vehicles in good repair, according to Federal and State laws and regulations, and provide all gasoline, tires, and other necessary equipment, and pay drivers' salaries, (3) furnish competent and qualified drivers, and (4) indemnify lessee against any loss resulting from injury or death of driver, or damage resulting from his negligence, incompetence, or dishonesty; furthermore, there is no indication on the record of unsatisfactory transportation service; investigation dismissed.—Murphy Motor Freight Lines, Inc.—Investigation, 99 M.C.C. 707 (709, 711-13).

Although respondent carrier's transportation of steel is performed through its steel division in owner-operator and leased equipment, the record is clear that respondent is in control and is conducting said transportation service; the steel division is not, therefore, unlawfully leasing respondent's operating rights.—Gateway Transp. Co., Inc., Investigation and Revocation, 106 M.C.C. 61 (63-68).

Although applicant for extended authority utilized on a trip-lease basis manned vehicles which it knew were not exempt from the 30-day operation requirement, mitigating circumstacces were held to compensate for this and other violative conduct, and authority was granted on basis of need.—S.T.L. Transport, Inc., Extension—New York Points, 115 M.C.C. 14 (23)*.

While carriers may legitimately lease motor vehicle equipment from others in order to operate to the full extent of their authorities, it is illegal for them to enter into ostensible equipment leases under which the so-called equipment lessor, and not the lessee under whose operating authority the traffic purportedly moves, is actually the carrier performing the transportation service. In such instances, the lessor merely uses the operating rights of the purported lessee and pays the lessee for such use. Stated somewhat differently, a carrier leasing equipment from another must be the one that actually conducts the operation, provides the service, and assumes full responsibility therefor. See 68 MCC 553 (559).—Diamond Transp. System, Ext.—Wis. and Okla. Origins, 117 MCC 706 (710-11).

Applicant, in its insurance policy, provided to hold certain lessees free of liability. Thus, the parties have agreed, in effect, that the applicant-lessor is to be responsible for the equipment. As a consequence, exclusive possession and control of the motor vehicles have not been transferred to the lessees, but remain vested in the lessor (applicant). Further, and though the Commission's lease and interchange regulations contain no specific prohibition against a flat rate or percentage of revenue method of compensation, this method of compensation also is a factor to be considered in determining the validity of the purported interchange arrangements.—Id. (712-13).

While the regulations merely require that the compensation to be paid by the lessee for the use of the interchange equipment shall be specific (49 CFR 1057.5(a)), it is equally true that such a division of the revenues as is present here has been condemned as inimical to sound regulation for the reason that it plays a large part in the practice of carriers with extensive operating rights, but which are unable or unwilling to provide service thereunder, unlawfully leasing such rights to others under the guise of equipment leases, 64 M.C.C. 361.—Id. (713).

Section 204a. [§*304a U.S.C.*] Actions for recovery of charges; limitation of actions; definition; effective date.—[Unchanged. See vol. 21, p. 17183.]

Notes of Decisions

Volume 15—p. 12188; Volume 16—p. 12835; Volume 17—p. 13528; Volume 18—p. 14328; Volume 19—p. 15569; Volume 21—p. 17184.

2. Construction and interpretation.—By amendment of §204a in Public Law 89-170 the Commission is specifically denied jurisdiction to award reparations in contested proceedings. In view of this denial of jurisdiction in contested proceedings the Commission cannot assume jurisdiction in uncontested proceedings for reparations and cannot establish informal procedure for handling of such cases. The willingness of a carrier to pay reparations is no substitute for the legislative delegation of authority.

—Informal Procedure for Determining Reparation, 335 I.C.C. 403 (412-13).

10. Claims of and against Federal Government.—[Vols. 19, 21].—In suit by carrier against the United States for freight charges allegedly due on l.t.l. shipments that moved under government bills of lading, when carrier billed the Government for amount less than that subsequently claimed to have been the proper charge and the bill was paid more than 3 years prior to institution of suit, plaintiff cannot recover any claimed amount over that billed and paid. However, carrier is entitled to full charges based on a minimum of 7,500 pounds and, since the action was filed within 3 years after the Government's post-audit deductions (based on claimed 1,000-pound minimum, plaintiff can recover amounts improperly deducted because that cause of action did not accrue until the deductions were made and, therefore, is not barred by the statute.—T.I.M.E. Freight, Inc. v. United States, 302 F. Supp. 573 (575).

In Court of Claims action to recover amounts allegedly due for transportation of household goods of military personnel, moved on Government bills of lading between points overseas and United States points, claim on shipment in motor-van-sea-van service was not barred when it was filed less than 6 years, but more than 3 years, after cause of action accrued. Plaintiff holds interstate authority with respect to services within the United States but, when it performed considered service, it was operating as an exempt freight forwarder of used household goods by virtue of §402(b) and not as a certificated motor carrier [citing 103 MCC 318]; accordingly, its claim was subject to the 6-year limitations period in 28 USC §2501, rather than the 3-year limitations period prescribed in §204a for actions by motor carriers. Therefore, since plaintiff's claim was asserted within the 6-year limitations period, it was not time-barred.—Global Van Lines, Inc. v. United States, 456 F. 2d 717 (747-9)*.

20. Complaint seeking reparation.—[Vols. 18, 19, 21].—Although the 1965 amendment to §204a does not expressly set forth the procedure to be used in awarding reparations in motor carrier cases, legislative history thereof makes it clear that Congress intended to restore the procedure used by the Commission prior to the Supreme Court decision in 359 US 464, which held that Part II of the Act gave no right to past unreasonableness of rates. Under that former procedure, the Commission had authority to make an after-the-fact determination as to whether past motor rates alleged to be unlawful actually were unjust and unreasonable, and also to determine the extent of the unlawfulness. Thus, while the Commission has no statutory authority (similar to that applicable to railroads) to order refunds with respect to motor carrier rates, the Act does provide to aggrieved shippers a reparations procedure applicable to motor carriers.—Admiral—Merchants Motor Freight, Inc. v. United States, 321 F. Supp. 353 (358-9)*.

The Commission has authority upon complaint of a shipper to make an administrative determination of the past reasonableness and lawfulness of the rates sought to be charged on the shipments which are the subject of the pending court action. Therefore since no court action was pending in the embraced proceeding, the Commission lacked jurisdiction to determine complainants' allegations that the charges on past shipments were unreasonable, unjustly discriminatory or unduly prejudicial.—Glama Dress Co. v. Mid-South Transports, 335 I.C.C. 586 (589, 590).

Under §204a, as amended by Public Law 89-170, shippers are accorded a remedy at law to recover reparations. See 335 ICC 403. Therefore, to extent the complainant seeks to recover damages for unlawful charges on past shipments by motor carriers, Commission is without jurisdiction to award reparations. Neither can Commission negate terms of the Act by tolling the statute of limitations with respect to claims on past shipments. Complainant must file a timely court suit.—Mammoth Plastics v. National Classification Board, 341 I.C.C. 15 (17-18).

Section 205. [§*305 U.S.C.*] Administration. (a) Joint board; composition; references of matter to boards.—[Unchanged. See vol. 11, p. 9395.]

Amendments, see footnotes, vol. 9, p. 7941, 7942, vol. 11, p. 9395; Historical Note, vol. 17, p. 13530.

Notes of Decisions

Volume 9—p. 7942; Volume 11—p. 9396; Volume 12—p. 10371; Volume 13—p. 11062; Volume 16—p. 12836; Volume 17—p. 13530; Volume 18—p. 14332; Volume 19—p. 15571; Volume 21—p. 17187.

2. Construction and interpretation.—[Vols. 19, 21].—Though plaintiffs (defendants in Commission proceeding) claim denial of due process because the Commission hearing was conducted before a hearing examiner rather than a joint board, as allegedly required under §205(a), the alleged procedural irregularity in assigning the matter for hearing was not timely. Neither plaintiff objected to order referring the case to an examiner, both participated in the hearing and filed exceptions to examiner's report and recommended order, and they filed petitions for reconsideration and rehearing without suggesting that a hearing before a joint board was required. Procedure followed was not challenged until 15 months after the hearing and 5 months after the Commission's action; clearly, plaintiffs waived any right to a hearing by a joint board.—Travel & Tour Service, Inc. v. United States, 302 F. Supp. 188 (191)*.

Plaintiffs appear to argue that the statutory requirement that certain matters be referred to a joint board is jurisdictional and cannot be waived by their failure to make timely objection, but they cite no case which so holds; in addition, as held in 185 F. Supp. 336, the §205(a) requirement is merely procedural. Furthermore, although the objection to a hearing by an examiner was first raised before the Commission, and not in the court, it was made after the hearing and the Commission's ruling and, since plaintiffs had knowledge of all facts on which the objection was based when the matter was referred to the examiner, their objection was not timely so as to distinguish instant case from 344 US 33. Complaint dismissed.—Id., pp. 191, 193.

Primary question of first impression in action seeking review of Commission orders, which granted intervening carrier operating authority between Belle and Lamar, Mo., concerns interpretation and construction of the §205(a) mandatory requirement that an application be referred to a joint board where not more than three states are involved and no other application or question included. No court decision or Commission order involving that primary issue have been cited and the court knows of none; the commission concluded, however, that §205(a) did not require it to refer intervenor's application to the state board and assigned the proceeding for handling under its modified procedure rules. While the Commission's construction of the statute is entitled to great weight on review, provided it is not obviously contrary to the plain language thereof and without rational basis for its action, the Supreme Court made it clear, in 380 US 1, that construction of statutory language given in an administrative proceeding must give way to the clear mandate of a statute.—Jones Truck Lines, Inc. v. United States, 321 F. Supp. 821 (825-6)*.

Since there is no case or Commission precedent on construction of §205(a) as to the issue of reference, legislative history is considered in determining if the Commission's handling of intervenor's application under its modified procedure has any rational basis that is warranted by law. Under the initial Motor Carrier Act, it was mandatory that the Commission refer all applications for authority to operate in not more than three States to a joint board of the state or states involved for appropriate proceedings; and after reviewing legislative history of the

1938 amendment, which added the language in §205 leaving to the discretion of a joint board whether a recommended report and order shall or shall not be issued, there can be no doubt as to what was intended by including the new clarifying language and, also, that Congress intended to maintain the mandatory requirement for referring an application to a state board wherein only three or less States were involved.—Id., pp. 827-9.

Accordingly, the court concluded that under the record presented, the Commission had a statutory duty to refer intervening carrier's application to a joint board for determination within its discretion whether there should be a recommended order and report to the Commission as required by the statute; and, further, that the Commission's action in assigning the case to its review board for handling under modified procedure was arbitrary and without rational basis. Therefore, the challenged orders are suspended, set aside and annulled; the Commission should proceed to consider the application involved in accordance with requirements of the Act.—Id., p. 829.

Relying on recent decision in 331 F. Supp. 821, plaintiff in suit to set aside Commission order granting intervening carrier authority to transport general commodities between Jacksonville, Fla. and Thomasville, Ga., contends that the application should have been initially heard by a joint board composed of a representative from each of the two States, instead of being assigned to Commission Review Board for handling under modified procedure; However, in instant case, protestant (plaintiff) did not complain of the modified procedure until an adverse Commission decision had been rendered. The assignment of motor carrier applications to a joint board is a procedural matter rather than one of jurisdiction. [Citing 185 F. Supp. 336 and 344 US 33.) And plaintiff waived any right it had to insist upon a joint board hearing by participating in the modified procedure without complaining. The Commission's order sustained.—Howard Hall Co. v. United States, 332 F. Supp. 1076 (1081, 1082)*.

Similarly, in action seeking to vacate Commission order granting defendant carrier certificate to operate between points in two States, §205(a) required that the Commission refer the application to a joint board of the states involved for appropriate proceedings, instead of to Commission review board for handling under modified procedure. Although the review board accepted as true many charges leveled by plaintiff (protestant in Commission proceeding) against the applicant, there were bona facie factual issues as to applicant's fitness and the need for its service; thus, the Commission had a statutory duty to refer the application to a joint board for determination. Therefore, all of the Commission's orders which contravene §205(a), including order granting the certificate, must be suspended, set aside and annulled.—Land-Air Delivery, Inc. v. United States, 327 F. Supp. 808 (810-11)*; Garrett Freightlines, Inc. v. United States, 333 F. Supp. 1267 (1270-1)*.

See also T. J. Claveau Transp., Inc. v. I.C.C., 28 USC §2325, n. 7

15. Jurisdiction of joint board.—[Vols. 9, 11-13, 16-19, 21].—It is clear that, under the statute, assignment of a motor-carrier application for authority to a joint board composed of three members or less is proper, if the application does not in itself indicate that the certificate will permit tacking with other authority held by applicant but indicates that three or less states are involved in the basic application. Therefore, since assignment of defendant carrier's application for authority to operate between Greely and Denver, Colo., to a joint board composed of one member from Colorado was consistent with the application itself, the proceeding was not erroneously assigned to that board, as plaintiffs allege, particularly since they raised no objection at the hearing to the assignment of the application and there appears to have been no prejudice to them or any other party.—Midwest Emery Freight System, Inc. v. United States, 295 F. Supp. 112 (116-7)*.

The 11 applications involved, whether assigned to an examiner or to a joint board, were consolidated, all of them were orally heard by three joint boards and an examiner, and the single joint recommended report and order was fully reviewed by the Commission. Even though it became evident during the hearing that considered application involved more than a certificate between two

Colorado points (since question of tacking was involved), plaintiffs did not object to any of the applications being heard as originally assigned; thus, absent any evidence of prejudice to plaintiffs or any other party, the most that can be urged is that assignment of the application to a one-member joint board was technically incorrect on basis of the evidence adduced, although technically correct on the basis of substance of the application itself. Under such circumstances, judicial interference is not warranted in absence of a showing that the procedural or technical error, if any, was prejudicial to persons complaining thereof. Orders of the Commission sustained.—Id., pp. 116, 117.

The court, citing 321 F. Supp. 821, sustained Commission's right to refer an application to a review board in lieu of joint board when there are no material issues of fact in dispute as in the instant case. Protestant has only alleged, not shown, such material issues to be involved. The use of modified procedure and the denial of oral hearing in an appropriate case has been approved by the Supreme Court in 401 US 928.—Theatres Service Co. Ext.—Duluth, Ga., 113 M.C.C. 744 (746-7)*.

Section 205. (b) [§*305(b) U.S.C.*] Creation of joint board; rules and procedure; nominations for membership; procedure on failure of board to act.—[Unchanged. See vol. 11, p. 9397, vol. 15, p. 12188.]

Amendments, see footnotes, vol. 11, pp. 9397-9398.

Notes of Decision

Volume 15—p. 12189; Volume 19—p. 15573.

5. Nomination and appointment of members.—[Vols. 15, 19].—Although the sole joint board member participating in the hearing was a member of a State regulatory body at the time of the hearing but not at the time of the signing of the report and recommended order, the jurisdiction of said board is not invalidated as §205(b) provides that joint boards continue in existence until terminated by the Commission and its actions on matters referred to it prior to appointment of a new board are valid and binding on parties thereto.—Wehe, 110 M.C.C. 798 (805-6).

Section 205. (c) [§*305(c) U.S.C.*] Place of holding hearings.—[Unchanged. See vol. 11, p. 9398.]

Amendments, see footnote, vol. 11, p. 9398.

Notes of Decisions

Volume 12—p. 10372.

Section 205. (d) [§*305(d) U.S.C.*] Oaths; attendance of witnesses and production of documents.—[Unchanged. See vol. 11, p. 9399.]

Amendments, see footnotes, vol. 11, p. 9399.

Notes of Decisions

Volume 9—p. 7946; Volume 12—p. 10372; Volume 17—p. 13530; Volume 18—p. 14335.

Section 205. (e) [§*305(e) U.S.C.*] Notice of proceedings and opportunity for hearing.—[Unchanged. See vol. 11, p. 9399.]

Amendments, see footnotes, vol. 9, p. 7947, vol. 11, p. 9399.

Notes of Decisions

Volume 9—p. 7947; Volume 11—p. 9399; Volume 12—p. 10373; Volume 14—p. 11583; Volume 15—p. 12189; Volume 16—p. 12837; Volume 18—p. 14336; Volume 19—p. 15574.

10. Notice.—[Vols. 9, 11, 12, 15, 16, 18, 19].—Under holding of 103 MCC 307, lack of proper notice may constitute such a failure to afford due process of law that a certificate is voidable; and fact broadened authority issued applicant did not result from any affirmative action on its part is of no significance. The essential point is that authority greater and different in scope than that applied for was granted without notice to interested parties as required by §205 of the Act.—May and Pearson—Modification of Certificate, 106 M.C.C. 118 (123-4)*.

Authority applicant originally sought, as published in the Federal Register, was "restricted to those shipments permitted by the permits or certificates issued by the State of Oregon and not permitting interline or interchange except as authorized by other authority held by applicant;" however, authority granted was "limited to operations through Payette, Idaho, and restricted against, pickup, delivery or interchange, at Payette." Therefore, authority granted did not prohibit interlining to or from points in Oregon; and, while this authority, different from that published in the Federal Register, was not the result of misrepresentation, fraud, inadvertence or a situation involving §212 of the Act, it was granted without notice to interested parties. Therefore, although certificate in issue is more than six years old, it is canceled and concurrently therewith an amended certificate issued, conforming with authority originally applied for as published in the Federal Register. However, carrier will be afforded opportunity to show need for the service—beyond that authorized—which it has been rendering.—Id., pp. 119, 124-5.

Where in good faith reliance upon the inadvertent failure of applicant's counsel to apprise them of the fact that an unrestricted grant of the applied-for authority would enable applicant through the tacking of such authority with its existing rights to become a substantial competitor for overhead meat and meat products traffic between mid-central and far western points, existing carriers withdrew their protest to the application and acted with due diligence to protect their interests when they first learned of the situation, applicant was ordered to show cause as to why the subsequently issued certificate should not be modified by imposition of an appropriate non-joinder restriction.—Curtis, Inc., Extension, 113 M.C.C. 170 (183).

Plaintiffs held not to have been afforded sufficient notice and further hearing ordered where mixed loads restriction was substituted for multiple pickup and delivery restrictions without republication.—Greenstein Trucking Co., Extension, 113 M.C.C. 489 (493)*.

Section 205. (f) [§*305(f) U.S.C.*] Joint hearings with State authorities; offices for boards and State Commissions.—Unchanged. See vol. 11, p. 9401, vol. 21, p. 17189.

Historical note, see vol. 21, p. 17190.

Section 205. (g) [§*305(g) U.S.C.*] Court review of Commission's orders; compelling Commission to take jurisdiction.—Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under part I: *Provided*, That where the Commission, in respect of any matter arising under this part, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may commence appropriate judicial proceedings in a court of the United States under those provisions of law applicable in the case of proceedings to enjoin or suspend rules, regulations, or orders of the Commission, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction. (Public Law 93-584, 88 Stat. 1918, Jan. 2, 1975, amended §205(g) by adding "commence appropriate judicial proceedings in a court of the United States under those provisions of law applicable in the case of proceedings to enjoin or suspend rules, regulations, or orders of the Commission" and deleting from "file" through "United States Code.") (See vol. 11 p. 9401, vol. 15 p. 12189).

Notes of Decisions

Volume 9—p. 7950; Volume 11—p. 9402; Volume 12—p. 10373; Volume 19—p. 15574; Volume 21—p. 17190.

5. Review of final orders.—[Vols. 9, 11, 12, 19, 21].—See also Admiral—Merchants Motor Freight, Inc. v. United States, at 28 USC §2325, n. 7; and Aluminum Co. of America v. Burlington Truck Lines, Inc., at §16(2), n. 8.

In suit to set aside Commission decision on further consideration, following remand in 251 F. Supp. 526, the court remains convinced of validity of the conclusion therein that, while wide latitude should be given to Commission interpretation of certificate commodity descriptions which require its great familiarity with trade usage and industry parlance, no special expertise is involved in the case of simple grammatical construction of territorial descriptions; as a result, no great deference to the Commission's rather unusual reading of plaintiff's certificate is necessary. In its original report and order, the Commission stated that disputed language in the certificate describing plaintiff's authorized base territory was non-technical in nature and, in considered decision, it found the certificate clear and unambiguous on its face; thus, technical terms of art, construction of which require the Commission's special expertise, are not involved. The Commission's order set aside and enjoined.—T. I. McCormack Trucking Co., Inc. v. United States, 289 F. Supp. 39 (41-2)*.

Competing lines, such as plaintiff motor carriers who oppose the grant of a certificate to intervenor-defendant, are parties in interest within the statute; therefore, plaintiffs have standing to bring suit under §205(g) to enjoin enforcement of, and also to set aside, the Commission's decision and order granting additional authority to defendant carrier.—St. Johnsbury Trucking Co. v. United States, 326 F. Supp. 938 (940)*.

Inasmuch as §205(g) subjects a final order under part II to the same right of relief in court by an interested party as that provided with respect to orders made under part I, and §16(2) permits a person for whose benefit an order for payment of money is made to bring suit for enforcement thereof, plaintiff shipper is entitled to sue motor carriers for recovery of refunds pursuant to a Commission order in increased-rate investigation proceeding. Order involved, granting carriers' request for postponment of the hearing on proposed rates and, as a *quid pro quo,* requiring carriers to make refund of increases not ultimately found just and reasonable, is a final order under part II; and though not a participant in the rate proceeding, plaintiff is a party in interest to order entered therein since, in effect, it is a third-party beneficiary of the refund provision. Thus, the court must look to part I of the Act to determine scope of plaintiff's right to sue for enforcement of the Commission refund order.—Aluminum Co. of America v. Admiral Merchants Motor Frt., Inc., 337 F. Supp. 674 (679-81).

While there is no doubt that §16(2) was designed originally to cover Commission orders in reparations situations, no reason appears why contested valid order for the payment of money, which clearly is covered under language thereof, should not also be deemed within the purview of that section. And contrary to defendants' argument, decision of the Supreme Court in 359 US 464, does not prevent granting the relief sought by plaintiff in instant case; that decision in no sense considered the question of whether, when the Commission issues a valid refund order under part II, shippers for whose benefit such order was issued can proceed under §16(2) for enforcement thereof. Accordingly, based on §16(2) and §205(g), plaintiff is entitled to judgment for stipulated amount of the refunds due under the Commission's order.—Id., pp. 681-2, 685-6.

On motions for a new trial or to alter or amend judgment for shipper in its suit to recover refunds pursuant to the Commission order, defendants further claim that §205(g) only provides for judicial review of orders made under part II and for relief from such orders and, thus, entitles plaintiff to review of the refund order to determine validity thereof but not to obtain its enforcement, and only if it desires relief from but not under such order; however, such a narrow reading of §205(g) is neither logical nor persuasive. Had Congress intended that only injured parties seeking relief from a part II order were entitled to the scope of review provided in part I of the Act, it would have chosen language limiting such relief to any "party injured" or "aggrieved party" rather than to "any party in interest," the language it utilized. And "any party in interest" includes all people affected by a Commission order, both those who are injured by it and those who, being benefitted, would not desire relief from such order but whose only interest would be to have the order entered and its specific benefit enforced.—Id., pp. 684-5; Proctor and Gamble Co. v. Byers Transp. Co., Inc., 355 F. Supp. 547 (559-62).

Congress amended §204a specifically to countenance a shipper's right for reparations as a complement to §205(g) so that orders made under part II (affecting motor carriers) shall be subject to the same right of relief in court by "any party in interest" as if made under part I of the Act. In view thereof, the court cannot agree with defendant motor carrier's position that there is no private remedy for enforcement of a Commission order entered against motor carriers, there being no rational reason to distinguish between rail and motor carriers and Congress having expressed itself by the 1965 amendment.—Land O'Lakes, Inc. v. United-Buckingham Frgt. Lines, Inc., 351 F. Supp. 103 (108).

Section 205. (h), (i), (j) [§*305(h), (i), (j) U.S.C.*] Application of section 17; Pecuniary interest in carrier forbidden; Employees, examiners, attorneys, etc.—[Unchanged. See vol. 11, pp. 9403, 9404.]

Section 206. [§*306(a) U.S.C.*] Certification of convenience and necessity. —(a)(1) Necessity for; carriers in bona fide operation on June 1, 1935; "grandfather" provisions.—[Unchanged. See vol. 11, p. 9404, vol. 15, p. 12190, vol. 21, p. 17190.

Amendments, see footnotes, vol. 10, p. 7935, vol. 11, p. 9404, vol. 15, p. 12190.

Notes of Decision

Volume 10—p. 7954; Volume 11—p. 9405; Volume 12—p. 10374; Volume 13—p. 11063; Volume 14—p. 11584; Volume 15—p. 12191; Volume 16—p. 12838; Volume 17—p. 13531; Volume 18—p. 14337; Volume 19—p. 15575; Volume 21—p. 17190.

2. Construction and interpretation.—[Vols. 10-14, 17-19, 21].—Certificate issued to motor carrier constitutes formal determination of public need for motor transportation, regardless of availability of other modes and authorizes holder to engage in for-hire transportation by motor vehicle, not by rail or other modes, on public highway. Motor carriers must perform their authorized services by motor vehicle unless shipment by other modes is permitted by some specific statutory exception.—Atchison, T. & S. F. Ry. Co. v. United States, 244 F. Supp. 955 (955)*.

Where the holder of a certificate of registration or its affiliate holds a contract with the Post Office Department to transport mail allegedly in more than one state, this does not act to void the certificate because (1) only operations as a carrier outside the basic state will act to void such certificate and (2) the transportation of mail is not an operation as a carrier. See cases cited herein.—Howard's Exp., Inc.—Purchase—Exchange Trucking Corp., 97 M.C.C. 341 (346-47).

Transportation services of local truckers who provide transfer, collection, or delivery service for forwarders of used household goods (on shipments which move on through forwarder bills of lading) are clearly performed solely for, in concert with, and as an incident to, the overall through forwarder transportation service; therefore, unless they qualify for a specific exemption, such local movers or truckers are subject to the specific provisions of the Act including §206 which requires motor carriers to possess appropriate authority for the transportation performed. Although the forwarder may be exempt from regulation under part IV of the Act, that fact in no manner determines the status of the local motor operator serving it because such status must be determined by reference to the Motor Carrier Act. Accordingly, since the only exemptions provided in part II to cover considered operations are those relating to terminal areas and commercial zones, operations conducted beyond such areas require authority in all instances.—Kingpak, Inc., Investigation of Operations, 103 M.C.C. 318 (336-40)*.

In accordance with 103 MCC 318 (sustained, 288 F. Supp. 641, latter aff'd, 393 US 265), applicants—local motor carriers and warehousemen—require authority for the local pickup and delivery transportation which, in addition to packing and unpacking services, they have been providing for forwarders of used household goods who operate under the §402(b)(2) exemption. Interstate authority is necessary since, whether carrier operations are conducted within or outside a commercial zone, neither the §202(c)(2) terminal area, nor §203(b8) commercial zone, exemption is available to carriers serving a forwarder (who holds no part IV authority) in movement of through shipments in interstate or foreign commerce; however, any authority granted local carriers to serve such exempt forwarders should be so circumscribed as to allow continuance of past services and, also, preclude rendition of a broader service. Authority granted both applicants to transport used household goods between the District of Columbia and points in specified Maryland and Virginia counties adjacent thereto is restricted accordingly.—District Moving and Storage, Inc., 107 M.C.C. 896 (899-902).

Applicant's proposed operation between Indianapolis and Lafayette, Ind. over indicated highways and including Crawfordsville, Ind. as an "intermediate point" of service, may not be performed under the "superhighway rule of construction" stated in 49 CFR 1042.3, as such service is not conducted between a point of departure and a point of return on the applicant's authorized route as required by the "superhighway" regulations.—Commercial Motor Frt., Inc., Ext.—Crawfordsville, Ind., 114 M.C.C. 500 (519-21).*

Respondent to investigation was found to have violated §206(a) of the Act, by transporting materials not authorized by its certificate.—Skyline Transport, Inc.—Investigation & Revocation, 115 M.C.C. 807 (823-824).

25. Injunctions; operation without certificate.—[Vols. 10, 19].—Respondent found to have been engaging in certain operations as a common carrier without appropriate certificate authorizing such operations, and therefore to have been in violation of §206(a); cease and desist order entered.—Hilt Trust Line, Inc.—Investigation of Operations, 117 M.C.C. 9 (26).

Since defendants' operations involved utilization of nonsuperhighway "connecting" highways which constitute a significant portion (52%) of the total over-the-road distance traversed between the point of departure from and the point of return to the underlying authorized regular service route, the operations are not within the scope of the Superhighway Rules. Defendants were therefore in violation of sections 203(c) and 206(a)(1) of the Act; cease and desist order entered.—Great Lakes Exp. Co. v. National Transit, 117 M.C.C. 735 (744-5).

Respondent found to be servicing points that were neither within 1 mile of its authorized regular service routes not within the commercial zones as defined by the Commission of those municipalities that respondent is authorized to serve; such transportation was found to be beyond the scope of respondent's certificate, and therefore in violation of §206(a) of the Act. Cease and desist order issued.—Adams Trucking, Inc.—Revocation of Certificates, 118 M.C.C. 567 (575-76).

26. Intrastate Certificate.—[Vols. 10-19, 21].—See also Bab Transfer, Inc., at §212(a). n. 25; and Statewide Transport, Inc., Extension, at §206(a)(6), (7), n. 2.

Interstate operations of respondent (holder of Pennsylvania "class D" certificate which is restricted against interlining intrastate traffic with other for-hire carriers) conducted pursuant to his Form BMC-75 statement, found to have been unlawful to extent that they involved interline service performed in conjunction with other for-hire carriers. Respondent contends that restriction in his intrastate certificate is inapplicable to interstate traffic, latter being subject solely to Federal regulation; however, it is well established that carriers operating in interstate commerce under former §206(a)(1) second proviso may engage in interstate operations only to same extent, in the same manner, and subject to the same limitations, as they can lawfully engage in intrastate operations; and that the scope of their authorities is governed by the interpretation or construction placed upon such certificates by the issuing State agency.—Bowser—Investigation of Operations, 98 M.C.C. 170 (173-5).

Nevertheless, other types of interstate traffic could lawfully have been handled by respondent under his registered intrastate authority (only the operations involving interline were conducted without authority) and cancellation of his Form BMC-75 registration would not be appropriate or necessary. However, since authority granted in related application proceeding to serve Philadelphia, Pa., carries with it implicit authority to serve points in commercial zone thereof, which includes a part of New Jersey it renders (respondent) applicant a multiple-State carrier; and since it is not advisable to impede his interchange operations by limiting the authority to the part of that commercial zone within Pennsylvania, authority granted is conditioned on cancellation of applicant's Form BMC-75 statement.—Id., pp. 176, 179.

Respondents' operations to and from Mexico under their certificates of registration issued pursuant to §206(a)(7) of the Act are unauthorized since such certificates are valid only as long as the holder is a carrier in operation solely within a single state; the phrase "in operation solely with a single state" must be generally construed to preclude operations in interstate or foreign commerce at any point outside of a single state or the United States by motor carriers operating under this section.—Imperial Truck Lines, Inc.—Common Carrier Application, 106 M.C.C. 741 (746-48).

50. "Grandfather" clause; bona fide operation.—[Vols. 10-15, 18, 19, 21].—See also Barton Truck Lines, Inc., Eligibility—Utah, at §207(a), n. 25 past operations; Beaufort Transfer Co. v. United States, at §212(a), n. 1; and Tarantola Trucking Co., Inc., Modification of Certificate, at §212(a), n. 30.

Petition for reopening of "grandfather" proceeding and modification of "truckload lots" restriction therein is denied when it was not filed until after investigation was instituted and reasons advanced therefor are not convincing. Commission policy is that "grandfather" clause rights which were determined many years ago should not be modified except where there is definite and positive evidence that a miscarriage of justice has occurred. Petitioner's predecessor did not object to the restriction but had sought its inclusion in the resulting certificate and its existence was a factor in the Commission's approval of the purchase thereof by petitioner. Moreover, documentary evidence relating to nature of the operations conducted by the predecessor having been destroyed, petitioner seeks to establish its position through the recollection of witnesses formerly connected with or familiar with operations of the "grandfather" applicant; such evidence has been found insufficient to establish the bona fides of a claimed operation.—Southwest Freight Lines Ext.—Removal of Restriction, 95 M.C.C. 269 (277-8)*.

Evidence as to carriers' claims to grandfather authority deemed convincing, despite failure to show by documentary evidence that their predecessors were providing charter service on or before June 1, 1935, the critical date. Both seek to explain this by reference to mishaps which reasonably account for their inability to locate such documentary evidence. As a result both applicants produced witnesses, whose testimony established the requisite charter operations. In addition, Greyhound's discontinuation of service after challenge by the Commission was clearly an "interruption of service over which [it]***had no control". Granted in part.—Greyhound Corp. Extension, 98 M.C.C. 712 (727-28)*.

If evidence shows that there are matters not previously brought to Commission's attention which establish that petitioner and its predecessors have transported, on and continuously since the "grandfather" date, palletized or bundled commodities which in their palletized or bundled form require the use of special equipment but which considered individually do not require such equipment, there would be substantial equity in favor of modifying the involved certificate. However, evidence presented by Dillner fails to establish specific dates of shipments, description of commodities transported, and whether or in what form commodities were packaged, bundled or palletized; carrier has furnished, therefore, no cogent basis for a determination that it is entitled to additional "grandfather" rights under the Motor Carrier Act of 1935.—W. J. Dillner Transfer Co., 99 M.C.C. 485 (488-489).

In a consolidated proceeding, relief was granted to one applicant for modification of his authority derived from a grandfather certificate, on the basis of documentary evidence of operations and expressions of shipper support; similar applicants' petitions were denied in the absence of shipper support. In the latter circumstance, modification must be shown to be warranted on two bases: that the specifice authority under consideration was intended at the time of issuance to authorize a broader service than that encompassed in the terminology used under present day interpretation, and that the authority has been continuously used to perform the broader service. The Commission acknowledged some former confusion as to evidentiary standards, however, and denied the petitions without prejudice to each of the petitioners filing an appropriate pleading for further hearing within a specified time period.—North Penn Transfer, Inc.—Petition for Modification, 115 M.C.C. 208 (216-218).

Respondent's refusal to operate within the limits of its authority to transport "stock in trade of drugstores", despite Supreme Court ruling that the commodity description is not ambiguous [355 US 554], resulted in cease and desist order, and an acknowledgment that continued violation may result in suspension or revocation of the authority.—North Central Truck Lines, Inc., Invest. & Revoca., 117 M.C.C. 180 (184, 195).

53. Intrastate operation; State requirements.—[Vols. 10-12].—Complainants allege that defendant, an irregular route carrier, is conducting operations in interstate or foreign commerce in violation of §206(a). Defendant is authorized to operate solely within the State of Missouri, pursuant to a grandfather certificate of registration for which it holds corresponding interstate authority. The state authority prohibits irregular-route operations between points on the regular route of an authorized motor carrier. The record shows that the defendant interlined interstate shipments originating in another state for delivery to points in Missouri. Both the interline point and the named destination points are served by regular route carriers. Such operations clearly contravene defendant's registered authority. Cease and desist order entered.—Orscheln Bros. Truck Lines, Inc. v Knaus Truck Lines, Inc., 108 M.C.C. 301 (303, 305).

55. In foreign commerce.—[Vols. 10-12].—Defendant holds authority to serve Buffalo and New York City. It also holds appropriate Canadian authority to operate from the international boundary line to various points in Canada. In connection with the Canadian line-haul service, defendant has transported traffic originating at Buffalo or interlined with other carriers in Buffalo to Canadian points. It is well established that a point in the United States located on the international boundary line embraces the port of entry at such point and, thus, a carrier specifically authorized to serve such points may serve the international boundary in foreign commerce. Therefore, the service authorized must in some way be incident to a line-haul movement between points the carrier holds authority to serve. Since defendant does not have specific authority to serve both Buffalo and the port of entry at Buffalo, its traffic originated at or interlined at Buffalo for continued movement in foreign commerce to Canadian points cannot properly be performed as there is no effective line-haul authorized between two separate service points on defendant's regular route. No such line-haul movement is part of defendant's local operations and, accordingly, this local service cannot be properly performed without separate, specific authority.—Red Star Express Lines of Auburn, Inc. v. Maislin, 110 M.C.C. 23 (25, 26, 27).

57. Off-route points.—[Vols. 10-12, 14].—Inasmuch as defendant was serving certain off-route points which operations were found not to be permitted under the Superhighway Rules [49 CFR 1042.3, 117 MCC 119], defendant was in violation of §§203(c) and 206(a)(1) of the Act, and was required to cease and desist from the performance of such unlawful transportation. The defendant was specifically reminded of its obligation, as directed in the order entered, to comply with the provisions of rule 99 of the General Rules of Practice [49 CFR 1100.99] describing the manner of its compliance with such order requiring it to cease and desist from the performance of the operations found in this report to be unlawful.—Burggrabe Truck Lines, Inc. v. Beaufort Transfer, 117 M.C.C. 567 (579).

Regulation of the Commission

35 FR 17264, Nov. 10, 1970, Part 1060: new Part 1060 Special Relief for Motor Carriers Affected by a Temporary Highway Closing, §1060.1 Special relief for motor carriers affected by temporary closing of West Virginia Highway 2, added, effective upon publication in the Federal Register.

Section 206(a). (2), (3) Traffic moving to and from Territories and Possessions; "grandfather" provisions.—[Unchanged. See vol. 15, pp. 12190-12191.]

Historical Note, see vol. 17, p. 13532.

Notes of Decisions

Volume 18—p. 14342.

Section 206 (a). (4), (5) Traffic moving from, to and within Alaska; "grandfather" provisions.—[Unchanged. See vol. 19, pp. 15580-15581.]

Notes of Decisions

Volume 21—p. 17199.

§206(a)(6)(7). Intrastate Certificate: Registration; "Grandfather" Provisions.—[Unchanged. See vol. 21, pp. 17207-17210.]

Notes of Decisions

Volume 21—p. 17210.

2. Construction and interpretation.—[Vol. 21].—See also Braddock Motor Freight, Inc., Petition, at §216(c), n. 10; and Home Transp. Co., Inc.—Purchase—Fuchshuber, at §5(2), n. 110 certificate under §207.

By the 1962 amendments to §206(a) repealing second proviso of paragraph (1) and adding paragraphs (6) and (7), Congress terminated all rights to engage in interstate and foreign commerce under the second proviso and, in addition, provided for "grandfather" certificates of registration for single-State carriers that were engaged in second-proviso operations on October 15, 1962, or would have been so engaged but for the pendency of litigation concerning validity of the carrier's operations. The "pendency of litigation" clause should be construed in keeping with the purpose of the "grandfather" provision which, by specific language, can have application only to those operations which the carrier had actually been conducting on October 15, 1962; thus, an application for new intrastate authority does not come within the meaning of the "pendency of litigation" clause.—A-OK Motor Lines, Inc. v. United States 287 F. Supp. 828 (830)*.

Plaintiffs, in action to enjoin and set aside Commission order denying their petition for amendment of their certificates of registration to include additional newly acquired State authority under the "grandfather" provisions, were not conducting the expanded operations under the second proviso when the statute was amended; and their application proceedings pending before the State commission do not come within the "pendency of litigation" clause of §206(a)(7). Accordingly, the Commission did not err in denying plaintiffs the requested "grandfather" certificates of registration which would permit them to begin additional interstate operations. Plaintiffs are not entitled to relief sought; action dismissed.—Id., p. 831.

Requirements of §206(a)(6) are fully satisfied when (1) interested persons have been accorded reasonable opportunity to be heard with respect to both the intrastate and interstate aspects of an application filed thereunder and (2) the State commission has considered both questions and found, on an adequate record, that public convenience and necessity require continuation, or initiation, of the intrastate operations and the initiation of proposed interstate service. The statute does not specify the kind of proof or type of hearing that a state commission must follow; and, since neither the legislative history nor the law require an initial application for intrastate authority before applicant can qualify for a certificate of registration under §206(a)(6) it is irrelevant whether the corresponding intrastate authority is original or was granted previously.—Ray Price, Inc. v. United States, 297 F. Supp. 55 (59-60)*.

The statute requires the State commission to make dual findings of public convenience and necessity as to both the intra- and interstate operations involved. However, the commission's argument that considered state proceedings related solely to transfer of existing rights and, under Nebraska law, intrastate need was not an issue in "transfer" proceedings, is not persuasive. The carriers applied for State commission approval of transfer of intrastate certificates from third parties and, simultaneously, sought concurrent authority for operations in interstate or foreign commerce under §206(a)(6), the State commission approved the transfers and found a corresponding need for operations in interstate and foreign commerce, and subsequently issued *nunc pro tunc* orders finding need for the intrastate operations. Thus, more than mere "transfer" of existing intrastate rights was being litigated: applicants' rights under §206(a)(6). Therefore, simply to categorize the state proceedings as relating solely to "transfer" rights is misleading; the applications and statutory notice make it clear that more was involved.—Id., pp. 60-61.

The Commission's denial of certificates of registration, on the ground that a *nunc pro tunc* refinding of need for an intrastate operation is not sufficient, misconstrues the use of such procedure, since the Nebraska commission has inherent power to correct its orders by a *nunc pro tunc* proceeding. State commission's order reflects orderly and proper consideration of prior records and sets forth a finding made then but inadvertently omitted; and, since it orders for now a finding made then, it properly recites a finding of public convenience and necessity for intrastate as well as interstate operations. The mere fact that this is accomplished by a *nunc pro tunc* order being immaterial, it is not a fatal defect. Accordingly, the Commission's orders in issue are vacated; proceedings remanded to the Commission for further consideration consistent with the court's opinion.—Id., pp. 61-3.

Whether or not applicant's State "permit," authorizing operations for which authority is sought, is a certificate of public convenience and necessity within meaning of §206(a)(7) and thus acceptable for registration, is as yet an unresolved question; and, while its right to register the State permit has been challenged, its §207 proceeding is not the proper forum to determine its eligibility for registration. However, since the registration provisions of former second proviso of §206(a)(1) and of §206(a)(7) are only applicable to carriers operating solely within a State, and applicant's purpose in instant application is to obtain authority between points in Idaho over highways passing through adjacent States, performance of such operations would render applicant ineligible to continue registration of its intrastate authority under former second proviso or to receive a certificate of registration under the "grandfather" provisions of §206(a)(7).—Statewide Transport, Inc., Extension, 96 M.C.C. 57 (59, 64-5).

Authority to serve Philadelphia, Pa., because it carries with it implicit authority to serve points in the commercial zone thereof, which includes a part of New Jersey, would render applicant (a single-State operator) a multiple-State carrier, thus making him ineligible to receive the certificate of registration he seeks under §206(a)(7) in another proceeding. However, his intrastate authority is restricted against interchange and the certificate of registration would be similarly restricted; and since, in the light of the evidence, it is not advisable to impede applicant's interchange operations by limiting authority granted to serving only that part of the Philadelphia commercial zone within Pennsylvania, grant is conditioned on dismissal of his application for a "grandfather" certificate of registration.—Bowser—Investigation of Operations, 98 M.C.C. 170 (172, 179).

Although it has been held that the doctrine in 53 MCC 672, was by its terms limited to operations under the former second proviso of §206(a), that case nevertheless reflects the Commission's long-established policy of not issuing authority for operations which may be performed by a carrier under existing laws and regulations without additional authority; furthermore, the Commission has held repeatedly that the scope of registered operations, both as to commodities and territory, is governed by the interpretation and construction placed upon the intrastate authority by the issuing agency. In this light applicant must establish that under its existing authority it is not authorized to perform the proposed service. Sidney has failed in this burden; application denied. —Sidney Truck & Storage, Inc., Extension, 99 M.C.C. 134 (138).

The conclusion that there has been an exercise of unlawful control and management by Livek, applicant's father and her husband's former employer is demanded by the following uncontested facts: that she has performed substantial office work for Livek, a motor common carrier with irregular-route interstate authority; that she maintains no terminal facilities but stations her one vehicle at Livek's terminal and uses his vehicles and drivers as needed; and that she has no advertisement nor phone listing in her business name nor does she solicit any of the involved traffic, for which shippers call on Livek and show him as the originating carrier, although the actual intrastate transportation is performed under applicant's authority.—Norquist "Grandfather" Registration Application, 99 M.C.C. 501 (503-504).

Commission review herein must be based solely on the record made before the State commission whose findings are to be given great weight and may not be modified unless they are inconsistent with those public convenience and necessity standards normally applied under the Act; this precludes the substitution of the Commission's judgement for that of a duly authorized State body based on substantial evidence and conforming to the requirements of the act. Therefore, since the underlying findings of the Kansas commission, except as to two points named, are supported by substantial evidence of record, they are affirmed; however, since there is no public support for service at excepted points, certificate of registration issued will not include these points.—Dugan Extension—Certificate of Registration, 99 M.C.C. 557 (566-68).

Service which may be authorized under §206(a)(7)(A) is necessarily dependent upon the construction and interpretation of the phrase "in operation solely within a single state". This phrase is in substantial conformity with the original terms of the former second proviso of §6(a) which read "in operation solely within any state", and therefore it is reasonable to assume that Congress, absent any legislative history to the contrary, did not intend to alter the interpretation of that phrase as enunciated in previous decisions of the Commission. In these circumstances, former decisions concerning the permissible range of service under the second proviso are likewise pertinent in determining the meaning of the present §206(a)(7)(A). Accordingly, the phrase "in operation solely within a single state" must be generally construed to preclude operations in interstate or foreign commerce by motor carriers operating under §206(a)(7) at any point outside of a single state or the United States.—Imperial Truck Lines, Inc.,—Common Carrier Application, 106 M.C.C. 741 (747-48).

When §§206(a)(7)(A) and 206(a)(7)(B) are considered conjunctively, it is clear that Congress did not intend to say that mere possession by applicant of an effective intrastate certificate on October 15, 1962, would constitute conclusive proof that applicant was lawfully engaged in interstate and foreign operations. Section 206(a)(7)(B) also provides that such certificates must have been filed with the Commission as evidence of authority to operate in interstate or foreign commerce under the former second proviso of §206(a)(1); since applicant's prior second proviso filing was declared to be of no force and effect on July 13, 1962, for failure to comply with the Commission's insurance requirements, he did not have such a certificate "filed with the Commission" on October 15, 1962, within the meaning of the statute and thus is not entitled to a certificate of registration under §206(a)(7) of the Act.—Dalton, Application for Certificate of Registration, 106 M.C.C. 774 (776, 778).

The "pendency of litigation" exception to §206(a)(7) is intended to excuse an applicant's failure to engage in operations in interstate or foreign commerce if his intrastate certificate was being subjected to some type of judicial or quasi-judicial review which would make it impossible for him to operate. A typical example would be where a court enjoined operation under such a certificate pending a suit to determine its validity, rather than the present applicant's voluntary cessation of operations because of the expense involved in the litigation of his state certificate. Additionally, the cessation of service involved herein does not fall within the category of "interruptions of service over which applicant had no control" since applicant voluntarily chose to terminate his operations and there is no evidence to establish the presence of circumstances such as to render applicant powerless to operate.—Id., pp. 779-80.

Held that "conclusive proof" provision of §206(a)(7) does not require the automatic issuance of "grandfather" certificates of registration to carriers operating pursuant to the former second proviso. Congress only intended to preclude Commission inquiry into the *bona fides* of the operations with respect to commodities and territory, and did not intend to require the Commission to grant a certificate of registration to a carrier which either prior or subsequent to the "grandfather" date had willfully violated the Act. See 281 F. Supp. 436.—All-American Transport, Inc.—Control and Merger, 109 M.C.C. 243 (246-8)*.

A certificate of registration loses its validity during the period that common control with a multiple-State carrier exists, but if the situation is remedied, it is again in full force and effect—unless earlier revoked by a formal Commission order under §212(a). The contrary dictum in the prior report, 104 MCC 396, was specifically voided.—All-American Transport, Inc.—Control and Merger, 109 M.C.C. 243 (249-50)*.

Certificates of registration are to be treated no differently than any other certificate insofar as suspension or termination is concerned. Such termination can be effected only by the procedures set forth in §212(a) which accords the holder the opportunity to demonstrate or achieve compliance prior to such termination.—Id., p. 248-9*.

When a holder of a certificate of registration comes under the control of a multiple-state carrier in violation of §5(4), the certificate is thereby invalidated so long as the control continues. Divestiture of the unlawful control would terminate the violation and reactivate the validity of the certificate of registration.—Reliance Truck Co.—Control and Merger, 109 M.C.C. 495 (499)*.

Complainant alleges that defendant is conducting operations pursuant to certificates of registration in violation of §206(a) of act by unauthorized tacking between various New York counties and New York City. Defendant contends that proper forum for this complaint is the issuing state authority, i.e., the New York State Public Service Commission. In 108 MCC 301 (1969), this Commission set out guidelines for the interpretation of registration authorities; the scope of authorities for carriers operating in interstate commerce under registration procedures is governed by the interpretation or construction placed upon such certificates by the issuing state agency. However, this Commission will interpret or construe registered authority for the purpose of determining the scope of interstate operations which may be performed thereunder, where state commission has issued an opinion or where the meaning of the scope of operations is clear. Defendant's contention that this Commission is not the proper forum for consideration of its registered authority is unfounded.—Flying Freight v. Van's Auto Express, Inc., 110 M.C.C. 358 (360, 361).

The purpose and scope of amended provisions of §206(a) of Act relate to operation by a motor carrier within a single state based upon its having obtained appropriate authority to conduct intrastate operations within that state, and such provisions are also exceptions to general requirement of certification. Section 205(a)(6) requires that state commission make concurrent separate findings of both interstate and intrastate commerce public convenience and necessity, i.e., state commission must determine whether the public need requires an intrastate motor service, and as an incident to such determination whether a corresponding interstate need exists. Therefore, in order to satisfy procedural requirements of §206(a)(6), there must exist: (1) the early identification of the issues to be resolved in the dual proceeding before state commission, (2) an opportunity for interested persons to be heard as to both intrastate and interstate aspects of the operations in issue, (3) the concurrent consideration and finding by state commission that the public convenience and necessity require both the intrastate and interstate operations in question.—Ray Price, Inc.—Certificate of Registration, 110 M.C.C. 381 (383, 384, 385)*.

50. "Grandfather" clause.—[Vol. 21].—See also Barton Truck Lines, Inc., Eligibility—Utah, at §207(a), n. 25 past operations; Helphrey Motor Freight, Inc.—Purchase—Manning Freight, at §5(2), n. 110; and Lake Shore Delivery, Inc.—Purchase—Delivery, Inc., at §5(2), n. 48 intrastate.

Carrier's application for a certificate must be denied, because she is controlled by, controlling, or under a common control with a carrier engaged in interstate operations. The existence of legal control in one person does not prevent the concurrent existence of actual control by another through acquiescence of, or a management contract with, the former, in addition, although family control does not show control or power to control, it is a factor to be given consideration. Herein uncontested facts of business and family connections demand conclusion that there has been an actual exercise of unlawful control and management by Livek, a multi-state carrier, over applicant's transportation operations. In effect Livek has been utilizing the intrastate certificate of his daughter to originate shipments from points in Illinois that cannot be served under his certificates, through the guise of tripleasing and interline operations.—Norquist "Grandfather" Registration Application, 99 M.C.C. 501 (503-504).

Respondents' shipments to Mexico from California under their certificates of registration issued pursuant to the "grandfather" provisions of §206(a)(7) are unauthorized since such certificates are valid only as long as the holder is a carrier in operation solely within a single state; the phrase "in operation solely within a single state" is interpreted to proscribe transportation outside the United States as well as at any point outside of a single state by motor carriers operating under §206(a)(7). Since this section shows substantial conformity with the original terms of the former second proviso of §206(a) it is reasonable to assume that Congress, absent any legislative history to the contrary, did not intend to alter the interpretation of the phrase as enunciated in previous decisions of the Commission; therefore, such decisions are pertinent in determining the meaning of the phrase "in operation solely within a single state".—Imperial Truck Lines, Inc.—Common Carrier Application, 106 M.C.C. 741 (746-48).

On October 15, 1962, applicant was engaged in operations in interstate and foreign commerce solely within Illinois under the certificate exemption provisions of the former second proviso of §206(a)(1) despite the fact that it held and now holds state certificates in both Indiana and Illinois; its activities in Indiana were confined to the leasing of vehicles with drivers and it has never performed transportation in interstate or foreign commerce in Indiana. Further, its Indiana certificate has never been registered with this Commission, and it has expressed willingness to tender its Indiana certificate for cancellation if such action is a condition precedent to the approval of the present application. Since the evidence shows that applicant's operations in Indiana have not been those of a for-hire carrier in interstate or foreign commerce within the meaning of section 202(a) of the Act, those operations, standing alone, do not impair applicant's eligibility to obtain the requested certificate of registration under §206(a)(7) of the Act.—Excel Trans. Service Co.,—"Grandfather" Registration, 106 M.C.C. 898 (901, 903-04).

Applicant's sole stockholder Mandel has shown satisfactoily that prior to, and on and after October 15, 1962, applicant neither was, not is, under common control with two other trucking companies of which her father is sole stockholder and her brother is secretary; while there is evidence of occasional business transactions between applicant and these companies, and the signing of some checks was performed by Mandel's brother for applicant, these matters standing alone fail to show that there is any common ownership or management of the considered companies, or that there is any material financial stake on the part of Mandel's father or brother in applicant's business. Notwithstanding the close blood relationships that exist between persons in applicant and the considered companies, none appear to have the power, either legally or actually, to control the business of the other.—Id., pp. 901, 904.

Applicant filed its application under the "grandfather" provisions of §206(a)(7) of the Act for a "grandfather" certificate of registration as evidence of its right to operate as a common carrier, by motor vehicle, within a single state (Massachusetts). The review board found that Edmund C. Merritt, president and holder of one-half of applicant's corporate stock, is in a position to control or direct applicant's operations in a common interest with the operations of Viola M. Merritt, doing business as E. C. Merritt Express Co., a multiple-state carrier engaged in interstate commerce, and also with a third motor carrier conducting intrastate operations within a state other than Massachusetts, namely Rhode Island, in his own name. Applicant admits its affiliation with a multi-state carrier, and therefore, it is not entitled to benefits of the registration provisions of §206(a)(7) because of its common control with a multi-state carrier on the statutory date of the enactment of the section on Oct. 15, 1962. Application denied.—Merritt Corporation Common Carrier Application, 108 M.C.C. 865 (866, 869. 871)*.

75. State commission findings, used as basis for certificate of registration review of.—Under statute the Commission's review of the State commission's findings, regarding need for proposed interstate transportation, must be based entirely on the record made before the State commission and the Commission cannot substitute its judgement for that of the State body when the latter's decision is based upon substantial evidence and conforms in all respects to the requirements of the Act; this amendment makes single-state operators in interstate and foreign commerce subject to combined Federal-State licensing process, and there is but a single standard by which to determine whether such an application should be granted or denied, i.e., whether public convenience and necessity require the considered single-state carrier to engage in interstate commerce.—Dugan Extension—Certificate of Registration, 99 M.C.C. 557 (566-67).

Based on the record made before the State commission and the lack of evidence of need for service in interstate commerce at two points, the State commission's findings as to need for proposed interstate service is modified to eliminate any service to those two points.—Id., p. 568.

While order granting State certificate to applicant Worldwide did not include required findings and recitation as to public convenience and necessity, it did recite that proposed interstate operations "are authorized in interstate commerce pursuant to §203(b)(8) of the Interstate Commerce Act." State commission when inserting this recitation viewed the considered interstate operations of Worldwide as within the city limits of Albuquerque, N. Mex., and, therefore, exempt. And from the record it is apparent that Worldwide's operations comprise only local collection and delivery services, not under common control, management, or arrangement for continuous transportation in interstate or foreign commerce to or from a point beyond Albuquerque, for local business concerns or line-haul motor carriers within their terminal areas. Therefore, since considered operations are exempt, no authority is required. Denied.—Miller Van Lines, Inc., Certificate of Registration, 102 M.C.C. 116 (118-9).

However, after noting that the cardinal purpose of this section is to make single state operators in interstate and foreign commerce subject to combined Federal-State licensing and that tests first applied in 1 MCC 190 to determine need are applicable here, Commission agreed with the State commission that on the record public convenience and necessity require operation by Miller, Inc. But since J. Clell Miller, controlling stockholder in Miller, Inc., already holds authority duplicating in part that sought, since it is against the Commission's policy to authorize commonly controlled

entities to engage in duplicate operations and since §§206(a)(6), (7) were enacted to prevent a multiplicity of authorized interstate carriers with duplicate authorities, any duplicating authority will not be included in the certificate of registration. Moreover, because of common control aspects, issuance of certificate deferred, pending filing under §5 or submission of evidence to establish that transaction is not subject to §5(2).—Id., pp. 121-2.

Complainant alleges that defendant, a certificate of registration holder, is operating in excess of its authority by unauthorized tacking of its separate underlying state certificates. Defendant is authorized to operate as a common carrier by motor vehicle between Albany and Kingston in Ulster County, N.Y., and from points in Ulster County to points in Rockland County, N.Y. It holds separate authority to operate from Westchester County, N.Y. to New York City. Defendant holds itself out to provide direct service from Albany (Ulster County) to New York City by claiming that New York State law permits tacking where any municipal commercial zone overlaps common boundaries of counties. Under §206(a)(6), (7) of Act, scope of authorities for carriers operating in interstate commerce under registration procedures is governed by interpretation or construction placed upon such certificates by the issuing state agency. Therefore, New York State Public Service Commission rules on tacking are applicable to the instant proceeding; and accordingly tacking would be proper in interstate and foreign commerce, if it were proper in intrastate commerce.—Flying Freight v. Van's Auto Express, Inc., 110 M.C.C. 358 (359-60-61).

Commission denied 3 Nebraska applications for certificates of registration based on underlying intrastate authority obtained through state transfer proceedings on grounds that Nebraska State Commission failed to make concurrent separate findings of both intrastate and interstate commerce public convenience and necessity; that the finding of need for intrastate service is meaningful only when state commission has under consideration an application for initial or additional intrastate service; and that a simple refinding of intrastate public convenience and necessity is insufficient to satisfy requirements of §206(a)(6). Commission's denial was set aside by Nebraska District Court on grounds that nothing in legislative history or Act itself requires an initial application to state commission before applicant can qualify under §206(a)(6) for an interstate certificate; court agreed with Commission's construction that statute requires state commission to make dual findings of public convenience and necessity as to both intrastate and interstate operations but that under Nebraska law, intrastate public convenience and necessity is an issue in a certificate transfer proceeding.—Ray Price, Inc.—Certificate of Registration, 110 M.C.C. 381 (383-84)*.

Regulations of the Commission

35 FR 17264, Nov. 10, 1970, Part 1060: new Part 1060 Special Relief for Motor Carriers Affected by a Temporary Highway Closing, §1060.1 Special relief for motor carriers affected by temporary closing of West Virginia Highway 2, added, effective upon publication in the Federal Register.

Section 206. (b) [§*306 (b) U.S.C.*.] Application for certificate; form and contents.—[Unchanged See Vol. 10, p. 7978]

Notes of Decisions

Volume 10—p. 7978; Volume 11—p. 9425; Volume 12—p. 10386; Volume 13—p. 11067; Volume 14—p. 11586; Volume 15—p. 12192; Volume 16—p. 12839; Volume 17—p. 13532; Volume 18—p. 14343; Volume 19—p. 15582; Volume 21—p. 17213.

15. Filing and verifying applications; parties; notice.—[Vols. 10-19, 21].—See also Blue Bird Coach Lines, Inc. v. United States, at §208(c), n. 1; and Iowa Beef Packers, Inc. v. United States, at APA, 5 USC, Judicial Review.

When plaintiff's apparently restrictive amendment (which actually broadened scope of its application) was accepted after notice of the application was published and was incorporated into the certificate issued without republication of notice, intervening defendant carriers who had no notice of the amendment could not have anticipated that plaintiff's certificate would enable it to operate in competition with them; the lack of proper notice deprived interveners of the opportunity to appear in opposition to the application; and, in such circumstances, the Commission had inherent power to correct an obvious injustice. Accordingly, a broadening amendment having been incorporated therein without adequate notice to competing carriers, the Commission had the power to cancel plaintiff's certificate and issue a modified (correct) one; and it correctly exercised such power; sustained.—Carl Subler Trucking, Inc. v. United States, 313 F. Supp. 971 (976-7)*.

When verified application of plaintiff (applicant) for irregular-route authority denied that extension authority sought could or would be joined with any authority then held for performance of a through service, and published notice of the application was consistent with assurances therein, other carriers were not given proper notice of actual authority sought and nature of proposed operations. Failure adequately to warn competing carriers of the authority actually sought and intended to be used, albeit by tacking, has an injurious impact on the integrity of administrative process. Also, as expressed in 206 F. Supp. 835, the Commission must be able to rely on representations of the parties; and when carrier made its application, it became bound to the representations contained therein. Complaint dismissed.—Eagle Motor Lines, Inc. v. United States, 331 F. Supp. 80 (81-2)*.

Right to notice is specifically provided for in §205(e) of the Act. In addition, Commission Rules of Practice provide that amendments which broaden scope of an application, if tendered after notice of the filing of said application has been published, will not be allowed. However, discretion rests with the Commission in these matters, and in order to facilitate the administrative process this provision has been liberally construed. Yet, there are persons, who in reliance upon published notice of matters involved, have not become parties in a particular proceeding. Thus, every effort should be made to see that published notice merits this reliance and that any tendered amendment be scrutinized lest it result in an unnoticed broadening of applicant's original proposal. In instant proceeding an apparently restrictive amendment, which in fact broadened the application, was permitted without additional notice. This lack of notice resulted in failure of due process, depriving those relying on the Federal Register publication of their statutory right to notice and of the opportunity to participate in the proceeding.—Carl Subler Trucking, Inc., Modification of Certificate, 103 M.C.C. 307 (312-3)*.

Each of the truckers who provide considered local cartage service for forwarders of used household goods (on shipments moving in containerized service on through forwarder bills of lading) will have to apply for authority covering operations they conduct beyond terminal areas or commercial zones, since their service is part of a through interstate movement and they do not qualify for exemptions provided in §202(c)(2) or §203(b8); and, though precise number thereof is not known, it is estimated that 400 to 600 local truckers must file applications. There is no legal requirement for an oral hearing in motor carrier application proceedings, nor is there a practical necessity therefor in every such case; therefore, in view of the burden on carriers of filing and prosecuting their applications, and the burden on the Commission of processing them in addition to its heavy and mounting caseload, each of the applications will be handled, insofar as possible, under modified procedure without oral adversary hearings.—Kingpak, Inc., Investigation of Operations, 103 M.C.C. 318 (342-5)*.

In an effort to develop clear and unmistakable guidelines, which are to be used as an aid in drafting proper and workable applications for motor carrier operating authority and, in turn, to remove some of the confusion apparently existing in the area of restrictions, undue fragmentation of authority, and formulation of appropriate and practical commodity descriptions, the basic problems of proper and practicable commodity, territorial, and service descriptions and restrictions are discussed extensively and specific suggestions are set forth. Considered extension application proceeding, being representative of numerous others, affords an appropriate tool for such general explanation and consideration.—Fox—Smythe Transp. Co. Extension—Oklahoma, 106 M.C.C. 1 (5-6, 9-29).

The application should provide adequate notice of proposed operations, both with respect to commodities transported and territory served; if tacking or interchange operations are proposed, these should be clearly identified; if regular-route authority is sought, the route description should be accurate, and complete, and intermediate points sought to be served should be named; and with respect to irregular-route operations, the requested route authority should be described only by one of the following methods: (1) "from *** to ***," (2) "Between* **and***" (nonradial), or (3) "between***, on the one hand, and, on the other, ***"(radial).—Id., p. 26.

The purpose of shipper certification is to assure a supported application filed with a bona fide intention of prosecuting it to its final conclusion and to permit the allocation of sufficient hearing time to accommodate the expected number of shipper witnesses; moreover, such certifications provide information to protestants and potential protestants helping them to decide their position and prepare their presentations, resulting in a more expeditious disposition of the proceeding. In furtherance of these ends it is necessary that similar certifications be required of public witnesses discovered subsequent to applicant's filing. Thus, henceforth, in addition to filing certifications with an application, an applicant is required to file with the Commission an additional certification of each witness (if less than 10) not known to applicant at the time of filing but who becomes known prior to the submission of evidence. Such certification shall be filed with the Commission as soon as practicable following discovery of the witness, shall contain a statement by witness as to date on which he first made his support known to applicant, and copies of such certification shall be served by applicant upon all parties of record.—Schaeffer and Schaeffer Ext.—New York City, 106 M.C.C. 100 (102-3).

In addition, when more than 10 shippers support the application, it behooves the applicant, at the time of filing, (1) to submit with application sufficient certifications of support in excess of 10 to be reasonably representative of the total number of witnesses and the scope of authority applied for, (2) to indicate the total number whose testimony will be presented, and (3) to identify by name and location those shippers on whose behalf certifications are to be filed. If the number of supporting shippers should be increased subsequent to the filing of the application, information regarding identity and location of each of the subsequently acquired supporting shippers should be transmitted promptly to the Commission and all parties to the proceeding.—Id., pp. 102-3.

Noncompliance with these requirements, absent showing of good cause, will result in the disallowance of testimony and evidence proffered by public witnesses upon whose behalf certifications or identifications have not been filed.—Id., pp. 102-3.

Where a certificate of public convenience and necessity is sought under §207 based on a certificate of registration which is the subject of a written contract of sale between applicant and vendor and there is no related §5 application since the purchase is exempt under the provisions of §5(10) of the Act, the basic guidelines underlying any transaction involving issues comparable to those here considered must consist of: (1) an application filed with this Commission seeking a certificate of public convenience and necessity, (2) an agreement by the parties involved filed as part of the application which includes a covenant for cancellation of the certificate of registration by the holder thereof, conditioned upon applicant's obtaining an appropriate certificate of public convenience and necessity, (3) the transfer of the underlying intrastate rights as an inseparable part of the proposed transaction, and (4) a positive showing that the transaction is one not requiring prior approval under §5.—Las Vegas Tank Lines, Inc., Extension, California Points—107 M.C.C. 589 (596).

Applicant's failure to comply with the requirement that Certifications of Support must be executed and filed by all shippers known to and supporting applicant at the time the application is filed cannot be excused for "good cause" and witness' proffered testimony was properly rejected. Applicant did not disclose what matters, if any, came to its attention to lead it to believe that protestants had intimidated other shipper witnesses who had filed certifications nor did applicant seek to subpena any shipper witness whose support had been withdrawn in order to elicit testimony concerning "intimidation". Statements made by one supporting shipper who withdrew its support for the reason that applicant is no longer in a position to render the services the shipper requires are not refuted by applicant and submission by applicant in its exceptions of these statements constitutes a tacit admission that applicant's service would not be responsive to that shipper's needs. Moreover, applicant at no time prior to the hearing sought formal relief from the prescribed procedure.—J&M Transportation Co., Inc.—Extension, 107 M.C.C. 744.

Commission found that the emergency transportation situation described herein required issuance of a special grant of operating authority to affected carriers and to avoid delay contrary to the public interest special procedures as to notice and filing were herein promulgated since authority granted under the special grant authorizes no new competitive service and is not shown harmful to anyone—Special Relief for Motor Carriers, 112 M.C.C. 323 (325).

While the filing of successive applications is not prohibited, where there are clearly no changed circumstances such tactics by an applicant should be strongly discouraged. This method of costly harassment of a smaller competitor will not be condoned by the Commission. Applicant and its counsel were admonished that the Commission will not look favorably upon similar actions in the future.—United Parcel Service Ext.—Tenn., Ark. and Miss. Points, 117 M.C.C. 621 (626).

Applicant was found to have advertised in a trade publication of the transportation industry, setting forth the nature and scope of its proposed operation, the date on which supporting verified statements were due to be filed, and requesting interested shippers to contact applicant for verified statement forms and for further information, in an apparent attempt to obtain support for its application. The director of the Office of Proceedings responded to an inquiry from an interested party, with a copy to the applicant, that this approach to solicitation was neither approved nor acceptable. This judgment was affirmed by the Commission in this proceeding, because of the unnecessary administrative litigation that such solicitation generates.—Transportes Azteca Extension—Eastern States, 117 M.C.C. 645 (651).

Notice: [Vols. 19, 21].—See also National Trailer Convoy, Inc., Extension, at §207(a), n. 25 commodity.

In suit to set aside grant of certificate to defendant carrier, the Commission committed error when, without notice to protestants, the public, or any further published notice, it granted authority in excess of that sought contrary to stipulation and amendment of application concerning restriction of proposed service. Notice to interested persons and their right to be heard are basic concepts of justice under law; stipulated restrictions were accepted and honored by the examiner; and protestants' subsequent withdrawal or inaction implies recognition by all that, without restriction, the proceeding could materially and adversely affect them. It would be clearly unfair and unjust to plaintiffs (protestants) and others interested for the court to permit them to be lulled into a false sense of security, protection and inaction by allowing the Commission to remove the restrictions without giving published notice to interested parties and the public so they could be heard. Order and certificate as granted should be republished in the Federal Register with plaintiffs and others interested given opportunity to offer evidence and be heard.—Georgia—Florida—Alabama Transp. Co. v. United States, 290 F. Supp. 764 (766-7, 769)*.

Inasmuch as need is shown for a grant of authority to transport all the commodities described in shipper testimony (including construction materials) and as it is possible that other persons who relied on notice of the application for authority to transport construction supplies as published may have an interest in, and would be prejudiced by a lack of proper notice of, the broadened scope thereof, notice of authority granted will be republished in the Federal Register, and issuance of certificate withheld for 30 days from date or republication, during which time interested parties may file an appropriate protest.—Statewide Transport, Inc., Extension, 96 M.C.C. 57 (64).

Applicant actually wanted authorization for an alternate route but, by mistake, its application, as filed and as published in the Federal Register, merely set out the route sought and did not contain the words "as an alternate route, for operating convenience only", so that the application appeared to request authority for a service route. Usually it is important for protestant to be adequately informed of the nature of applicant's proposal because when applicant proceeds on an alternate route theory, protestant must meet a case quite different from the more usual application supported by public witnesses by showing it is an effective competitor of applicant rather than satisfactorily serving members of the shipping public and evidence of traffic volume, time in transit, and the like becomes more important than evidence of its service potential. However, here, protestants were ready to meet an alternate-route case and the lack of notice was not fatal.—West Bros., Inc., Extension, 96 M.C.C. 490 (495).

An irregular-route motor carrier must indicate if it intends to combine proposed operations with those already authorized; and, in light of the few certificates to which proposed authority can be tacked and its ability to furnish any carrier with additional information upon request, applicant's simple statement of intent to tack is adequate to apprise other carriers of the scope of the application. Moreover, the number of protestants to this proceeding evidences the sufficiency of notice.—Gregory Heavy Haulers, Inc., Extension, 100 M.C.C. 603 (608-9).

An application for irregular-route authority must indicate whether or not applicant holds authority which can be tacked to the authority it is seeking, and whether it intends to tack or join the proposed authority with any it presently holds for purpose of providing a through service. Protestant contends that notice of applicant's proposed service as published in Federal Register is insufficient; and that if grant is authorized, there must be a republication describing the many possibilities which exist permitting applicant to tack proposed authority to those authorities presently held by it. Applicant, in instant application indicated that it did hold authority which could be tacked, but stated that it had no intention to do so. By negating such intention, consideration of application is limited to proposed operation between points and areas specifically named in application. Mere fact that tacking possibilities exist and that applicant may avail itself of them does not warrant imposition of a restriction against tacking on basis of failure to give adequate notice. To conclude otherwise would be tanamount to finding that in every extension proceeding in which a tacking possibility exists, such a restriction would automatically have to be imposed. Ruan Transport Corp. Extension—Ames, Iowa, 110 M.C.C. 389 (390, 392)*.

Notice to interested parties by publication in the Federal Register of the proposed service, to the same extent applicant expects to submit evidence in support thereof, between points and areas specifically named in the notice, is adequate and sufficient notice. Applicants herein indicated that proposed service would not involve tacking possibilities of presently held authorities. Publication of manner in which proposed authority could be used is not required. —Klipsch Hauling Co., Extension—St. Joseph, Mo., 111 M.C.C. 295 (304-6)*.

Omissions: [Vols. 12, 21].—Although application as filed did not seek authority to perform special operations to all points in New York City and Philadelphia, but sought only to serve airports in or adjacent thereto, applicant's oversight in that respect is attributable to its unfamiliarity with distinctions between the various types of passenger service envisioned by the Act. Moreover, the number of passengers per vehicle it will be authorized to transport is substantially less than the number contemplated by application. Hence, grant of authority to serve

New York City, Philadelphia, and Philadelphia International Airport does not unduly broaden application.—D & M Taxi Co., Inc., 96 M.C.C. 439 (447).

Supporting shipper did not mention or indentify other applications which it supported, nor did it make cross-reference to any of the 5 embraced proceedings. Shipper's apparent lack of candor, in part, misled the Commission into separate consideration of related matters without regard to other similar applications supported by it, and without knowledge of the complete, overall transportation picture, including the scope of shipper's transportation needs and the transportation situation in the considered areas. Not only is this approach inconsistent with the effective performance of the Commission's administrative functions, but it also leaves such contradictions of record that rational conclusions may not be reached regarding any possible real need for additional service to some particular areas. Applications denied.—Jenkins Truck Line, Inc. Extension—Gentry, 117 M.C.C. 725 (730).

Parties: [Vols. 11-13, 15, 18, 19, 21].—Where need is shown for service of only one applicant, the overwhelming equities are in favor of granting authority to applicant, who is an experienced carrier with established terminals and adequate equipment and who has been handling a substantial portion of the involved traffic satisfactorily for the majority of the 46 supporting shippers and receivers, as opposed to applicant with neither experience nor equipment and whose application was filed subsequent to that of the established carrier.—Dean Truck Line, Inc., Extension, 96 M.C.C. 184 (190).

When a definite need is shown for a service which existing carriers cannot fill and more than the necessary number of carriers seek to fulfill that need, it becomes the function of the Commission to determine which of the applicants should be granted the authority. To accomplish this requires examination of existing authorities, the operations of the considered applicants, the location of their terminals, and their operating equipment. No single factor is determinative and all must be considered in relation to the public need, the particular applicant, and the authority sought. The relative date the carriers filed applications for authority and, because public need is a fact and not the property of any particular applicant, which carrier provided the proof of need, are unimportant, except when all other things are equal.—Willis Shaw Frozen Exp., Inc., Extension, 96 M.C.C. 225 (230).

Where a need is shown for a new service and more than the necessary number of carriers proffer their services to meet such need, it is the function of the Commission to determine, in furtherance of the aims of the national transportation policy, which applicants should receive grants of additional authority. The exercise of this function requires an evaluation of the existing authorities and operations of the considered applicants, the location of their terminal facilities, and the equipment operated by them. No single factor is controlling, but all must be considered in relation to the public need, the particular applicant, and the authority sought. Also considered are the relative date of filing the applications and the carrier which produced the evidence supporting the finding of public need, although priority of filing, unless all else is equal, is of minor importance.—Kroblin Refrigerated Xpress, Inc., Extension, 96 M.C.C. 233 (237-8)*.

The parceling out of authority to a number of applicants who had each shared in the involved traffic on an interline basis by participating in its transportation from the shippers' plants to different areas of the country, when all of the applicants were relatively equal as to experience in moving the type traffic involved and the location of terminals was not a factor, was done on the basis of operational experience, that is, based on the theory that those carriers already experienced in performing the movement from its origin to the different destination areas that each had been serving in the past were best qualified by such operational experience to perform that particular portion of the movement; each carrier was allocated operating authority to perform that part of the movement which corresponded to that which it had been performing in the past by interchange.—Id., pp. 239-240.

Appearance by a person in one proceeding, heard with another on a consolidated record, does not confer on that person the status of a party in all the embraced proceedings; this can only be accomplished by compliance with provisions of the Commission's Rules of Practice. Bureau of Inquiry and Compliance, although a party to investigation proceeding, did not enter an appearance in respondent's application proceeding and therefore is not a party thereto. Motion to strike the Bureau's exceptions insofar as they relate to the application proceeding and respondent's fitness to perform the proposed operations, granted.—S & C Transport Co., Inc., Investigation and Revocation, 96 M.C.C. 642 (644).

Protestant's contention that it can not be found in default for failing to file verified statements within allowed time because it "conditionally withdrew" was denied. A "conditional" withdrawal is no withdrawal at all until specified condition takes place and parties must actively continue participation or be subject to default or other applicable sanctions. Protestant may file exceptions limited to Commission's refusal to allow an amendment or restriction.—Sammons Trucking Extension—Fort Dodge, Iowa, 111 M.C.C. 92 (97-8).

Since protestants did not testify at the hearing, did not reply to applicant's exceptions to the Administrative Law Judge's recommended report and did not file any subsequent pleadings, their interests in the proceeding were not considered; and the failure of an additional protestant to reply to applicant's petition for reconsideration showed a lack of continuing interest in the involved traffic and detracted from the weight that its opposition would normally be accorded.—Trans West Exp., Inc., Ext. —Seattle—Portland, 118 M.C.C. 1 (2, 3).

Inasmuch as a freight forwarder is responsible for the commodities shipped, must rely on other carriers for the performance of underlying transportation services, and cannot be a party to joint rates, it is wholly dependent on other carriers to whom it tenders consolidated shipments for line-haul transportation between its terminals. Consequently, the freight forwarder has traditionally and appropriately supported the applications of motor common carriers for new or improved operating rights. See 107 MCC 706, 714—Sullivan Lines, Inc., Extension—Far West, 118 M.C.C. 801 (812).

Priority of filing: [Vols. 11-13, 15, 19, 21].—As a result of a basic change in the transportation of cement, a large part is now handled as a rail-motor coordinated movement and many motor carriers filed applications for authority to enable them to participate in its movement. Some of these applications already had been processed and granted at the time of instant proceeding and the holders of those new authorities appeared as protestants. However, those so-called existing authorities are looked on as having been applied for contemporaneously with considered applications and will be considered as such. The Commission's right to consider applications separately or in combination is a well established matter of administrative discretion, and where applications conflict in some degree, the decision will be based on the concept of fairness of opportunity to all parties, the effective procedures of the Commission, and the public interest.—Transport, Inc., Extension, 96 M.C.C. 671 (678).

The fact that Wehe's application for authority was filed first is not controlling, as priority of filing is given little consideration unless all other things are equal. In the instant case, the successful applicant Reliance was found better qualified to perform the proposed service and Wehe's application was denied as the Commission found that only one grant of authority was warranted. —Wehe Common Carrier Application, 110 M.C.C. 798 (814).

16. Amendment of application.—[Vols. 10-14, 17-19, 21].—Plaintiff (protesting carrier) was put on notice that restrictive amendments to an application must be acceptable to the Commission and that protestants who withdraw from a proceeding relying on such a proposed amendment do so at their own peril by the Commission's opinion in 106 MCC 1; by its Rules of Practice, particularly Rule 247 (d)(5); and by the warning in the Federal Register, in which notice of intervenor's application appeared, that restrictions not acceptable to the Commission would be eliminated. Thus, though the Commission did not rule on restrictive amendment in question prior to the hearing, plaintiff was not entitled to presume that it would be accepted; and since plaintiff withdrew from the proceeding in reliance on that amendment at its own peril, it cannot complain that it was denied an opportunity to oppose the application actively. The commission's denial of plaintiff's request for reopening to allow it to present its evidence in opposition was not procedurally defective; suit to enjoin and annul Commission orders, dismissed.—Frozen Food Exp., Inc. v. United States, 328 F. Supp. 666 (667, 669-70)*.

Amendment adding tea to "grandfather" application should have been accepted; record is clear that applicant's failure to include tea in the application as originally filed was clearly an oversight because, as indicated, an abstract of shipments of tea was attached to the original application. The amendment respecting tea was properly received.—Midwest Emery Freight System, Inc., 95 M.C.C. 642 (647).

Proposed amendments intended solely to eliminate opposition to an application must be closely scrutinized as they can result in subordinating the public need for a particular service to the applicant's own interest, leaving a muddled picture of the authority sought. While Rule 1.247(d)(5) of the Rules of Practice states that any restrictive amendment must be "acceptable to the Commission," the Commission will not accept amendments that are contrary to the public interest, such as the confusing amendments offered by applicant in 83 MCC 113. Furthermore, the Commission is not, and cannot be, bound by restrictive amendments agreed to by the parties where they achieve results inconsistent with the public interest and inimical to practicable and effective regulation; nor is the Commission required to accept a restriction in the exact form agreed upon by the parties.—Fox—Smythe Transp. Co. Extension—Oklahoma, 106 M.C.C. 1 (8, 21-2).

Broadening scope of application: [Vols. 12, 18, 19, 21].—Applicant's motion at the further hearing on its "grandfather" application (granted to enable it to present additional evidence as to two specified groups of shipments) that the application be considered as amended to conform with proof of operations contained in its exhibit listing shipments in addition to the two groups, denied. All of applicant's and protestants' arguments were before the Commission when it considered the matter and limited the additional evidence which applicant would be permitted to introduce; moreover, 4 years have passed since the first hearing and it would be inappropriate for applicant now to seek to amend the application to include additional shipments.—Consolidated Freightways Corp. of Del., 95 M.C.C. 220 (222-3)*.

An applicant is obligated to inform the Commission if there is anything remiss regarding the published notice of its application and, if it fails to do so, it is bound by the publication; and this is true even though the incorrect publication is the fault of the Commission. Therefore, it follows in instant proceeding that applicant carrier, upon becoming aware of the tacking possibilities created by amendment of the application (made after the notice of filing thereof had been published), had a duty to make known the broadening nature of its amendment and that a grant of the amended application would enable it to conduct operations in possible competition with carriers not parties of record. In addition, carrier should not have gone to any great expense in realizing such tacking possibilities before assuring itself that the lack of notice had been cured.—Carl Subler Trucking, Inc., Modification of Certificate, 103 M.C.C. 307 (314)*.

Commodities: [Vols. 10, 19, 21].—Applicant's amendment restricting authority to enumerated commodities is unacceptable as evidence of supporting shipper shows that a grant of general-commodity authority is required. Commission is not, and cannot be, bound by applicant's restrictive amendments which are inconsistent with public interest and inimical to effective regulation. Protestants who withdrew in reliance upon such unacceptable amendments do so at their own peril, and cannot later complain they were denied the opportunity to oppose such applications actively.—Comet Messenger & Deliv. Serv., Inc., Com. Car. Applic., 111 M.C.C. 13 (16-17)*.

Narrowing scope of application: [Vols. 12, 21].—Protestant's failure to appear at the hearing in reliance upon an understanding with applicant that the application would be amended at the hearing makes it technically no longer a party to the proceeding under Rule 247 (d) (6) of the Commission's General Rules of Practice; but in view of its timely protest and applicant's failure to offer the restrictive amendment that protestant understood was to be made, and for good cause shown, its pleading termed exceptions and petition for further hearing will be made a part of the record and considered in the disposition of the proceeding.—Truck Transport, Inc.,—Extension, 106 M.C.C. 885.

Applicant's amendment restricting application against bulk commodities was refused and unrestricted authority granted. When commodity description proposed is reasonable and embraces the service contemplated for which need is shown, protestant must show that a material, adverse effect would result from unrestricted authority which protestants herein have failed to show.—Sammons Trucking Extension—Fort Dodge, Iowa, 111 M.C.C. 92 (99-100).

18. Burden of proof.—[Vols. 10-19, 21].—See also Ashworth Transfer, Inc., Ext., at §207(a), n. 7 existing carriers; Behnken Truck Service, Inc., Ext.—Exbarge Traffic, at §203(a)(10), n. 5; Curtis, Inc., Extension, at §207(a), n. 25 existing service; Delaware Exp. Co. Extension, at §207(a), n. 25 commodity description; Heavy & Specialized Haulers, Inc., Investigation, at §212(a), n. 30; Schilli Motor Lines, Inc., Conversion Application, at §207(a), n. 25 conversion; and V. Van Dyke Trucking, Inc. v. United States, at §207(a), n. 25.

Where applicant carrier and its supporting shipper are under common control, the burden falls on carrier to show that, despite existence of such relationship, there is no substantial opportunity for engaging in discriminatory practices. The Commission examines closely situations where the carrier and principal supporting shipper are under common control because such situations create opportunity for discrimination and unfair competitive practices which is incompatible with common carrier status; and, except where no substantial opportunity is shown, it is reluctant to grant a certificate where such circumstances exist. Record supports the Commission's conclusion that, in view of existing common control of plaintiff (applicant) and its supporting shipper, plaintiff had failed to show its fitness to operate as a common carrier; therefore, order denying plaintiff's application is sustained.—Alter Trucking and Terminal Corp. v. United States, 299 F. Supp. 819 (822-4)*.

In suit by motor carriers (protestants in Commission proceeding) attacking order granting extension authority not restricted against interlining to defendant carrier because it was without substantial supporting evidence and contrary to law, the dispositive question is whether the applicant had the burden of showing that imposition of an interline restriction was not warranted. Ordinarily, once need is shown for a proposed new service, an initial burden is on protestants to show that any new authority should be restricted against interlining; however, an application for elimination of an existing interline restriction is, itself, a proposal of new service for which applicant must show public need. Uncontroverted evidence showed need for proposed new service in transporting general commodities, and the right to interline overhead traffic followed as a reasonable adjunct to providing such service; thus, there was no necessity that applicant show public need for unrestricted authority unless it first appeared that a restriction was warranted.—Ashworth Transfer, Inc. v. United States, 315 F. Supp. 199 (201-2)*.

Furthermore, though applicant had previous authority in the area that was subject to an interline restriction, which is subsumed by its proposed new operations, the substantiality of the new authority granted justified conclusion of the Commission that the old restriction did not shift to applicant a burden to show that the public interest required unrestricted new authority. Therefore, in absence of a showing by protestants that imposition of an interline restriction was warranted, the Commission's grant of unrestricted general commodity authority was amply supported by evidence of need for the proposed new service.—Id., pp. 202-3.

An applicant for a motor carrier certificate has the burden of proving that the proposed service is required by the public convenience and necessity; and that burden cannot be met simply by a showing that applicant will be able to obtain traffic if the authority is granted. Thus, it was incumbent on plaintiff (applicant) to establish, by a preponderance of the evidence, that the unrestricted household goods service which it seeks authority to render was in fact needed by the shipping public. And a basic factor in that proof is a demonstration of the extent to which needs of the shipping public cannot adequately be met by existing service already available.—Towne Services Household Goods Transp. Co. v. United States, 329 F. Supp. 815 (820-1)*.

Plaintiff (applicant) failed to prove need for proposed unrestricted household goods service between Texas points when testimony of supporting freight forwarders was limited to need for service that could be provided under the "Kingpak" certificate granted; shipper witnesses were merely "trying to help out" plaintiff with no genuine need for service which could not readily be met by existing carriers; and support of five household goods carriers who are authorized to render complete service between all points in Texas is based on a desire to avoid handling traffic they consider "undesirable." While the household goods carriers indicate desire for proposed service in the accumulation and distribution of small shipments, in effect, they would use applicant to avoid their statutory common carrier duty to render continuous and adequate service to the shipping public under their certificates; that falls far short of establishing a public need for the additional service which plaintiff seeks authority to provide. Considered Commission orders, sustained.—Id., pp. 817-8, 822.

In suit to set aside Commission order granting defendant carrier extension authority between Jacksonville, Fla., and Thomasville, Ga., without a restriction against tacking that route with applicant's existing Montgomery, Ala.—Thomasville route, record does not show that the Commission unjustly imposed too great a burden of proof on plaintiff (protestant) regarding material adverse effect on its Montgomery—Jacksonville operations that grant of the authority without such a restriction would have. An applicant must bear the burden of proof with respect to primary route it seeks; in instant case, applicant carried that burden. However, with respect to the imposition of tacking restrictions, protesting party must prove his own damage as opposed to having applicant prove that a protestant will not be harmed; and a mere showing by protestant that tacking possibilities exist, and applicant might use them, is not sufficient to warrant a restriction against tacking. Thus, when plaintiff failed to meet its protesting-party burden of proof, there was no ground for the Commission to grant no-tacking restriction it desired; final order of the Commission is sustained.—Howard Hall Co. v. United States, 332 F. Supp. 1076 (1079, 1081-2)*.

In application filed under "interim" provisions of §7(c) of Transportation Act of 1958 applicant has failed to meet his burden of proving public convenience and necessity inasmuch as he failed to produce shipper support for transportation of the frozen commodities and tea, although the record shows that nine shipments of frozen commodities were transported during the interim period.—Midwest Emery Freight System, Inc., 95 M.C.C. 642 (647).

It is well established, see 64 MCC 299, that the burden of establishing fitness in a proceeding involving an application for a certificate of public convenience and necessity rests on the applicant. Since applicant was found unfit in another proceeding, its operations must be carefully scrutinized before a finding of fitness can be made here. Consideration must be made, in the light of the finding of the prior report, which found that applicant had conducted "willful unlawful operations* * *almost up to the time of the hearing in the complaint proceeding notwithstanding several warnings by the Bureau and applicant's assurance that such operations were being discontinued." Manifestly, a finding of fitness is not warranted unless applicant has demonstrated a change of disposition which may be seen from its manner of operation since the prior hearing.—Schenck Tours, Inc., Extension, 96 M.C.C. 66 (75)*.

The contention that applicant should be allowed to continue service irrespective of the mode of transportation used without consideration of the adequacy of other existing services was rejected herein as in 94 MCC 677. Authorization of a proposed line-haul operation by an express applicant must be justified on standards no less than those applicable to other carriers and the burden of proof is the same whether the proposal is supported by representative user complainants regardless of the mode of transportation or by the carrier's own testimony of need therefor in its role as a shipper.—Railway Exp. Agency, Inc., Extension, 96 M.C.C. 127 (134).

To justify a grant of authority which would allow relocation of an interline point, applicant must establish (1) that while there would be resulting operating economies and efficiencies to the carrier applicant, the shipping public would be primarily benefited, and (2) that a competitively different interline service would not be performed through the new interline point. While the applicant's proof relates to projected operating economies, the Commission must find public convenience and necessity require the proposed service.—Brada Miller Freight System, Inc., Extension, 96 M.C.C. 473 (475).

Since carrier failed to give details concerning specific commodities, volumes, origins and destinations to establish shippers' bulk motor carrier transportation requirements, it has failed in its burden of proving that a need exists for the proposed service. Shippers' support of this application is premised on an existing and increasing market for bulk chemicals, an asserted trend to dry bulk motor shipments, and their requirements for flexible bulk motor service to a wide destination area in order to meet rapidly fluctuating market requirements. However, there is no specific indication when or where future shipments would move; the only future movements, which have been shown to be likely, can be handled by certain protestants. In these circumstances it is not possible to judge whether the existing services are inadequate or adequate to meet shippers' reasonable transportation requirements. Denied.—Chemical Leaman Tank Lines, Inc., Ext., 98 M.C.C. 452 (457, 459, 462-463).

Because of the difficulty in obtaining evidence as to prospective shippers as well as to past shippers inconvienced by lack of adequate service, applicant's burden of proof in cases involving automobile drawn trailer traffic is similar to burden in cases involving shipments of household goods and less exacting than in cases involving the transportation of general freight. Accordingly, service failures experienced by five of the persons supporting the application are significant and demonstrate an inability on the part of protestants to handle the traffic. Granted in part.—Chandler Trailer Convoy, Inc., Extension, 98 M.C.C. 567 (570-571)*.

Applicant has failed to sustain its burden of establishing the interpretation and construction placed upon its intrastate authority by the State of Ohio and of establishing that it is not authorized thereunder to perform the operations for which it here seeks authority; in addition supporting shippers concede that existing service of applicant and other motor carriers meets their reasonable transportation needs. Therefore, as it is against Commission policy to issue authority for operations which may be performed under existing authorities, application denied.—Sidney Truck & Storage, Inc., Extension, 99 M.C.C. 134 (138-139).

Applicant failed in its burden of proof, since it failed to produce any shipper testimony demonstrating a need for its proposed common carrier services and since this need cannot be inferred from the resume of applicant's past operations and industry practices. An application for a certificate under §207(a) may be granted only on showing that the present or future public convenience and necessity require the operations proposed; a showing under §212(c) that the carrier holds a permit and that its operations are those of a common carrier is irrelevant.—Eastern States Transp., Inc., 99 M.C.C. 524 (529-31).

Since the evidence shows applicant corporation as nothing more than a paper agency, formed for the purpose of obtaining a certificate by a number of individuals, it has failed to establish that it is fit, willing and able to perform the proposed service; the absence of a firm corporate structure or plan indicates that applicant is in no position to effectively influence or control stockholders' individual enterprises or to accept responsibilities involved in conducting proposed operations. Thus, it is clear that individual stockholders, and not applicant, would actually conduct proposed operations and that applicant's proposal is basically the separate proposals of its several stockholders. Denied.—International Automobile Delivery, Inc., 100 M.C.C. 119 (124-5).

If applicant fails to show that it is "fit, willing, and able to perform the service proposed and to conform to the provisions of * * * [part II] and the requirements, rules, and regulations * * * thereunder * * *'', it has failed to sustain its burden of proof and its application should be denied. And having operated in violation of its temporary authority up to and during time of hearing and having failed to comply with certain regulations concerning lease and interchange of equipment and with the requirements pertaining to publication of appropriate tariffs, applicant cannot be expected to conduct its future operations in a lawful manner since it has knowingly and willfully engaged in prior unlawful conduct. Denied.—Fanshaw Extension, 100 M.C.C. 173 (178-9).

Inasmuch as applicant's notice of intent to tack proposed operations effectively extended scope of application to include all origin points in applicant's existing certificates as well as those specifically mentioned in the application, applicant need not be limited to the specific burden of proving a need for service from, to, or between the latter points. However, in absence of proof of need for service from the points specifically applied for, service should not be authorized from such points solely for purpose of allowing a combination with existing authority.—Gregory Heavy Haulers, Inc., Extension, 100 M.C.C. 603 (609).

Where applicant and one of supporting shippers are under common control, burden is upon applicant to establish that a grant of common carrier operating authority cannot result (1) in favoritism, preference, and discrimination as between the commonly-controlled shipper and competing shippers, and (2) in unfair competition as between applicant and other carriers. Where shippers other than one affiliated with applicant are aware of affiliation, but nevertheless support applicant, applicant found to have met its burden as to first condition. However, a finding favorable to applicant with respect to second condition can be made only where there is no service available from existing carriers or where applicant and another carrier are fiercely competitive and traffic available from affiliated shipper is so minimal as to preclude possibility of changing the competitive relationship. On applicant's failure to show that grant would not result in unfair competition as between it and protestant, application denied.—Cousins, Inc., 102 M.C.C. 481 (484-5).

Supporting shippers' expression of complete confidence in applicant's existing service, standing alone, is not a sufficient basis for extension of territorial authority sought; applicant participates in movement of interline traffic to and from considered western States under exclusive joint-line arrangement with carrier serving the area and record does not show any threatened loss of such traffic through possible termination of the joint-line arrangement. Moreover, there is no showing that existing service is inadequate or that the authority sought is necessary to enable applicant to maintain its competitive position; on the contrary, record indicates that a grant would enable it to enhance its competitive position by an unwarranted encroachment upon protestants' established authorized services; denied.—Neptune World—Wide Moving, Inc., Extension, 103 M.C.C. 533 (538-9)*.

Since the evidence consists primarily of supporting shippers' general statements and since the only instances of existing carriers failure to furnish adequate service are during periods of unusual peak shipper activity, applicant has failed to show that existing service is inadequate; neither infrequent nor isolated instances of delays demonstrate a general pattern of service failure. Moreover, as there is ample evidence that existing carriers provide adequate service and as existing carriers should be afforded an opportunity to transport all traffic they can handle in an adequate and efficient manner without added competition, application denied.—Point Transfer, Inc., Extension, 105 M.C.C. 634 (659-61)*.

Applicant has burden of proving affirmatively that need exists for proposed service which existing carriers are either unable or unwilling to provide. And supporting shipper's testimony without any specificity concerning actual inadequacies in existing service usually fails to meet this burden; however, in the circumstances present, a showing of inadequacy of existing carriers' service is not controlling in proving need. Inasmuch as considered service has existed, albeit unauthorized, under color of right and without challenge for a number of years, its continuance would not create a new or aggravated competitive situation; therefore, all things considered a public need has been established for proposed service.—Dixie Ohio Exp., Inc., Investigation and Revocation, 105 M.C.C. 835 (841-2)*.

Following 61 MCC 421, applicant has proved that it has operated through the gateways in question. Applicant's manifests contained the routings which its drivers were to follow; applicant asserted that 85 to 90 percent of the time its drivers observed the gateway instructions and that it is not uncommon for drivers' logs not to show gateways traversed, because drivers are only required to show rest and meal stops so as to show off-duty and driving time in order to be in compliance with the safety regulations. As a practical matter by showing such stops, drivers' logs do show routings and thus, indirectly, the gateways traversed. —Cartwright, Inc., Ext.—Elimination of Circuity, 106 M.C.C. 106 (111-12).

Under the provisions of 206 of the Interstate Commerce Act, an applicant has the burden of demonstrating the existence of a public need for the proposed operation before a grant of common carrier authority may be authorized. An important requirement in this regard is whether the existing carriers are unable or unwilling to provide reasonably adequate service; because applicant formerly held temporary authority raises no presumption that corresponding permanent authority will be granted. Proof of past operations conducted under temporary authority may be established by showing the volume and pattern of traffic handled within the scope of its past operations. In such circumstance, evidence of such operations, under temporary authority is clearly desirable to show movements within the scope of the application and the competitive effect of such operation on existing carriers.—Chicago & Eastern Illinois R. Co., Com. Car. Applic. 108 M.C.C. 53 (60, 61).

Though cases involving the relocation of an interchange point are somewhat similar to alternate route or elimination of gateway application cases, an analogy thereto is improper. Applications for relocations of an interchange point are clearly distinguishable; and an applicant for such authority need only establish, in addition to operating economy or efficiency, that the interline service capable of being performed through the new point will not result in a new service competitively different from that which can be performed through the present interchange point; it is not required to show that it is transporting substantial volume of traffic between points involved, nor that it is competing with existing carriers as to substantially all its authorized commodities and points of service. Since applicant has met its burden of proof, authority allowing it to conduct interchange operations at Montrose instead of Rico, Colo., granted.—R. A. Gould, Inc., Extension, 108 M.C.C. 69 (71-2, 73)*.

Because of the large number of parties and the broad commodity and territorial scope involved, the application was handled under a special procedure; however, it is equally incumbent upon an applicant to establish a prima facie case in proceeding assigned under special procedure as it is in a case assigned for modified procedure. Minimum showing expected of any applicant for motor carrier authority is that the shippers and consignees clearly identify the commodities they ship or receive, the points to or from which their traffic moves, volume of traffic they would tender applicant, the transportation services now used by them, and any deficiencies in existing services. Supporting shippers' verified statements fail to prove a prima facie case for applicant's proposed operations; shippers failed to demonstrate specific deficiencies in services of existing carriers and, since the evidence is extremely speculative in terms of the points to which their commodities move, there is no way of ascertaining the points in the broad destination area to which their traffic will move. Thus, applicant failed to meet minimum legal requirements to prove a prima facie case; denied.—Jerry Lipps, Inc., Extension, 110 M.C.C. 113 (118-9).

As held in 95 MCC 312, applicant in a conversion proceeding shoud present, in addition to evidence of its past lawful operations pursuant to its permit, shipper testimony which demonstrates a need for its service as a common, rather than contract, carrier. However, as long as its transportation needs are satisfied, a shipper would ordinarily have no reason to care what kind of authority the carrier operates under; thus, to hold applicant in a conversion proceeding to a very strict standard of proof as to need for common rather than contract service would require of shippers a legal knowledge which they cannot be presumed and should not be required to have. In view of its past history of competent service, coupled with established transportation need of supporting shipper, applicant has satisfied applicable criteria for issuance of a certificate in lieu of its outstanding permit.—Ferree Moving and Storage Co., Inc., 110 M.C.C. 375 (378-9)*.

Part 4 of the new application forms (op-or-9) for motor carrier certificates, effective May 20, 1966, requires an applicant for irregular-route authority to indicate whether or not it holds authority which can be tacked to the authority it is seeking, and whether it intends to tack or join the proposed authority with any it presently holds for the purpose of providing a through service. Applicant must bear the burden of proving a need for the service it proposes. With the submission of affirmative evidence concerning such need for the service as specified in the application and published in the Federal Register, plus the required showing of fitness and ability to perform the service, applicant may rest. At this point the burden of going forward with the evidence shifts to the protestant which, if it is concerned with the possibility of applicant combining the authority sought with its existing authority, must establish that failure to impose a restriction against tacking of the authority will have a materially adverse effect on its operations.—Ruan Transport Corp. Extension —Ames, Iowa, 110 M.C.C. 389 (391, 392)*.

Burden of proving fitness to conduct proposed service continues upon applicant even though its fitness has been challenged as applicant remains the proponent of an order which requires a finding of fitness to be made.—Spector Freight System, Inc., Extension—Whitley, 111 M.C.C. 889 (892).

Protestant International, holder of heavy-hauler authority, bears burden of proving aggregated commodities, herein specified, are aggregated by reason of their "inherent nature" and their minimum weight per bundle requires use of special equipment thus placing them within the scope of its heavy-hauler authority according to criteria established in 79 MCC 335 and related cases cited herein.—Vant Transfer, Inc., Common Carrier Application, 112 M.C.C. 36 (41-3).

Where applicant is the agent of a household goods carrier holding authority which it seeks to duplicate, its proposed service must be shown to be required in addition to the services of existing authorized carriers including that of its principal. Burden of proof met.—Kriegsman Transfer Co. Extension, 113 M.C.C. 554 (559)*.

The filing of a petition for modification of existing authority is a proper and long-established practice and is a better vehicle for modification than an application and, as previously stated in 73 MCC 345, petitioner still bears the burden of proving that the proposed services are required by the public convenience and necessity.—North American Van Lines, Inc.—Modification, 113 M.C.C. 867 (871).

To warrant authority to transport used household goods, applicant must present evidence of its past good faith operations and indicate support from shippers it has served. Otherwise, applicant must show that proposed operations are required by the public convenience and necessity.—Panda Transport, Inc., Extension—Baltimore, Md., 114 M.C.C. 75 (79)*.

Applicant held not to have met requisite burden of proof, based on failure to supply essential details. Specifically, applicant supplied no identification of the origin points of the involved traffic with any degree of certainty, and offered no showing that protestant was unable to handle adequately the traffic involved, or that protestant's service within the territorial scope of its authority was in any way inadequate. Application denied in part.—Graham Extension—Port Huron, Mich. 117 M.C.C. 412 (416-417)*.

While existing carriers had not met each and every requirement of the traveling public, minor failures are not sufficient to establish a pattern of serious deficiencies in presently available service. A showing of inadequacy in existing service, however, is not a prerequisite to the granting of a certificate of public convenience and necessity.—Western Mass. Bus Lines, Inc., Com. Car. Applic., 118 M.C.C. 74 (83)*.

Since protestants in 103 MCC 699, 715-16, were authorized collectively to perform all of the proposed service, applicant had the responsibility of showing that its entry into the system would not result in needlessly duplicative services or excessive capacity. Applicant in the instant proceeding, however, does not seek to enter an existing area-wide transportation system of general commodity carriers, but rather requests authority to transport specific commodities to points throughout the United States. Also to be distinguished herein are those cases in which the application was denied because the shipper had supported numerous other carriers and was seeking to add yet another. Granted, in part.—National Trailer Convoy, Inc., Ext.—Oregon, Ohio, 118 M.C.C. 437 (441-2)*.

In concluding that there were shown no violations of regulations relating to the extension of credit to shippers by applicant, the Administrative Law Judge erroneously placed on the Bureau of Enforcement the burden of establishing the dates payments were mailed by shippers to whom credit was extended, notwithstanding the Bureau's submission of evidence indicating that payments were recorded by applicant between 28 and 92 days after the freight bills in question were presented to the involved shippers. The burden of going forward with evidence to rebut the unfavorable inference which rises upon such a showing falls upon applicant.—Peoples Express Co. Ext.—Empty Containers, 118 M.C.C. 675 (679).

Alternate route; change; elimination of gateway: After proceeding under various theories of proof including elimination of gateway, alternate route, or extension of a new service route, under which it failed to meet its required burden of proof, applicant, a regular-route motor common carrier operating through interchange points at Detroit and Bay City, Mich., and Toledo, Ohio, on the one hand, and on the other, points in Michigan and other States, was granted authority to establish additional interchange points at Grand Rapids and Lansing, Mich., based upon a showing that its present interchange point at Detroit was heavily congested with traffic, that the proposed operation will result in greater operating economy and efficiency, and that the additional interchange operations will not result in a service competitively different from that which applicant renders at its present interchange points.—Short Freight Lines, Inc., Extension, 113 M.C.C. 316 (321, 322)*.

"Grandfather" clause: [Vol. 13].—Applicant has the burden of establishing the character and scope of the operations upon which it relies in claiming rights under the "grandfather" provisions. Thus, since applicant's witness did not prepare the exhibit offered in support of claimed "grandfather" authority to transport frozen fruits, frozen berries, and frozen vegetables, and conceded that he could not be sure with respect to entries therein of commodities labeled frozen foods what specific commodities were or whether they were in fact fruits, vegetables, or berries, motion to strike from the exhibit those shipments for which the underlying bills showed the commodity as being frozen foods is granted. With respect to frozen food shipments, applicant has not met his burden of proof.—Consolidated Freightways Corp. of Del., 95 M.C.C. 220 (223)*.

Public convenience and necessity: [Vol. 13].—Supporting shipper has the burden of demonstrating that the common carrier services it desires to replace prior contract carrier operations are required by the present or future public convenience and necessity.—Saldutti & Son, Inc., Ext.—Inedible Fish Oils, 118 M.C.C. 58 (66)*.

Substituted freight service: [Vol. 13]. —Applicant failed to sustain its burden of proof, when it relied solely upon its own testimony to establish that it should be authorized to participate in all types of TOFC service; since no public witnesses support the application requisite public convenience and necessity, cannot be found. However, applicant can render service in connection with the C & O's plan II piggyback operations under its existing authority, and this is the type of motor service it would normally be called upon to perform.—Masselink Bros. Trucking Ser. Inc., Ext.—Restrictions, 103 M.C.C. 507 (511).

In proceeding wherein authority for substituted motor-for-rail service is sought and public need for such service is dependent upon showing that proposed service will entail economies, efficiencies, and improvements in existing rail service, alternative standards of proof described in 84 MCC 205 are of primary importance. Protestant's interest and probable capability is so limited that need for proposed service, except as it interferes with protestant's interest is shown by shippers' evidence.—Erie Lackawanna Ry. Co. Ext.—Substituted Service, 110 M.C.C. 823 (826).

22. Evidence.—[Vols. 10-19, 21].—See also Barton Truck Lines, Inc., Eligibility—Utah, at §207(a), n. 25 past operations; Beaney Ext.—Ports of Entry Between U.S. and Canada, at §207(a), n. 25 past operations; Cartwright, Inc., Ext.—Elimination of Circuitry, at §206(b), n. 18; Frozen Food Exp. Extension, at §207(a), n. 25 fitness; Heavy & Specialized Haulers, Inc., Investigation, at §212(a), n. 30; M. R. & R. Trucking Co., Extension, at §207(a), n. 30 commodities; Mid-American Lines—Purchase—Five J Motor Service, at §5(2), n. 115; Midwest Coast Transport, Inc., Ext.—Duluth, Minn., at §207(a), n. 25 fitness; and Southwest Freight Lines Ext.—Removal of Restriction, at §206(a)(1), n. 50.

Evidence is not limited to oral testimony but may also include such matters as pleadings, written stipulations, records and other documents and exhibits; therefore, although no oral testimony was adduced at continued hearing, amendment to the application and telegram withdrawing a protestant's opposition accepted by the hearing examiner constitute "evidence" within the Commission's Rules of Practice and the provisions of APA.—Skinner Motor Exp., Inc., Extension, 96 M.C.C. 135 (140-1).

The record contains no evidence to justify finding that proposed intrastate motor service in common arrangement with a multi-State water carrier is required by public convenience and necessity; no public witnesses, who would make use of the proposed joint service, support the application; and there has apparently been so little demand for such joint service that applicant has never made any attempt to arrange a connection on a two-ticket basis with the water carrier's scheduled arrivals and departures. Therefore, to extent regular-route authority on Long Island, New York, requested, application denied.—Archambault, 99 M.C.C. 535 (538-9).

Motion to strike testimony of three of the four supporting shippers denied, despite failure to submit certifications of support by these shippers with the application. Had applicant intended to rely upon considered testimony at the time of filing the application motion to strike would be well taken. However, as there is no clear indication on this record that applicant did intend to rely upon these additional witnesses at the time application was filed, there is not sufficient basis to strike their testimony, although applicant should have informed the Commission and all parties of record, when apprised that testimony by these witnesses was to be presented at the hearing. In the future such notification shall be required.—Schaeffer and Schaeffer Ext.—New York City, 106 M.C.C. 100 (103-4).

Where the witness does not testify from certain bills purporting to reflect charter trips to and from the area in question although the sight of them in counsel's hand apparently refreshed his recollection and testimony relating to the involved area was thereupon elicited from him, the witness is not required to present these bills for cross-examination inasmuch as they were not considered underlying data for any exhibit presented by protestant and their contents were not used to refresh his memory. Harry Lee Eyre, Jr.—Extension, 106 M.C.C. 851 (855).

Complaints received by the Bureau of Enforcement about applicant's operations need not be furnished to applicant since they did not constitute the basis of the Bureau's investigation, were not prepared by the Bureau's witness and were not the subject of his testimony. Thus, these complaints do not fall within the scope of the rule enunciated in 353 U.S. 657, but rather are confidential material not required to be furnished to applicant. On the other hand, denial of applicant's request for other underlying data cannot be sustained on the basis that this is confidential, but since the only underlying data utilized by the Bureau were the pertinent logs and the "Mississippi State permits" (the latter not considered by the examiner), all of which were available to applicant, no prejudicial error resulted.—Eagle Motor Lines, Inc., Extension, 107 M.C.C. 499 (502).

The Commission cannot presume, in the absence of proof, that a carrier is performing adequate and satisfactory service to points it is authorized to serve when shippers' evidence is to the contrary. While certain protestants assert that they hold adequate authority to provide the service proposed by applicant, they do not affirmatively state a willingness to pick up supporting shippers' l.t.l. shipments; also, if they desire a local carrier to bring such l.t.l. traffic to their terminals, it is necessary that they show the existence and willingness of local carriers to originate the movement to their terminals.—Belford Trucking Co., Inc., Extension, 108 M.C.C. 5 (15)*.

Commission herein construed the so-called Schaeffer criteria (106 MCC 100) with respect to application proceedings handled under the modified procedure. Applicants are hereby required to disclose the identity of all shippers, by certification of support or identification, known to applicant at time of filing or who subsequently become known prior to entry of order assigning application for handling under the modified procedure. Where such applications are handled under modified procedure and are reassigned for an oral hearing, the requirements for disclosure of witnesses will be those heretofore promulgated in the Schaeffer proceeding.—Carl Subler Trucking, Inc., Extension—Canned Goods, 111 M.C.C. 624 (627-28)*.

Commission found that adoption of the so-called Schaeffer criteria requiring applicants to certify and disclose identities of all known supporting witnesses in proceedings in the passenger service field would impose an onerous burden without corresponding benefit as passengers are an ephemeral and ever changing class, not readily capable of specific identification. This conclusion applies only to such witnesses whose identity is discovered subsequent to filing the application.—Carolina Transit Lines, Com. Car. Applic., 111 M.C.C. 630 (634-5)*.

The position of the Department of Defense, appearing in support of an application for operating authority, is the same as any other shipper so appearing and it is not excused from meeting the minimum evidentiary requirements set forth in 103 MCC 555 for application proceedings. Also, because of the large number of applications for authority similar to that at issue herein now pending, the Commission set forth general evidentiary guidelines as to the type of evidence expected to make, as a minimum, a prima facie showing of need for the proposed service in future proceedings of similar magnitude.—Ashworth Transfer, Inc., Ext.—Explosives, 111 M.C.C. 860 (865-68).

Sworn statements of supporting witnesses failing to appear at the hearing were stricken from record but those of witnesses who did appear were accepted. The stricken statements were found unacceptable as they were notarized by an officer of applicant solely on the affirmation of applicant's employee that the signatures of witnesses were genuine, without the presence of the subscriber in violation of Rule 50 of Commission's General Rules of Practice.—Arrow Line, Inc., Ext.—Saratoga Race Track, 112 M.C.C. 116 (118-9).

Gennerally, Commission has been less exacting with respect to the evidence deemed necessary to establish that public convenience and necessity requires operations of a household goods carrier, than in similar cases involving transportation of general freight because the nature of household goods moving business is such that it is exceptionally difficult to obtain testimony of prospective shippers or persons previously inconvenienced by a lack of such service. Although supporting witnesses herein are not themselves persons who need or would use applicant's proposed service, they are, because of their position or station in the affected community (real estate operator, president of local Chamber of Commerce) in a position to reflect the desires and transportation needs of the affected area and the problems and hardships experienced by householders through inadequacies of protestants' services.—Empire Fuel & Transfer Co., Common Carrier Applic., 113 M.C.C. 38 (43-44)*.

Protestants' failure to reply to applicant's petition for reconsideration is an indication of lack of interest in the involved traffic and detracts from the weight that their opposition would normally be accorded. Therefore since protestants have little or no interest in the traffic and will not be affected by the grants of authority requested, application is granted.—Morgan Drive—Away, Inc., Extension, 113 M.C.C. 137 (138, 140)*.

The Novak criteria [103 MCC 555] require that any applicant seeking either motor common or contract carrier authority present testimony that clearly identifies the commodities to be shipped or received, the points to or from which its traffic moves or will move, the volume of freight it would tender to applicant, the transportation service now bieng used, and the deficiencies, if any, in existing service. Since the instant application provides virtually no specific evidence relevant to the shipper's transportation requirements, it must be denied.—Sterling Trucking, Inc., Ext.—Additional States, 118 M.C.C. 374 (377-8)*.

Admissibility: [Vols. 12, 19, 21].—Motion to strike extra-record evidence, i.e., facts stated in applicant's exceptions and reply but not contained in record, granted, even though such facts are insignificant.—W. T. Byrns Motor Exp., Inc., Extension, 96 M.C.C. 765 (767).

Testimony as to the operating authority, willingness and ability of a nonprotestant carrier who had been called as a witness for a bona fide party protestant is admissible. Thus, Johnson, a qualified party to the proceedings, properly can present evidence as to the witness's relevant operating authority; applicants were aware of witness's authority and, in fact, brought forth evidence regarding the supporting shipper's dissatisfaction with such service. Under these circumstances the applicants' rights to proper notice and a fair hearing have not been prejudiced by the admission into evidence of material relevant to the authority, willingness, and ability of the nonparty carrier.—White Bros. Trucking Co. Extension—Dayton, Ohio, 99 M.C.C. 389 (396).

Since Canadian applicant's past unauthorized operations between Canadian points over U.S. highways were basically the result of some misapprehension of applicable law, evidence thereof is admissible. Considered traffic moved under the fixed and persisting intent of shipper from United States origins to Canadian destinations, or vice versa, and, although applicant transported this traffic under no joint or through arrangements with any United States carrier, the traffic is in foreign commerce and subject to Commission regulation. However, since Scott conducted these operations pursuant to advice from counsel and with what it interpreted to be the acquiescence of Commission field staff, rather than in difiance of Commission regulation, evidence of these operations is admissible.—D.S. Scott Transport Ltd. Extension, 100 M.C.C. 1 (6-7).

In order to testify at hearing regarding protestant carrier's operations and its willingness and ability to provide proposed service, it is not necessary that protestant's witness be carrier's full-time employee, but it is necessary that his testimony reflect his personal knowledge acquired in regular course of his business. Consequently, considered testimony correctly stricken from record, since witness failed to demonstrate that his duties as "national accounts representative" made him sufficiently intimate with protestant's operations to enable him to testify as to its willingness and ability to provide proposed service.—Jenkins Truck Line, Inc., Extension, 100 M.C.C. 625 (628-9).

Since applicant's past operations as transporter of used automobiles in driveaway service, utilizing casual or non-professional drivers, were conducted in the belief that such operations were within the exemption of §203(b)(9), they were conducted under color of right and are entitled to consideration as evidence of public need; and since applicant and three other corporations, whose activities are no different, are solely owned by Irving Zola, who intends to merge all these corporations under applicant's name, combined corporate operations are entitled to consideration. Also public support of 27 individual and corporate witnesses for applicant's continued service is impressive in view of difficulty of obtaining witnesses in this type of proceeding. Granted.—AAA Con Drivers Exchange, 102 M.C.C. 393 (396-401).

Certain exhibits listing tonnages shipped to destination states involved herein from 1961 to 1965 presented by supporting shipper's superintendant of transportation were improperly admitted into evidence since they were prepared specially for introduction in these proceedings and are not records kept in the ordinary course of business. No underlying documents were made available in support of the exhibits and timely objection was made to their admission.—Consolidated Forwarding Co., Inc., Extension, 107 M.C.C. 11 (18-19).

Testimony of shipper witness' traffic manager pertaining to that shipper's 1965 volume of traffic and obtained from shipper's western sales manager was improperly admitted; the witness' testimony is based on information not within his personal knowledge nor was it obtained by him in the regular course of business.—Id., p. 19.

As shipper support had been withdrawn and was not reinstated, no representative of the shipping public appeared and presented support for this application. The hearing examiner, over the objections of the protestants, took official notice of and admitted into evidence a copy of the transcript of record of a prior proceeding, and granted the application based solely upon the shipper's testimony in that transcript. The prior proceeding embraced eight applications which were supported by the same shipper which had withdrawn its support of this applicant and two others. Official notice may be taken of other Commission's proceedings and the findings therein, but no consideration may be given to the evidence contained in the records in those proceedings. Therefor, it was error on the part of the examiner to give official notice to the evidence contained in the transcript of the prior record.—Coastal Tank Lines, Inc., Extension—Neal, West Virginia 108 M.C.C. 190 (193, 194).

The examiner's reception of the transcript of the prior proceedings without according protestants the opportunity to cross-examine the shipper with respect to applicant's proposed service, in contravention of rule 75 of the General Rules of Practice, clearly violates the substantial rights of the protestants. The transcript of the record in the prior proceedings should not have been received as evidence in this case. The Commission has uniformly required that applications for new motor carrier operating authority be supported by competent shipper testimony. Only the most compelling considerations of equity would justify departure from this standard. Since there is no overriding considerations of fairness present in this case, application is denied.—Id., p. 194, 195.

The examiner's ruling to strike evidence of a nonprotestant carrier was sustained by the review board. On reconsideration the evidence of the nonprotestant carrier was admitted into evidence. The examiner's decision and order was based upon the decision in 105 MCC 111. On reconsideration in 107 MCC 419, the entire Commission concluded that as of the date of that decision protestants may properly introduce evidence as to the operating authority, willingness and ability of nonparty carriers to perform the service for which an applicant seeks authority. Therefore, in proceedings where the applications were published in the Federal Register prior to that report evidence concerning the operating authority, willingness and ability of nonparty carriers would be admitted. However, those applications published subsequent to that report would be bound by §1.247(d)(8) of the Special Rules of Practice promulgated concurrently with 107 MCC 419, which prohibit a protestant from introducing evidence of a nonprotestant carrier into evidence.—Bilyeu Refrigerated Transp. Corp. Ext.—Baltimore, 108 M.C.C. 238 (239, 240)*.

Applicant sought leave to present the support of an additional public witness by a late filed petition which embraced a verified statement of that supporting shipper and a certificate of support executed by an officer of that company; no reply was filed to the petition. In the petition applicant indicates that the additional shipper recently indicated a desire to support the application for the first time and, therefore, it appears to have filed the certificate of support as soon as practicable after discovery of the witness; on the other hand, applicant failed to meet the requirement that a late filed certification shall contain a statement by the witness as to the date on which he first made his support known to the applicant. Inasmuch as there is no opposition to the petition and no party would be prejudiced by consideration of the shipper evidence, the verified statement of the additional shipper is received in evidence; however, in future requests to submit additional evidence, applicants will have the burden of showing good cause to justify receipt thereof.—Jerry Lipps, Inc. Extension, 110 M.C.C. 113 (115, 120).

Examiner permitted applicant's vice president, who is not an attorney, to present applicant's case. On exceptions, applicant contends that it was incumbent upon examiner to relax procedural rules in applicant's favor; that application of ordinary standards of admissibility of evidence constitutes lack of due process; and that examiner was bound to resolve procedural doubts in applicant's favor. There is no merit to applicant's contention that examiner was obligated to give it preferential treatment. At the beginning of the hearing, the examiner announced that the Commission's rules would not be strictly applied since applicant was without counsel. Moreover, the examiner offered to continue the hearing to a later date to allow applicant to obtain counsel but applicant declined. Consequently, no basis has been shown for a finding that applicant has been denied due process of law.—Sanders World Travel, Inc., Broker Application, 110 M.C.C. 246 (247-8).

Commission finds no error in joint board's failure to consider the testimony of applicant's witness. The rules laid down in 106 MCC 100, requiring that additional certification for witnesses discovered by applicant subsequent to the filing of its application, were published in the Federal Register on December 20, 1967, and neither at the continued hearing nor in its petition has applicant presented any good cause for its failure to comply with this requirement.—Turner Expediting Service Extension—Montgomery County, Ky., 110 M.C.C. 342 (345)*.

Commission found that evidence adduced in two application proceedings for authority similar to that sought herein to be admissible as administrative agencies are not confined to the specific record in administrative proceedings. Fact that a determining body has looked beyond record proper does not invalidate its action unless substantial prejudice is shown to result. As three applications considered herein were heard on a consolidated record, no showing of prejudice has been made.—Braswell Motor Freight Lines, Inc., Extension, 112 M.C.C. 558 (567-8)*.

In denying motions by both parties to strike certain statements of specified witnesses, Commission noted that as a Federal administrative agency it is not bound by technical rules for the exclusion of evidence which are applicable in jury trials at law. Generally, Commission favors a more lenient policy respecting admissibility of evidence, including hearsay testimony, than pertains in jury trials.—Commerical Motor Frt., Inc., Ext.—Crawfordsville, Ind., 114 M.C.C. 500 (516-19)*.

Most of the witnesses who supported application for authority to transport used automobiles between Hawaii and the mainland did not themselves propose to use applicant's service. In a situation such as this in which the need for service by individual customers is sporadic and nonrecurring, this type of evidence is appropriate.—American International Driveaway Ext.—Hawaii, 117 M.C.C. 63 (67).

Almost half of supporting shipper's statements were submitted by Mexicans, in the Spanish language, and applicant offered no translation or even any summary or digest of the contents of many of the statements. Due process of law does not permit the Commission unilaterally to interpret such statements in the first instance without the benefit of party-sponsored interpretations, nor is it incumbent upon the Commission to provide interpreting services for the parties. In the circumstances, the entire testimony made solely in the Spanish language was given no weight in the determinations. —Transportes Azteca Extension—Eastern States, 117 M.C.C. 645 (649).

Protestants at the joint-board hearing objected to the questioning of applicant's public witnesses as to delays in existing service that such delays were not mentioned in the written statements and the objection was overruled by the joint board. In his decision the Administrative Law Judge considered all the evidence of record as admitted by the board but stated that he would have sustained the objection since the Special Rules of Procedure restricts the oral testimony of supporting shippers to the correction of errors, to the supplying of inadvertent omissions, to matters not specifically listed, and to cross-examination. However, the Administrative Law Judge was in error that this evidence as to delays in service should have been stricken. The joint board could have recessed the hearing and allowed the shipper witnesses to correct any deficiencies in their statements that were alleged by protestants.

Trans West. Exp., Inc., Ext.—Seattle—Portland, 118 M.C.C. 1 (5, 6).

Conversion of authority: [Vols. 11-13, 15, 18, 19, 21].—In suit to vacate Commission report and order converting outstanding permit of defendant carrier (applicant) into a certificate, plaintiff erroneously contends that, since supporting contract shipper's testimony did not show a need for common- rather than contract-carrier service, applicant failed to meet the evidence requirements for a conversion set forth in 95 MCC 312. Shipper testimony of need for requested conversion was before the Commission in considered case; further, plaintiff's position that shipper's statement that it did not care whether it had common or contract service, as long as its needs were satisfied, disposed of the issue of public need for common carriage is unsupportable in the law; the Commission recognized that a shipper's private feelings are fallible and stated that no shipper can be counted on or required to make such a distinction; in such circumstances, it properly considered the total effect of shipper testimony in granting the application.—Perkins Furniture Transport, Inc. v. United States, 333 F. Supp. 879 (884-5)*.

Because of the backlog of irregular- to regular-route conversion cases built up during pendency of Ex Parte MC-55 proceeding, special procedural rules, 49 CFR 2a, were promulgated to simplify and expedite the processing of conversion applications. They apply only to applications filed prior to March 1, 1965, and are not to be utilized to obtain regular-route authority in addition to, rather than in lieu of, corresponding irregular-route authority and do not contemplate the unwarranted broadening of a carrier's existing authority, either as to commodities or as to territory. These special rules do not alter the basic criteria of the Brady case, but, in fact, refer to it, particularily in the Declaration of Policy, which holds the applicant carriers only to such burden of proof as is consistent with a realistic approch to the objectives (set out in the Brady case) sought to be achieved.—Midwest Motor Exp., Inc., Ext.—Intermediate Points, 96 M.C.C. 402 (404, 406-7).

Cross-examination: [Vols. 11-13, 15, 19, 21].—See also Coastal Tank Lines, Inc., Ext.—W. Va. case, §206(b), n. 22 *Admissibility*.

Evidence adduced at the first hearing, to which protestant was not a party, cannot be used against protestant until it has had an opportunity to cross examine, and no decision on the merits should be made until protestant has exercised its right. Protestant did not file opposition to the application as originally published in the Federal Register because the restriction contained therein satisfied its interest. However, after a grant of authority, which differed substantially from that initially sought, was republished in the Federal Register, protestant requested oral hearing at which applicant produced no witnesses and adduced no evidence, relying solely on the evidence presented at the first hearing. The application is set for further hearing wherein the applicant should be prepared to present for cross-examination the person or persons upon whose testimony it relies.—Southern Tank Lines, Inc.—Extension—Chattanooga, 107 M.C.C. 64 (66).

Disclosure and discovery: Asserting that the charges against it were not sufficiently definite or specific to enable it to prepare a proper defense, and that if proven in a proper forum the violations could lead to imposition of criminal penalties, respondent requested that it be allowed to utilize various discovery procedures of the Federal Rules of Civil Procedure in any hearing it is required to attend. The petition was denied, because rules 56-57 and 102 of the Commission's General Rules of Practice (49 CFR 1100.56-57, 102) provide a comprehensive source of obtaining discovery. There is no reason for establishing whole sets of new and different rules for different proceedings, unless it is established that the existing rules are ineffective or otherwise insufficient to enable respondents to prepare adequate defenses. Should the present rules prove inadequate, a petition under rule 102 for extraordinary relief would be available.—Eagle Motor Lines, Inc., Invest. & Revoca. of Certif., 117 M.C.C. 72 (76-7).

Exhibits, abstracts: [Vols. 11-13, 19, 21].—Though protestants urge that applicant's traffic exhibits should be disregarded because of its refusal to permit inspection of the underlying documents, the record discloses no reason for questioning applicant's assertion that those documents were available for protestants' inspection, and the questioned exhibits are therefore evaluated on their merits.—D & M Taxi Co., Inc., Common Carrier Application, 96 M.C.C. 439 (441, 442).

Filing after hearing: [Vols. 19, 21].—Advertising material and related correspondence attached to protestant's exceptions constitute evidentiary matter which goes beyond argument and does nothing to refute the fact that protestant's counsel and stockholder, when called as applicant's witness, was evasive in answering all questions which might shed light on whether protestant placed the words "Fort Dix" in its advertising matter only after applicant filed for authority to serve Fort Dix in special and charter operations. As protestant has given no sufficient reasons for initial submission of evidence at such advanced stage of the proceeding, the attachments to its exceptions are stricken.—D & M Taxi Co., Inc., Common Carrier Application, 96 M.C.C. 439 (440).

New and extension operation: [Vols. 12, 19, 21].—Supporting shipper's failure to supply specific probative data in support of application resulted in denial of unopposed portion.—Mid-western Express, Inc., Extension—Bossier City, La., 117 M.C.C. 886 (891-892)*.

That applicant was faulted for failure to adduce evidence with respect to the services of a carrier not a party to the proceeding was a departure from the general rule that an applicant ordinarily is not required to introduce evidence detailing the ability or inability of nonprotesting carriers to handle the involved traffic [81 MCC 778]. In the circumstances, applicant had no duty to prove that the service of a carrier which indicated no interest in providing the proposed service could not meet the shipper's needs. Moreover, a number of factors have combined to increase substantially shipper's production, and where there is evidence that a large volume of traffic will be moving, the services of more that one carrier may be authorized to insure adequate service.—National Trailer Convoy, Inc., Ext.—Oregon, Ohio, 118 M.C.C. 437 (441-2)*.

The testimony adduced in support of applicant's request is couched, as was the shipper evidence described in 111 MCC 652, largely in terms of speculative generalities. As a rule, such testimony is insufficient to warrant a grant of motor carrier operating rights, and our reading of 111 MCC 652 convinces us that the same principle must be applied in disposing of requests by heavy haulers for so-called complete service authority. Moreover, applicant's size and weight traffic covers almost every article whose dimensions necessitate special handling, and thus could encompass products shipped by virtually any member of the industrial community; and an application of the "field of service" doctrine (warranting the expansion of existing commodity authorities for the purpose of enabling applicants serving specific industries to transport all of the items produced by their customary shippers), to the facts in this proceeding would approach the certification on the basis of comparatively relaxed evidentiary standards of a wholly new irregular route general commodity operation. Denied.—Eagle Motor Line, Inc., Ext.—Machinery, Tools, 118 M.C.C. 604 (614-16).

Record in other proceedings: [Vols. 19. 21].—See Ayers Extension case, §206(b), n. 23.

Self-serving, indefinite, unsupported statements: [Vols. 11, 12, 19, 21].—Applicant's failure to substantiate its claim of increased economy and needed improvements to be derived from proposed modification of authority resulted in denial of application. See also §207(a), n. 25 *economy and efficiency*.—Salem Transp. Co., Inc. Ext.—Additional Passengers, 117 M.C.C. 405 (409)*.

Weight of evidence: [Vols. 12, 13, 19, 21].—See also Fischbach Trucking Co.—Control and Merger—Peck case, §5(2), n. 115.

With regard to the question of weight to be accorded certain evidence and the qualifications of several supporting witnesses, in proceeding on application for authority to transport passengers and their baggage between Wareham, Mass., and New York, N.Y., (1) authentic resolutions by civic or fraternal groups, while properly admitted in evidence, generally are afforded little probative value; (2) testimony of institutional wit-

nesses, shown qualified to speak in behalf of potential travelers at schools they represent, should be given appropriate weight as support for the need of proposed service; and (3) testimony of Chief of Staff at Newport, R.I., Naval Base is clearly appropriate for purpose of helping to determine probable volume of traffic between points involved. Also, while individual witnesses who volunteered their support might not qualify as experts on bus transportation, they are reasonably well acquainted with available services and schedules of opposing carriers; therefore, in evaluating the evidence, their testimony is given appropriate probative weight.—Almeida Bus Lines, Inc., Extension—New York City, 106 M.C.C. 311 (323-4)*.

Applicant's exhibits have been given probative weight only to the extent that the review has indicated transportation of a shipment to an obvious noncontractor, since it was incumbent upon applicant to show that certain consignees who cannot be classified as noncontractors on the basis of identification available on the record were not, in fact, engaged in the functions of a contractor. However, applicant's method of proof (naming consignees other than contractors or shipments where the intended use of the commodity transported was not known) is sufficiently informative to support its contention that it participated in transportation of commodities for noncontractors under color of right, since it is consistent with the language of the Commission in the report which directed the reopening of this proceeding.—Mayfield Sons Trucking Co.—Removal of Restriction, 106 M.C.C. 892 (895, 896)*.

On reconsideration, applicant's traffic study in support of its alternate route application was improperly accorded little probative weight based on the fact that the underlying dispatch records from which the data was taken were not produced for inspection at the hearing. The probative value of evidence depends upon the facts and circumstances of each case, including, but not limited to, such factors as the nature of the proceedings and the purpose for which the evidence is introduced, the qualifications, knowledge, candor and demeanor of the witness introducing the evidence, and the nature of the objections raised by the opposing parties. In the instant proceeding traffic evidence of a general nature is all that is needed to show applicant to be an effective competitor engaged in transporting substantial volume of traffic over an underlying service route or routes between the points involved.—Michigan Express, Inc., Extension, 108 M.C.C. 245 (251).

The Commission has consistently held that evidence of past operations is to be considered as conclusive proof of public need for the proposed service—but only to the extent actually demonstrated by such operations (see 106 MCC 741, 106 MCC 234 cited herein).—Federal Transfer Co., Inc., Extension—Seattle, Wash., 111 M.C.C. 559 (563-4)*.

Verified statements filed in opposition to the application for household goods authority sought herein were generally fill-in-the-blank type prepared forms usually filed by protestants in opposition to *King-pak*-type applications and so detract from the weight to be afforded them.—Empire Fuel & Transfer Co., Common Carrier Applic., 113 M.C.C. 38 (44)*.

In evaluating common carrier proposal, operations conducted by applicant under erroneous, but bona fide, interpretation of either its existing authority or applicable statutory law are entitled to appropriate weight. See 106 MCC 892. Such past activities are not alone conclusive proof of public need for a proposed service but may be considered, conjunctively with other evidence to determine whether, or to what degree, the application should be granted. Applicant herein sought advice as to the legality of its operation and was reassured of their legality by unofficial views expressed by representatives of this Commission, which views were cited by Division 1 in support of its decision in a complaint case against applicant (subsequently reversed). Thus, applicant's past operations were conducted in good faith under a color of right.—Byers Transp. Co., Inc., Ext.—Restriction Removal, 113 M.C.C. 50 (55-56).

The Commission cannot base a grant of authority on evidence which is vague and couched in general terms leaving the Commission to hypothesize as to the volume of traffic to be tendered applicant or what, if

any, deficiency there is in existing service. —Jenkins Truck Line, Inc., Extension—Gentry, 117 M.C.C. 725 (728).

The evidence in support of the instant application was found to be vague and lacking in specificity and probative force. It failed to indicate that existing service is inadequate or that the proposed service is required. Instead, it would appear that shipper already has available the services of an ample number of motor carriers to handle the involved traffic and should fully utilize the services of these carriers before supporting a new carrier for additional authority.—Onley Refrigerated Transp., Inc., Ext.—Conn., 118 M.C.C. 127 (133)*.

Motor common carriers have obligations to the general public which from time to time create conflicting demands upon their equipment, and they cannot reasonably be expected to respond immediately to each and every shipper request for service. Consequently, instances of "turndowns" on the part of existing carriers mean little in the absence of a complete explanation of the facts surrounding such an event which would tend to establish a pattern of disinterest or wrongful refusal to provide service. Since such evidence was found lacking in this proceeding and since the alleged "turndowns" generally were the result of morning calls requesting service within a few hours, afternoon calls requesting service early the following morning, or calls generally requesting service in less than 24 hours, it was held that no justification for additional service was apparent.—West Nebraska Express, Inc., Ext.—Five States, 118 M.C.C. 423 (429)*.

Protestant's failure to reply to applicant's petition for reconsideration is an indication of a lack of continuing interest on its part in the involved traffic and detracts from the weight to which its opposition would normally be accorded. Application granted in part.—Coast Freightways, Inc., Ext.—Swift Meats, 118 M.C.C. 739 (744)*.

23. Official notice; res judicata; stare decisis.—[Vols. 19, 21].—In exceptions to examiners report, protestants pointed out that they had pending various applications of their own, which if granted would duplicate authority requested by applicant in present proceeding. Division 1, in the report herein, noted that the protestants' applications had, since the filing of exceptions, been granted, and, as these newly granted authorities duplicated substantially the authority requested by applicant in this proceeding, denied the application.—Willis Shaw Frozen Exp., Inc., Extension—Springdale, Ark., 96 M.C.C. 560 (564).

Applicant, seeking authority to transport coal, as well as pig iron and fertilizer, at the time of hearing was owned and controlled by two companies that were both producers and shippers of coal. Between 35 and 40 percent of applicant's total revenue was derived from transporting coal for these two companies. In protestant's reply to applicant's exceptions to examiner's report, applicant's relationship with its principal supporting shippers was pointed out. However, by footnote in the report of Division 1, official notice was taken of applicant's annual report which disclosed that the ownership and control of the two shipping companies had been terminated and the issue was declared moot, not to be discussed further. —Tajon Trucking Co. Extension—Specified Commodities, 96 M.C.C. 591 (note, 593).

The Commission may take official notice of its own decisions, and it would surely be remiss in its duty if it were to ignore the concurrent finding in investigation proceeding, heard on consolidated record with extension application, that applicant has been in willful violation of the Act and the Commission's regulations.—S & C Transport Co., Inc., Investigation and Revocation, 96 M.C.C. 642 (646).

In light of rules 1.2, 1.75, and 1.82 of the Rules of Practice, the examiner properly took notice of part of transcript of hearings in the pending *Ward* proceedings, MC-113624 (Sub-No. 17), and of the authority sought therein, because those pending applications were for authority similar to that sought here, but by other carriers. However, the examiner's independent incorporation of portions of the transcript of that hearing into his report is erroneous.—Ayers Extension—Cheyenne, Wyo., 99 M.C.C. 795 (797).

In carrying out the national transportation policy, Commission may take official notice of its actions in other proceedings bearing materially upon the issues under immediate consideration. Accordingly, Commission noted that authority to serve a portion of the area involved herein was recently granted to another carrier, not a party to this proceeding, and authority granted herein is restricted against serving that area covered in such other certificates.—West Brothers, Inc., Extension—Baton Rouge, La., 108 M.C.C. 485 (489)*.

25. Hearing, generally.—[Vols. 12-19, 21].—See also Kingpak, Inc., Investigation of Operations case, §206(b), n. 15; Red Line Transfer & Storage, Inc., Extension case, §17(6), n. 15; White Bros. Trucking Co. Extension—Dayton, Ohio, case §206(b), n. 22 *Admissibility.*

In suit to set aside order granting operating authority, the Commission did not deny fundamental fairness to plaintiffs (protestants) by handling the application under modified procedure, which provides for submitting evidence and arguments in writing, and denying plaintiff's request for oral hearing. The right to a hearing includes the right to present evidence and a reasonable opportunity to know opposing party's claims and to meet them; implicit therein is the right of "confrontation and cross-examination" in furtherance of fundamental fairness; however, although in adjudicative proceedings cross-examination and confrontation are conducive of trustworthiness in the face of factual dispute, there is no right thereto unless material facts are in dispute. Examinatin of record in instant case reveals no material difference on critical facts; thus, effect of plaintiffs' request for cross-examination is to attack the weight of undisputed facts not credibility of the affiants. Due process does not require that weight of the evidence be argued orally. —National Trailer Convoy, Inc. v. United States, 293 F. Supp. 634 (636)*.

Plaintiffs (protestants in Commission proceeding) were denied procedural due process when, after application for authority to transport certain meats, foods, and diary products, restricted to multiple pickup service in origin area and multiple delivery in destination States, as filed (including proposed restrictions) was published in the Federal Register and hearing was held thereon by an examiner, Review Board No. 3 deleted proposed restrictions because of administrative undesirability and substituted a "mixed load" restriction in lieu thereof without any further notice or hearing. At some point in the proceeding, initially or on petition to reopen, plaintiffs were entitled to a hearing and an opportunity to show, if they could, the claimed gravity of the substitution. The order and certificate as actually granted should be republished in the Federal Register, with plaintiffs given an opportunity to offer evidence and to be heard on the substitution question; case remanded for further Commission consideration.—Refrigerated Transport Co., Inc. v. United States, 297 F. Supp. 5 (6-7, 9)*.

In suit to set aside Commission order in consolidated proceeding, which denied plaintiff's application for certificate, there is no merit in plaintiff's allegation that the Commission failed to relate its findings and conclusions to the evidence since, where grounds for agency's action can be clearly perceived, such a point-by-point annotation is not legally required. The Commission summarized authority sought in each of the 32 applications, noted tonnage handled by those applicants holding temporary authority, summarized shipper support for the various applicants, described services being provided by existing carriers, and then found that evidence of record did not justify granting authority for proposed additional services; its report contains all the essential findings required, and the Commission is not compelled to note the evidence supporting each finding. Therefore, since interests of all parties were adequately represented at a full and fair hearing, and substantial evidence supports the Commission's action, order denying plaintiff's application is sustained.—Mississippi East, Inc. v. United States, 301 F. Supp. 1332 (1335-8)*; Yourga Trucking, Inc. v. United States, 308 F. Supp. 625 (628)*.

Commission denial, in application proceeding handled under its modified procedure, of protestants' (plaintiffs) motions for oral hearing and right to cross examine applicant's witnesses, especially on economic feasibility of latter's operating under an interline restriction, affords no basis to set aside order granting unrestricted general

commodity authority. Applicant's evidentiary affidavits showed need for its proposed service; but protestants made no showing adverse to the evidence on issue of economic feasibility, nor did they use discovery procedures available under modified procedure which might have obviated their alleged need for oral hearing and cross examination. Viable and useful modified procedure depends on the general principle that a party cannot simply fail to dispute the veracity of sworn statements and then succeed in a demand of the right to cross examine. In view of protestants' inability to show from their own records an adverse diversion of material traffic, and their failure to attempt the use of discovery procedures, the Commission's conclusion does not violate any concept of fundamental fairness or due process.—Ashworth Transfer, Inc. v. United States, 315 F. Supp. 199 (202-3)*.

The Commission's decision not to reopen considered proceeding, wherein intervening carrier's application was granted without a proposed restrictive amendment, did not constitute denial of due process to plaintiff (protestant) who had withdrawn from the proceeding in reliance on that restrictive amendment. The opinion in 106 MCC 1 and warning in the Federal Register—that restrictions not acceptable to the Commission would be eliminated—were sufficient to put plaintiff on notice that amendments must be acceptable to the Commission and that anyone who withdraws relying on a proposed amendment does so at his own peril. Moreover, an application proceeding is not like a lawsuit where the court normally accepts stipulations and restrictions agreed to by the parties and does not superimpose third-party interests on the litigants. The Commission is required to represent the public, a third party, when it grants or denies certificates and, in that capacity, it cannot defer to the parties and permit them to define the metes and bounds of the controversy.—Frozen Food Exp., Inc. v. United States, 328 F. Supp. 666 (669-70)*.

In action to set aside Commission order granting the authority sought in defendant carrier's application which, under Rule 247(e)(3) of the Rules of Practice, was handled by modified procedure without oral hearing, plaintiff (protestant) was not denied its right to cross examine adverse witnesses under such procedure. Due process of law does not require that an oral hearing be held in all administrative agency cases [citing 303 F. Supp. 742]. Administrative decisions based solely on written presentations are within the limits of procedural due process where proper safeguards exist; and there are proper safeguards for procedural due process under Commission modified procedure, which affords all parties an ample opportunity to present their evidence, including rebuttal, in affidavit form and provides a specific method (Rule 53) for obtaining cross-examination or oral hearing where material facts are in dispute.—Howard Hall Co. v. United States. 332 F. Supp. 1076 (1079-80)*.

Therefore, since no material facts were in dispute in the application proceeding and a specific request for cross-examination or oral hearing was never made therein, plaintiff had no absolute right to an oral hearing, especially when it made no attempt to utilize the Commission's discovery procedures. Under the circumstances, plaintiff should not be allowed to defeat an adverse ruling by requesting an oral hearing for the first time after a decision approving the application had been entered; order sustained. —Id., pp. 1080, 1082.

One applicant's petition requesting that its application be considered separately from other proceedings embraced in consolidated proceeding and that examiner's recommended order, granting it authority to transport canned carbonated beverages from N.Y. point to designated points in 6 destination states, to which no exceptions were taken but which was stayed by the Commission, be affirmed, is denied. The two other applicants seek to provide essentially the same service and thus it is appropriate to consider all applications together.—Stevens Truck Lines, Inc., Extension—New England, 95 M.C.C. 63 (64).

Petition of rail protestants for further hearing in extension proceeding, to introduce certain evidence adduced in applicant's interim "grandfather" proceeding, denied. Since the two proceedings deal with related issues, they are disposed of in a single report; such consolidation of the proceedings has the same effect as the further hearing sought by the rail carriers.—Midwest Emery

Freight System, Inc., Interim Application, 95 M.C.C. 642 (642, 644-5).

Upon a thorough review of the record, including the transcript of the hearing, applicant's accusation that the examiner's attitude throughout the proceeding was "one of suspicion" is unfounded. While the examiner was forced on a number of occasions, particularly during the lengthy testimony of applicant's principal witness, to clarify certain points by examining the witness, such examination was well within his province as an examiner and certainly warranted in the circumstances; furthermore, applicant's claim that the examiner disregarded the testimony of its principal witness is completely without merit.—Schenck Tours, Inc., Extension—Nassau, 96 M.C.C. 66 (75)*.

Although evidence relevant to operations of two rail carriers was presented by other rail protestants, those carriers had not entered an appearance in accordance with the Rules of Practice, and applicant's motion to strike their exceptions was granted. On the other hand, its motion to strike was denied as to two motor carriers who had made timely appearances under the rules then in effect, even though a subsequent change therein would have required them to have done more. Subsequent modification of the Commission's Rules of Practice does not affect the status of parties to a proceeding which commenced prior thereto.—Transport, Inc., Extension—Ex-Rail Cement, 96 M.C.C. 671 (674).

When normal oral-hearing procedure would be costly and time-consuming to all the parties, in view of the broad commodity and territorial scope of the application and the large number of parties, special procedure was promulgated with a view of further processing the application in the most convenient, economical, and expeditious manner possible consistent with due process. Consequently, applicant was directed to file (1) complete written prepared testimony of all persons intending to present supporting evidence and (2) any restrictive amendments, consistent with supporting evidence, which could be submitted for purpose of reducing the issues. Special procedure in such cases can be a useful tool in cutting costs and in reducing the regulatory backlog since, after viewing applicant's verified statements, the Commission can determine the most effective way of processing the case and, if a hearing is necessary, a more accurate estimate can be made of the time required therefor.—Jerry Lipps, Inc., Extension—Pipe, 110 M.C.C. 113 (114, 120).

However, it is incumbent on applicant to prove a prima facie case in its verified statements before the Commission would be justified in setting a case like the instant one or oral hearing. Therefore, the requested oral hearing would serve no useful purpose and would entail considerable expense to all the parties and the Commission; moreover, since applicant failed to establish a prima facie case through verified statements which were required to set forth all its direct evidence, the application would still have to be denied; petition for oral hearing denied.—Id., pp. 119-120.

The joint board's action in refusing protestant's counsel the opportunity to cross-examine applicant's witness as to certain vehicle defects set forth in protestant's offer of proof was not prejudicial. The defects were not alleged to have resulted in any injury or accident or to have been left uncorrected. The offer of proof is clearly insufficient to proclude a finding of fitness.—Tri-State Coach Lines, Com. Car. Applic., 110 M.C.C. 601 (604).

36. Laches.—[Vols. 13, 17, 21].—In suit seeking judicial review of Commission order (entered two years earlier) granting certificate to intervenor, the right of plaintiffs (protestants) to relief is not barred by laches. There is no applicable statute of limitations; and mere running of time does not invoke the doctrine of laches, since it is an equitable doctrine addressed to discretion of the trial court in which each case must be determined according to its own particular facts. The crucial consideration is whether assertion of plaintiffs' cause, through lapse of time, would do defendants an injustice. Under the facts of instant case, no such injustice would ensue; rather, it would be inequitable to bar plaintiffs' suit for a two-year delay under the particular circumstances. Moreover, plaintiffs have been denied procedural due process, and the court does not look with favor on a loss of constitutional rights by laches.—Refrigerated Transport Co., Inc. v. United States, 297 F. Supp. 5 (7, note, 8)*.

Regulations of the Commission

34 FR 18122, Nov. 11, 1969, Part 1003: List of Forms, §1003.1(a) Application forms, certain prescribed motor carrier and broker forms amended, and Forms OP-TA-19 and OP-TA-19(a) added, effective upon publication in the Federal Register.

36 FR 4984, March 16, 1971, Part 1003: List of Forms, §1003.1(a) Application forms, amended by adding Form OP-OR-10, Application for Postal Motor Carrier Certificate, effective on date of order.

36 FR 5911, March 31, 1971, Part 1003: List of Forms, §1003.1(a), Form OP-OR-10 (36 FR 4984) prescribed for use by persons who were contractors under a star route, mail messenger, or contract motor vehicle service contract on effective date of the Postal Reorganization Act (P.L. 91-375), effective on date of order.

36 FR 21596, Nov. 11, 1971, Part 1062: Special Regulations for For-Hire Motor Carriers Engaged in the Transportation for Recycling or Reuse of "Waste" Products in Furtherance of Recognized Pollution Control Programs, new Part 1062 setting forth special procedures, added, effective Dec. 15, 1971.

37 FR 14307, July 19, 1972, Part 1003: List of Forms, §1003.1 Motor Carrier and Broker Forms, OP-OR-9 revised, effective Aug. 21, 1972.

37 FR 24355, Nov. 16, 1972, Part 1003: Lists of Forms, §1003.1 Motor Carrier and Broker Forms, amended by deleting Form B.M.C. 79 and substituting therefor Form BOp-79, effective on date of order.

Section 207. [§*307(a) U.S.C.*] Issuance of certificate.—(a) Issuance authorized to qualified applicants for regular routes and between fixed termini.—[Unchanged. See vol. 10, p. 7988.]

Historical Note, see vol. 16, p. 12842, vol. 18, p. 14365, vol. 19, p. 15609, vol. 21, p. 17250.

Notes of Decisions

Volume 10—p. 7988; Volume 11—p. 9432; Volume 12—p. 10390; Volume 13—p. 11071; Volume 14—p. 11589; Volume 15—p. 12195; Volume 16—p. 12842; Volume 17—p. 13537; Volume 18—p. 14365; Volume 19—p. 15609; Volume 21—p. 17251.

5. Construction and interpretation.—[Vols. 10-19, 21].—In action to set aside Commission order granting a certificate to defendant carrier, plaintiffs' claims as to priorities and rights of the competing carriers, and their concepts of "justice" *among the carriers*, are strictly secondary to the legal standards set out by Congress—*public* convenience and necessity. The Commission very correctly addressed itself to the needs of the public and its conclusion, that the public needs the extra hauling capacity in the areas embraced in the certificate, is not only supported by the record but most obvious thereon; sustained.—Carolina Freight Carriers Corp. v. United States, 297 F. Supp. 848 (852)*.

While "public convenience and necessity" has not been defined by the statute, that phrase should be interpreted in the light of prior judicial and administrative interpretation to secure for the nation the broad aims of the Act.—Feature Film Service, Inc. v. United States, 349 F. Supp. 191 (201)*.

There is no express statutory prohibition against certification of an air carrier as a motor common carrier, and no special rule should apply to an air freight forwarder, since the Commission recognizes that the Federal Aviation Act classifies air forwarders as air carriers. As a need for the service has been established by shipper and consignee testimony, and since the record fails to support protestant's argument that a grant of authority would enable the applicant to discriminate and gain a competitive advantage over competing certificated air carriers in applicant's motor carrier operations, public convenience and necessity require issuance of a certificate, restricted to traffic having an immediately prior or subsequent movement by air.—Direct Air Freight Corp.—Common Carrier Application, 106 M.C.C. 785 (789-91).

6. Restriction of operation.—[Vols. 10-19, 21].—See also AADA Systems, Inc. case, §207(a), n. 25 *Truckaway;* Ashworth Transfer, Inc., Ext.—15,000 lb. Articles case, §207(a), n. 7 *Existing motor carriers;* Ashworth Transfer, Inc. v. United States case, §207(a), n. 25; Atlas Van Lines, Inc., Extension case, §207(a), n. 28 *Elimination;* Burham Van Service, Inc., Extension

—Hawaii case, §208(a), n. 30; Distributors Service Co. case, §207(a), n. 25 *Fitness;* Eastern Massachusetts S. Ry. Co. Ext.—Tours case, §208(c), n. 10; Georgia Highway Exp., Inc. v. United States, §207(a), n. 25; Home Transp. Co., Inc.—Purchase—Fuchshuber case, §5(2), n. 110 *Restrictions;* Mutrie Motor Transportation, Inc., Ext.—Ex.-Rail case, §3(4), n. 39; R.A. Gould, Inc., Extension case, §207(a), n. 25 *Interchange;* Ray Carter, Inc., Extension case, §212(a), n. 30; Sammons Trucking Extension—Fort Dodge, Iowa case, §206(b), n. 16 *Narrowing;* Wilson Trucking Corp.—Purchase—Compton Lines, Inc. case, §5(2), n. 110 *Restrictions.*

In action to set aside Commission order granting defendant carrier (applicant) authority to operate between Mobile, Ala., and Pensacola, Fla., restricted against transporting traffic "moving solely between" Mobile, on one hand, and Pensacola, Panama City, and Jacksonville, Fla., and Atlanta, Ga., on the other, the Commission committed error when, without giving any further notice, it removed stipulated restrictions against "transportation of any traffic, direct or interline," between those points and granted the broader authority. Since applicant already held authority to serve Pensacola, and the authority granted was not restricted against tacking, it not only received a new grant to a new terminal, serving a new area, but in effect it received a second grant of authority due to permitted tacking at Pensacola which extends its authority eastward several hundred miles.—Georgia-Florida-Alabama Transp. Co. v. United States, 290 F. Supp. 764 (765-6)*.

As the Commission itself has noted, where tacking occurs on a new grant, two grants actually take place: (1) a grant of authority between the two terminals and (2) a grant from a new terminal to all other areas brought into being by tacking to a terminal which applicant already serves under a prior grant. However, a much graver situation arises where tacking occurs and no restrictions are made against interlining; and, in instant case, the additional grant by reason of tacking and removal of the restrictions contained in the application constitutes a grant of authority not contemplated by the application which could adversely and materially affect operations of other authorized carriers. Order and certificate as granted should be republished in the Federal Register with opportunity given plaintiffs and others interested to offer evidence and be heard; then the Commission will re-examine the evidence and arguments and determine whether the certificate and order should stand or be set aside.—Id., pp. 766-7, 769.

In action to set aside the Commission's grant of authority to defendant carrier, there is no merit in plaintiffs' contention that the record does not support the Commission's conclusion that grant of single line authority from Chicago to eastern States, unrestricted as to interlining from the west, would not materially alter existing competitive situation. The applicant had handled considered traffic in joint-line service for several years; interlining is a right and duty of common carriers; and it is a well-established Commission policy to impose restrictions against interlining only where it is shown to be necessary in the public interest, since restrictions on operating rights create undesirable complications. Moreover, the Commission's conclusions that any restriction of the authority granted would preclude applicant from continuing service it had provided, and would adversely affect shipper and interlining carrier using that service, finds substantial basis in the record evidence; order granting the certificate sustained.—Midwest Emery Freight System, Inc. v. United States, 293 F. Supp. 403 (406-7, 408)*.

In suit seeking judicial review of Commission order granting certificate to intervenor, the court recognizes, and does not question, that in granting operating authority the Commission may add to, delete from, or change applicant's proposed restrictions as the public interest may require. Also, it is obvious that some of the additions or deletions may require publication of additional notices and further hearings; others may not. Whether the Commission acted reasonably or arbitrarily when it deleted restrictions originally sought by the applicant and substituted a different restriction of its own, without any further notice or hearing, cannot be determined on the record; moreover, that question is one which calls initially for the Commission's expertise. However, plaintiffs (protestants) are entitled to show at a hearing, if they can, the claimed gravity of the substitution; and that opportunity has been arbitrarily denied. Matter remanded for further Commission consideration in conformity with the court's opinion.—Refrigerated Transport Co., Inc. v. United States, 297 F. Supp. 5 (6-7, 9)*.

On review of the record in carrier's suit to enjoin Commission order on rehearing which substituted a "single plantsite," in lieu of the "mixed load," restriction in the certificate issued to it 5 years earlier, imposition of the new restriction after years of operations under the "mixed load" certificate was not inequitable, as plaintiff claims, in that such added restriction of its authority will cause it an extreme financial hardship. Undoubtedly the new restriction will adversely affect plaintiff's operations which, under certificate issued, were expanded probably to require additional investments in equipment and personnel; however, interstate operating authority is not granted pursuant to the doctrine of estoppel but, rather, on a determination of the public need. Moreover, plaintiff's expanded operations to some extent appear to result from its own questionable compliance with the "mixed load" restriction. Record shows that the authority granted on rehearing is consistent with evidence presented in support of original application; injunctive relief, denied.—Greenstein Trucking Co. v. United States, 343 F. Supp. 194 (200)*.

Restrictions limiting traffic to that which originated at specific cement plants or restricting traffic against movement between rail points rejected as limiting service to the public and competition among various cement producers without serving any useful purpose or providing any real protection for protestant rail carriers.—Transport, Inc., Extension—Ex-Rail Cement, 96 M.C.C. 671 (682).

Restriction to shipments moving from, to, or between warehouses, wholesale, retail, and chain outlets, or other facilities of grocery and food business houses was imposed on authority to transport commodities dealt in or sold by grocery stores, because only such limited authority was shown as needed.—Interstate Grocery Distribution System Ext.—Paper, 98 M.C.C. 546 (549-550).

As a condition to grant of authority and to insure authority granted applicant is not utilized by other corporations and in interest of corporate simplicity, applicant must merge with three other involved corporations or else these corporations must be dissolved. In view of the commodity description "used passenger automobiles" and the secondary movement limitation in authority sought, it is not necessary nor desirable further to burden authority granted with proposed restriction against the transportation of vehicles for or on behalf of manufactures.—AAA Con Drivers Exchange Common Carrier Application, 102 M.C.C. 393 (398, 401).

Restrictions on motor operations frequently create undesirable complications and should not be imposed except where it is shown conclusively that they are necessary, in the public interest, and consistent with practicable and effective transportation regulation. While the phrase "administratively undesirable" broadly depicts the ultimate reason for the limitation or modification of any proposed restriction, there are at least three more specific reasons for most of the changes made by the Commission: (1) that the proposed restriction serves no useful purpose, (2) that it is unclear or confusing or (3) that it is unduly restrictive. An additional factor to be considered is whether or not proposed restriction serves only or primarily the purpose of limiting the efficiency of the operations. 96 MCC 627, which has been misconstrued throughout the transportation industry, indicates that acceptance or rejection of a proposed restriction depends not upon the particular language utilized—i.e., whether it is positively or negatively phrased—but rather on the purpose intended to be served by the particular limitation.—Fox-Smythe Transp. Co. Extension—Oklahoma, 106 M.C.C. 1 (9-10, 15).

Moreover, the many complex problems involved in drafting proper commodity, territorial, and service descriptions and restrictions can be broadly categorized as (1) the imposition of restrictions generally, (2) the undue fragmentation of authority, and (3) the formulation of appropriate and practical commodity descriptions. Accordingly, this proceeding, being representative of numerous others, is an appropriate tool for dealing with the basic problems of proper and practicable commodity, territorial, and service descriptions and restrictions. Those problems are discussed extensively and, in an effort to develop clear and unmistakable guidelines for future use, specific suggestions are set forth.—Id., pp. 1, 5, 9.

As concluded in 103 MCC 318 (sustained, 288 F. Supp. 641, aff'd 393 US 265), any authority granted to local motor carriers to serve exempt forwarders of used household goods should be so circumscribed as to allow continuance of the past carrier services and at the same time preclude rendition of any broader service. Record in instant proceedings shows that operations of both applicants consisted of services as agents of such exempt forwarders in performance of pickup and delivery services primarily between residences of householders and their warehouses and, in addition, rendition of a specialized packing, crating, and containerization service on used household goods shipments. Accordingly, both certificates granted are restricted to "transportation of traffic having a prior or subsequent movement, in containers, beyond the points authorized and further restricted to the performance of pickup and delivery service in connection with packing, crating, and containerization or unpacking, uncrating, and decontainerization of such traffic".—District Moving and Storage, Inc., Common Carrier Application, 107 M.C.C. 896 (900-1, 903-4).

Commission denied applicant's restriction of authority to shipments picked up and delivered on the same day as such restriction would serve only to render the operation difficult.—Swan Messenger Service, Inc., Ext.—General Commods., 112 M.C.C. 26 (34-5)*.

The proposed restriction on applicant's authority which would allow applicant to handle only that traffic which could be unloaded by applicant's mechanical unloading devices is not imposed because it would be unduly limiting and would impede the free flow of commerce.—Pittsburgh & New England Trucking Co., Extension, 113 M.C.C. 46 (48)*.

Authority granted to applicant to transport animal and poultry health aids, animal and poultry feed, and animal and poultry feed ingredients, restricted to shipments of mixed loads for protection of protestant, who has no authority to transport health aids. Citing 92 MCC 254, 255, Commission declined to fix arbitrary limits on the percentages of the mixed load restriction, requiring only that each load constitute a "reasonable volume of contrasting freight".—C.B. Transportation, Inc., Ext.—Worthington, Minn., 118 M.C.C. 247 (250-51)*.

In general: [Vols. 18, 19, 21].—The Commission has refused to impose restrictions that lack precision and consequently are difficult to enforce, as well as ones that are administratively undesirable and burdensome to police. Considered "truckload lot" restriction, imposed in certificates during early days of motor carrier regulation, is both imprecise in meaning and difficult, if not incapable, of enforcement; such restrictions are uniformly rejected when proposed today; and it is neither unreasonable nor arbitrary to remove them from existing certificates. Question of the inconsistency of truckload lot restrictions with the basic tenets of common carriage has been dealt with in several cases and, on one occasion (98 MCC 607, 612), it was stated that such a restriction is not legally sustainable. Furthermore, public policy favors issuance of operating authorities to perform a complete service, and "truckload lot" restrictions militate against that policy; therefore, in instant circumstances, removal of the truckload restriction, which unduly precludes needed complete services, would be in the public interest and consistent with the national transportation policy.—Removal of Truckload Lot Restrictions, 106 M.C.C. 455 (483-4, 488, 490, 493)*.

On a petition for extension of operating authority by a regular route carrier of general commodities where a need clearly exists for a service similar to that proposed by the applicant, but where doubts exists as to whether applicants' proposed service, if authorized, would be fully responsive to the actual needs of the shipping community, the issuance of the certificate is conditioned upon applicant's acceptance of the following conditions: that the grant of authority will be limited to a term of three years from the date of the certificate; that applicant file an annual performance report with the Commission's Bureau of Economics; and that the Commission's jurisdiction be reserved to impose such further terms and conditions to insure that applicant's operations comport with the type of service the supporting shippers are shown to require on this record.—Campbell Sixty-Six Express, Inc., Extension—Atlanta, 108 M.C.C. 80 (82).

Restrictions to service at facilities of named shippers are imposed in grants of authority only where affirmatively justified by the evidence. Record herein shows clearly that applicant intended throughout this proceeding to seek appropriate authority to serve all shippers of the considered commodities in Philadelphia, Pa. Unrestricted authority granted.—Weiss Transportation Co. Extension—Delaware, 114 M.C.C. 70 (72-3)*.

Any consideration of an application by a rail motor common carrier affiliate to eliminate restrictions binding it to operations auxiliary and supplementary to rail service must begin and end with consideration of what constitutes the "special circumstances" necessary to warrant a grant of functionally unrestricted operating authority [63 MCC 91, 355 US 149].—Southern Pac. Transp. Ext.—Elimination of Restrictions, 117 M.C.C. 224 (325).

See also, §207(a), n. 35.

Commercial zone: [Vols. 11, 17, 18].—See Hayes Lines, Inc. v. Gateway Transportation Co., Inc. case, §204(c), n. 6.

Commodities: [Vols. 18, 19, 21].—In action to set aside Commission's order granting plaintiff authority to transport frozen fruits, frozen berries, frozen vegetables, and potato products, instead of the frozen foods and potato products authority applied for, the reviewing court finds that the grant of such limited authority is not based on adequate subsidiary findings, not supported by substantial evidence. In restricting the authority the Commission referred to a "scheme" to which each application should conform, but made no findings to support its grant of such limited authority. Furthermore, in its "scheme" to limit commodity description, the Commission did not consider the copious evidence of need for transportation of "frozen foods" and disregarded the requirements of "typical" shippers. Remanded for further proceedings in conformity with the court's opinion.—Dunkley Refrigerated Transport v. United States, 253 F. Supp. 891 (895-6)*.

When the commodity restriction "(except acids and chemicals)" is added to a grant of authority to transport dry animal and poultry feeds, it implies that some dry animal and poultry feeds are acids and chemicals and that some are not. Dry animal and poultry feeds are not listed as acids and chemicals in the National Motor Freight Classification and are not commonly considered to be such for transportation purposes. Therefore, dry animal and poultry feeds are excluded from the acids and chemicals classification by common usage and the phrase "(except acids and chemicals)" should be eliminated from the grant of the feeds authority.—Stearns Common Carrier Application, 96 M.C.C. 627 (628).

Transportation of refrigerated commodities is routinely permitted to carriers of general commodities, with usual exceptions as noted, and we are reluctant to exclude any specific commodities or class of commodities from such authority merely because of dormancy of prior rights in such limited respect, barring a convincing showing of adverse effect upon others.—Howard's Exp., Inc.—Purchase—Exchange Trucking Corp., 97 M.C.C. 341 (350).

Applicants' authority should be limited to transportation of "used household goods" since the majority of support for the present applications is provided by freight forwarders who, by virtue of the §402(b)(2) exemption, are limited to handling of "used household goods" and applicants' evidence relative to past services concerns essentially the same commodities.—Central Forwarding, Inc., Extension, 107 M.C.C. 706 (717).

Applications granted in the consolidated proceeding are subject to a restriction against the transportation of commodities which because of size or weight require the use of special equipment. In accordance with the Commission's policy of not unduly encumbering grants of authority this restriction will be inserted in a grant of specific-commodity authority only in those instances where heavy-hauler protestants can affirmately establish (or where it is admitted) that they will be materially or adversely affected by the failure to impose such a restriction. Protestants herein have demonstrated that they would be affected by the failure to impose such a restriction. Restriction imposed.—Herr's Motor Exp., Inc., Extension—Wheeling Steel, 108 M.C.C. 626 (634)*.

Although applicant requests that the authority be restricted against the transportation of commodities in bulk, in dump or tank vehicles, no need has been shown for the transportation of any commodity in bulk. Accordingly, the proposed vehicle limitation is inappropriate; and the authority granted will simply be restricted against the movement of "commodities in bulk".—Frost Trucking Co., Extension—Philadelphia, Pa., 110 M.C.C. 203 (210)*.

Although applicant sought general commodity authority and excepted therefrom two of the five usual exceptions ("household goods" and "articles of unusual value"), the Commission also excepted "commodities in bulk," "classes A and B explosives," and "size or weight" commodities from authority as no need has been shown for such transportation.—Watkins Motor Lines, Inc., Ext.—General Commodities, 113 M.C.C. 658 (670-72).

Applicant's assertion that inclusion of express and newspapers in certificates authorizing transportation of passengers has become general practice, and should be granted in absence of showing by protestant of material and adverse effect of such grant, is rejected. No such general policy exists and public support is required for any grant of new authority.—Greyhound Lines, Inc., Ext.—Norwich, Conn., 115 M.C.C. 617 (619-20)*.

See also Garrett Freightlines, Inc.—Modification case, §212(a), n. 1.

Direction: [Vol. 18].—See Tarantola Trucking Co., Inc., Modification of Certificate case, §212(a), n. 30.

Distance: [Vol. 18].—Authority to transport used household goods for freight forwarders exempt from regulation by §402(b)(2) is restricted to territorial scope of applicants' past good faith operations and is described in terms of named counties rather than in miles.—Central Forwarding, Inc., Extension, 107 M.C.C. 706 (715-16).

Equipment: [Vols. 18, 19, 21].—Since applicant's existing authority to haul coke to Ohio and Kentucky is restricted to movements "in bulk," it cannot meet shipper's requirements for shipments of coke in bulk pack equipment, i.e., in steel containers which hold 12 tons of coke and which are loaded and unloaded, five to a trailer, by overhead crane, to consignees in those states which require that type of delivery. Authority is granted to move coke with no restrictions subject to the provision that such unrestricted authority granted shall not be construed as conferring more than one operating right.—Skinner Motor Exp., Inc., Extension—Bulk Commodities, 96 M.C.C. 135 (141-2).

Qualifying phrases in operating authorities should normally be confined to those which describe the service authorized or the transportation characteristics of the commodity transported and should serve some positive purpose. Such limitations should be positive in nature because negative restrictions, designed solely to keep a carrier from using a particular kind of equipment to the asserted benefit of existing operations, prevent the rendition of needed service with optimum efficiency. A restriction banning the use of tank or hopper-type vehicles for transportation of bulk commodities is therefore unacceptable.—Stearns Common Carrier Application, 96 M.C.C. 627 (628).

In a grant of operating authority, a restriction limiting commodities to those "requiring temperature control" should not be imposed. Rather, the commodities will be restricted to those "moving in vehicles equipped with mechanical refrigeration". This latter description follows the policy in 71 MCC 321, in which it was said that such form of grant is not only definite but has the advantage of being largely self-policing, since equipment of the type specified is necessarily insulated, heavy, and expensive, and not attractive for any extensive use in the movement of commodities which do not require refrigeration.—Zero Refrigerated Lines Extension—Six States, 96 M.C.C. 482 (488).

The restriction "in vehicles equipped with mechanical loading devices" is designed solely to restrict the type of equipment a common carrier may use, and not only does it obstruct the free flow of traffic, but it also impairs the efficiency of the carrier; therefore, being contrary to the Commission's view relating to the duties of a common carrier, it is unacceptable.—M. Pascale Trucking, Inc., Extension—Gray, Maine, 99 M.C.C. 542 (544).

In order to protect existing carriers from unwarranted competition, grants of authority to transport foods, food preparations, etc., are limited to transportation in vehicles equipped with mechanical refrigeration. Such equipment normally is not provided by the regular-route protestants, and the additional expense inherent in operation of mechanically refrigerated vehicles should effectively prohibit the entry of irregular-route applicants into the dry freight business. —Frozen Food Express Extension—Four States, 103 M.C.C. 913 (917)*.

Public convenience and necessity found to require operation by applicant as a common carrier of iron and steel fencing (except commodities the transportation of which, because of their size or weight, require the use of special equipment) from La Grange, Tex., to points in the United States. —Pre-Fab Transit Co., Ext.—Fencing, 118 M.C.C. 68 (72)*.

Explosive, 5 year limitation: [Vols. 18, 19, 21].—Since authority to transport aerospace craft involves transportation of jet thrust units (classes A and B explosives), authority granted limited to 5-year term, to extent that movement of such explosives is involved.—U.S.A.C. Transport, Inc., Extension—Missiles, 103 M.C.C. 23 (36).

Job-site: [Vol. 18].—Petitioner's contention is that the term "jobsite" has never been defined by the Commission and finds little or no acceptance in dictionaries, and that therefore such term is ambiguous. While the Commission has been loath to place jobsite restrictions in operating authorities, this is not because the term "jobsite" is ambiguous or undefineable but rather because jobsite locations do not have permanency either with respect to the location of a particular job or to the duration of time expended on a particular job; the term itself i.e., what a jobsite is, as embasced in petitioner's certificate is clear and unambiguous and susceptible of only one reasonable interpretation.—Widing Transportation, Inc., Investigation and Revocation of Certificates, 110 M.C.C. 106 (110).

Keypoint restriction: Modification of key-point restriction at Poplar Bluff, Ark., was approved to enable applicant to perform substituted motor service from St. Louis to destinations in Missouri. Applicant has shown that such operations would accomplish economies and needed improvements in rail service. Complete removal of such restriction is denied as all-motor movements are not the basis for economies and improvements in service and would divert significant traffic from protestant.—Missouri Pac. Truck Lines, Ext.—Key Points, 111 M.C.C. 383 (387-8).

Application to modify key-point of Abilene, Tex., so as to provide motor carrier service solely for REA express shipments between Dallas-Forth Worth and intermediate points along route of movement to key-point of El Paso, Tex., approved. Modification results from discontinuance of two trains handling such traffic; inability of protestants to meet needs of REA; and applicant's satisfactory service under temporary authority. Restriction of applicant's authority to only those express shipments having prior or subsequent movement by rail found not justified as it would foreclose applicant from traffic it formerly or persently handles and would preclude applicant from tendering a complete and rounded service on all tendered express traffic.—Texas & Pacific Motor Transport Co.—Modification, 111 M.C.C. 389 (393-4).

Limited-term operating authorities: [Vols. 18, 19, 21].—See also *Explosives*, above.

Commission limited the grant of authority herein to three years in view of fact that virtually all other previously authorized carriers have demonstrably failed to individually provide reliable, expeditious service for considered operations. Commission also retained jurisdiction in order to impose such further terms as may be found necessary in the future.—Texas-Oklahoma Express, Inc., Ext.—Oklahoma Points, 110 M.C.C. 769 (783-5).

Inasmuch as applicant seeks authority to transport classes A and B explosives, such authority will be made subject to a 5-year limitation in accordance with Commission policy as stated in 64 MCC 299.—Rio Grande Motor Way, Inc., Ext.—Grand Jct. to Price, 111 M.C.C. 715 (716).

Although applicant has remedied its past service deficiencies which violated §216(b) and its own certificates, the serious nature of the violations causes the Commission to limit the grant of authority herein to a 3-year term during which the Commission will examine whether applicant continues its compliance efforts regarding all authorized operations—Spector Freight System, Inc., Extension—Whitley, 111 M.C.C. 889 (893-94).

While applicant had made a sincere effort to correct past mistakes and indicated a willingness to effect compliance with a mixed-loads restriction in one of his certificates, the grant of authority was limited to a 3-year term in view of his unauthorized operations.—Radke Extension—Various Commodities, 113 M.C.C. 89 (96).

Authority granted is limited to 3 years as the Commission retains some doubts that the proposed service, a rather unique type of cross-country operation involving substantial new equipment and terminals, is feasible. Applicant, therefore, is also required to file annual performance report, as detailed herein, to enable Commission to determine if shipping public has obtained required service.—Watkins Motor Lines, Inc., Ext.—General Commodities, 113 M.C.C. 658 (669-70).

Because record discloses applicant has occasionally failed to provide authorized service in the area considered herein, and because certain doubts exist whether applicant's service would actually reflect the type of expedited operation proposed and shown to be required, grant of authority is restricted to a term of three years and the filing of an annual "Performance Report," as detailed, is required.—East Tex. Motor Frt. Lines, Inc., Ext.—Miss. & La., 115 M.C.C. 122 (142-3).

Since shippers and receivers of general commodities, with exceptions, between Portland, Oreg., and Seattle, Wash., have shown that the existing joint-line service is not meeting their reasonable transportation requirements, such as consistent overnight service, scheduled pickup, available specific types of equipment, and a carrier willing to handle the traffic. The Commission should be provided with sufficient and pertinent data to permit a determination as to the extent to which applicant's actual performance measures up the operation proposed and shown to be needed by the shipping public. Applicant granted a 3-year term certificate with a condition that it file an annual Performance Report at the end of each of the first 2 years after date of issuance of the certificate. If applicant desires it may file a petition for permanent extension of the certificate.—Trans West. Exp., Inc., Ext.—Seattle-Portland, 118 M.C.C. 1 (12).

In view of applicant's past violations of the Act through illegal tacking operations and certain leases and interchange arrangements which have now been terminated, the authority granted herein will be limited to 3 years to afford the Commission an opportunity to examine whether applicant continues its compliance efforts.—Distributors Service Co., Extension—Foods, 118 M.C.C. 322 (330)*.

In light of past violations, authority granted was limitied to a term of two years.—People Express Co., Ext.—Empty Containers, 118 M.C.C. 675 (680).

Oilfield, oilwell; pipeline stringing: [Vols. 18, 21].—See Willett Extension—Pipeline Machinery case, §207(a), n. 25 *Commodity description.*

Passenger operations: [Vols. 18, 19, 21].—In action to set aside Commission order granting authority to intervening defendant bus line to transport passengers over roughly the same routes as limousine service being provided by plaintiff (protestant), the certificate authorizing operations "by motor vehicle" may be read to permit both bus service and limousine service exactly duplicating that of plaintiff, as it contends. Therefore, in view of defendant carrier's representations that it provides only a motor bus service, the reviewing court holds that, for instant case and any other proceedings involving the parties or their successors, the authority granted to intervening defendant carrier is limited to a motor bus service.—Connecticut Limousine Service, Inc. v. United States, 295 F. Supp. 1335 (1338)*.

Authority granted taxicab operator for special and charter operations between Fort Dix and McGuire Air Force Base, N.J., and New York City, Philadelphia, and Philadelphia International Airport is limited to transportation of not over six persons in any one vehicle, exclusive of the driver and children under 10 years of age not occupying seats.—D & M Taxi Co., Inc., Common Carrier Application, 96 M.C.C. 439 (446, 448).

Restriction limiting the proposed service to traffic originating at or terminating at Bradley Field, Conn., is indefinite, ambiguous, and administratively undesirable. The imposition of such a restriction would prevent persons "seeing off" or meeting air passengers. In view thereof authority is restricted to the transportation of passengers moving from and to Bradley Field.—Key Trans-port Service, Inc., Common Carrier Application, 98 M.C.C. 628 (631).

Authority to transport passengers between Wareham, Mass., and New York, N.Y., is restricted to protect one protestant's direct service between Newport, R.I., and Boston, Mass., since public support for the Newport area is directed between Newport and New York City or between Newport and Cape Cod. Also, though the Commission generally does not favor closed-door operations, it is clear that most of the supporting testimony concerns service between the Rhode Island—Cape Cod area and New York City; thus, since New London is the only Connecticut point that has adequate support for inclusion as a service point, record does not justify authorizing service at other intermediate points in that State. Authority granted is restricted accordingly.—Almeida Bus Lines, Inc., Extension—New York City, 106 M.C.C. 311 (326)*.

Authorities granted herein are restricted against indicated points inasmuch as public witnesses' testimony expresses mere preference for such service. Record shows such witnesses' travel plans are highly conjectural and no evidence indicates such witnesses had tried to determine whether existing carriers can provide service similar to that proposed. Showing of mere preference fails to sustain applicant's burden of proving public need exists for proposed service.—Brush Hill Transp. Co., Com. Car. Applic., 112 M.C.C. 348 (359-67)*.

Plant site: [Vols. 18, 19, 21].—Inasmuch as the evidence discloses as the only origin point supporting shipper's Fremont, Nebraska, plant site considered authority is so restricted. Although plant site restrictions are, in many cases, unduly limiting, they are not necessarily inconsistent with the duty of a common carrier to serve the shipping public, for a restricted carrier is able to serve not only the plant site operator (producer) but the numerous consignees (consumers) who may purchase its products f.o.b. plant site basis. However, because a plant site restriction does limit the carrier's holding out of service rather strigently, it is frowned upon and is not imposed unless shown to be necessary. In addition to the immediate issues raised, the significance of this proceeding extends to the many complex problems related to the imposition and description of restrictions in motor carrier operating rights.—Fox-Smythe Transp. Co. Extension—Oklahoma, 106 M.C.C. 1 (17, 31).

Protestants' proposed plant site restriction at the plant of one of the supporting shippers is not appropriate because a number of the consignees on return movements will be customers of that supporting shipper, and such a limitation would prevent the other supporting shippers from the possibility of developing a two-way movement. The Commission will not hinder such initiative unless so required to protect other carriers form unwarranted competition. To the extent that some diversion might occur, the benefits to be derived by the public in the form of economical transportation far outweight the slight potential disadvantages of the existing carriers.—Rogers Cartage Co., A Corporation—Extension, 110 M.C.C. 139 (150,151)*.

Record in conversion proceeding is convincing that grant of a certificate in lieu of applicant's existing contract carrier authority from Munster, Ind., will not adversely affect any party; however, to protect protestants' interest in future traffic that might originate at Munster, the origin point will be limited to supporting shipper's plant site.—Ferree Moving and Storage, Inc., 110 M.C.C. 375 (379)*.

Authority granted to tranport commodities which applicant will unload with its own mechanical unloading devices is restricted at one of the commodity origin points because one protestant has the type of specialized equipment shown to be needed by shippers and no dissatisfaction with this protestant's service had been indicated; its interest will be protected.—Pittsburgh & New England Trucking Co., Extension, 113 M.C.C. 46 (48)*.

Outstanding certificate modified by substitution of plant site restriction for mixed loads restriction.—Greenstein Trucking Co. Extension—St. Paul, Minn., 113 M.C.C. 489 (495)*.

Applicant granted authority sought to transport various commodities (excluding those in bulk), from plant sites and storage facilities of supporting shipper to points in three states, based on public convenience and necessity.—Pulley Freight Lines, Inc., Extension—Compounds, 115 M.C.C. 106 (109-10).

Points, origin, intermediate, off-route, destination: [Vols. 18, 19, 21].—See also Delaware Exp. Co. Extension case, §207(a), n. 25 *Existing carriers;* Public Service Coordinated Transport v. Trans-Bridge case, §212(a), n. 1; R-C Motor Lines, Inc. v. United States case, §204(c), n. 51.

As it does not appear there is any real need for joint-line service between applicant in midwest and its N.Y. affiliate or other connecting lines, and applicant does not seek to participate in such a service, authority granted is restricted against transportation of shipments received from, or to be delivered to, any other motor carrier for movement to or from any point beyond those specifically named in the certificate. —United Parcel Service, Inc., Extension—Midwest Territory, 96 M.C.C. 10 (13).

Authority, granted to operate through Port Huron as an alternate port of entry on traffic moving between Detroit, Mich., and Ontario over specified route, will be restricted against transportation of shipments originating or destined to Sarnia, Ontario, in order to maintain competitive balance with respect to local traffic; without such restriction, proposed operation would permit a substantially improved service on local traffic between Detroit and Sarnia and would enable applicant to attract this traffic for which is has not been previously competitive.—The Overland Express, Limited, Extension—Alternate Route, 96 M.C.C. 24 (27).

Although the Examiners recommended that applicant be granted authority from points in Tennessee, there is no evidence that considered traffic originates or will originate at any points in that State other than the six named points. Since to permit applicant to originate traffic at all points in Tennessee would allow it to serve other industrial cities therein without a showing of public convenience and necessity, authority granted is limited to the six origin points named.—Skinner Motor Exp., Inc., Extension—Bulk Commodities, 96 M.C.C. 135 (139, 141).

An alternate route was limited to use "in connection with carrier's regular-route operations between Birmingham, on the one hand, and, on the other, Mobile, Ala., Gulfport, Miss., and New Orleans, La." The limiting words do not restrict the traffic to shipments moving solely between Birmingham and the three other named points, but rather the words are descriptive in nature and intent, merely identifying the authorized route to which the alternate route is appurtenant, and not restricting the service which may be performed over it. An actual service restriction would have been phrased in more specific, unambiguous terms.—West Bros., Inc., Extension—U.S. Highway 11, 96 M.C.C. 490 (493).

Although the Commission does not favor grants of authority described in terms of a mileage radius, there appears to be no practical alternative when need is established for applicant's service solely between Big Run, Pa., and points within 25 miles thereof, on one hand, and Pittsburgh and Philadelphia, on the other; authority granted is limited accordingly.—Bowser—Investigation of Operations, 98 M.C.C. 170 (179).

Since Virginia intrastate passenger authority of one applicant is restricted against service on U.S. Highway 1 or up to within 1000 feet thereof, if it were authorized in interstate authority sought to serve all intermediate points between Washington, D. C., and Richmond, Va., it would be placed in the intolerable position of having to inquire into the destination of prospective passengers to exclude intrastate patrons destined to points it cannot serve. While the Commission is not bound by limitations contained in an intrastate certificate, it is required to determine whether all service proposed is calculated to meet a public need.

Since the other applicant already serves most the considered intermediate points at which service is shown to be needed and new provides adequate service in this immediate area over other routes, it is the logical carrier to continue proposed service. Authority granted first applicant, therefore, is restricted against service at intermediate points, except the 2 specified.—Virginia Stage Lines, Inc., Extension—Interstate Highway 95, 102 M.C.C. 568 (579-1).

Proposed restriction prohibiting applicant from performing North-South operations from and to new Mississippi and Louisiana points rejected as it would detract from the utility of applicant's service, result in less efficient and economical distribution of shippers' commodities, and materially impair applicant's ability to conduct proposed operations in an economically feasible manner. —East Tex. Motor Frt Lines, Inc., Ext.—Miss. & La., 115 M.C.C. 122 (139).

To resolve an apparent ambiguity between the authority of the granting paragraph and the positively stated restriction imposed ("restricted to the transportation of [commodities] between points in that part of the Kansas City commercial zone, as defined by the Commission, situation in Kansas, on the one hand, and, on the other, points in Louisiana and a specified portion of Texas"), it was held that the restriction merely limits the destination territory to which shipments of the involved commodities originating in the Kansas portion of the commercial zone may be transported. Thus traffic originating at points in Kansas other than those in the Kansas City zone is unaffected by the restriction.—Little Audrey's Transp. Co., Inc., Ext.—Emporia Meats, 117 M.C.C. 173 (178)*.

The number of origin points listed for 3 states in which authority was sought was not sufficiently representative to justify a grant of authority from all points in the states, and service was therefore authorized only from those origin points specifically identified.—West Motor Freight, Inc., Extension—Fleetwood Foods, 118 M.C.C. 50 (56)*.

Since protestants established an almost unbroken pattern of late pickups and deliveries frequently resulting in door-to-door transit times of from 3 days to a week between Jackson, Miss., and New Orleans (200 miles), and have demonstrated a lack of interest in shippers' largely less-than-truckload traffic, public convenience and necessity was found to require removal of applicant's restriction precluding transportation of traffic between Jackson and New Orleans.—Barnes Truck Line Extension Restriction Removal, 118 M.C.C. 339 (343)*.

Sought authority included a duplication of existing service provided by protestant, and, since applicant failed to prove that such portion would serve a useful purpose responsive to a public demand or need or that the purpose could not be served as well by existing carriers, a restriction was imposed on the sought authority. The necessity of protecting the interest of protestant was held to outweigh the relatively minor burdens placed on applicant by the restriction, which requires it to determine whether shippers in Texarkana are located in Arkansas or Texas; granted authority restricted against shipments moving from Texarkana, Tex., to or from Dallas.—Mistletoe Express Service Extension—Arkansas, 118 M.C.C. 414 (418-9)*.

Authority granted herein was restricted to the particular origins inasmuch as supporting shippers are located at a rather limited number of origin points. However, all but one foodstuffs shipper made a sufficient showing of need of service the entire destination area. Without such restrictions set forth herein, unwarranted additional competitive operations could evolve thus causing a diversion of traffic from protestants that would not be in the public interest.—Onley Refrigerated Transp., Inc.—Foodstuffs and Drugs, 118 M.C.C. 715 (723)*.

Prior or subsequent movement beyond authorized points: Applicants' authority to transport used household goods for freight forwarders exempt from regulation under §402(b)(2) is restricted to traffic having a prior or subsequent movement, in containers, beyond the points authorized, and confined to performance of pickup and delivery service in connection with packing, crating, and containerization of such shipments.— Central Forwarding, Inc., Extension, 107 M.C.C. 706 (717-18).

Prior or subsequent movement by air: [Vols. 18, 19, 21].—See also Commodity

Haulage Corp. Common Carrier Application case, §207(a), n. 25; Kato Express, Incorporated, Extension case, §207(a), n. 25 *Express.*

Granting of a motor common carrier certificate to an air forwarder, restricted to traffic having an immediately prior or subsequent movement by air is a step toward achieving intermodal coordination, and possibly, a step toward alleviating the small shipments problem.—Direct Air Freight Corp.—Common Carrier Application, 106 M.C.C. 785 (791).

To prevent illegal dual operation, since applicant already has contract carrier authority, issuance of certificate herein is conditioned on applicant's prior submission of its written request for cancellation of its permit except that portion authorizing transportation of processed and unprocessed film. Authority granted is restricted against transportation of traffic having prior or subsequent movement by air and is subject to the usual size and weight restrictions; the certificate herein shall be subject to the right of the Commission, which is hereby expressly reserved, to impose such terms, conditions, or limitations in the future as it may find necessary in order to insure that applicant's operations conform to the provisions of §210.—Hourly Messenger, Inc., Extension—Parcels and Packages, 108 M.C.C. 402 (404-5)*.

Authority is granted to both applicants to transport ex-air shipments of freight restricted to traffic having an immediately prior or immediately subsequent movement by air.—Turner Expediting Service Extension—Montgomery County, Ky., 110 M.C.C. 342 (351, 352)*.

Prior or subsequent movement by rail: [Vols. 18, 19, 21].—In order to protect protestant from excessive and unwarranted competition, restriction prohibiting applicant from transporting any traffic moving between Omaha, Nebr., on the one hand, and St. Joseph and Kansas City, Mo., on the other, except that having a prior or subsequent movement by rail, is substituted for the Omaha key-point restriction previously in applicant's certificate. Since protestant's opposition is predicted mainly upon traffic it handles between these cities, if is clear that now little, if any, harmful effect would be made upon the existing service.—Missouri Pac. Truck Lines Extension, 100 M.C.C. 677 (682-4).

In order to limit respondent's service to that which is auxiliary to and supplemental of parent rail service, as originally intended, present key point restriction must be replaced with restriction authorizing only shipments having a prior or subsequent movement by rail. This is necessary since present motor operations are not a true substituted motor-for-rail service, but an independent motor operation traversing route much shorter than and situated a distance from parent's railway lines.—Santa Fe Trail Transp. Co., Extension—Phoenix, Arizona, 103 M.C.C. 164 (171-2)*.

Prior or subsequent movement by rail-haul restriction in lieu of key point restriction imposed in prior report, 103 MCC 164, upon substituted motor-for-rail service found to be inadequate to prevent all-motor service by applicant between Los Angeles, Calif., and Phoenix, Ariz. Therefore, in order to insure that the subsidiary motor carrier's service will be auxiliary to, or supplemental of rail service, the Commission modified the certificate by adding to the original key point restriction a clause requiring shipments transported by applicant to be limited by an immediately prior or subsequent rail movement by the parent railroad to, from, or through Ash Fork or Flagstaff, Arizona.—Santa Fe Trail Transportation Company—Extension—Phoenix, Arizona, 108 M.C.C. 16 (21)*.

Prior or subsequent movement by water: [Vols. 18, 21].—See IML Freight, Inc., Ext.—Containerized Freight case, §207(a), n. 25 *Existing carriers:* Petroleum Transit Co., Inc., Extension case, §207(a), n. 25 *Foreign.*

Private and for-hire transportation: [Vols. 18, 19, 21].—Along with its nonexempt towing business for which a certificate is granted, applicant also engages in truck repairing and the sales and service of truck parts. Therefore, the authority granted for interstate towing will be made subject to the condition that such towing activities shall be conducted separately from applicant's other business activities and that separate accounts and records shall be maintained. These two conditions are designed to keep the carrier's for-hire operation apart from its other business activities.—Skyline Diesel Sales & Service, Inc., Com. Car. Applic., 96 M.C.C. 430 (431).

State requirements: [Vol. 18].—The Commission's grant of a contract carrier permit authorizing the transportation of malt beverages to Louisiana is in conflict with that state's law prohibiting transportation of such products by other than common carriers and hence must yield to the exercise of a state's power under the twenty-first amendment to the Constitution of the United States to regulate the transportation or importation of intoxicating liquors within the state; however, present and future public convenience and necessity is found to require operation by applicant as a common carrier of malt beverages conditioned upon applicant's request for voluntary cancellation of his contract carrier permit.—Fred S. Berry—Common Carrier Application, 106 M.C.C. 848 (849-50).

Commission held that rates charged by carriers operating under certificate of registration for interstate transportation are subject to exclusive regulation by this Commission pursuant to §216 and that rate restrictions in protestant's State certificates are inapplicable to interstate operations. Commission granted extension application as protestant's tariff restricts shipments to sizes inadequate to meet shipper's demonstrated needs.—Rio Grande Motor Way, Inc., Ext.—Grand Jct. to Price, 111 M.C.C. 715 (716).

Tacking: [Vols. 18, 19, 21].—See also Baggett Transportation Co.—Investigation of Operation case, §212(a), n. 1; Red Line Transfer & Storage, Inc. case, §207(a), n. 30.

In suit to enjoin and set aside Commission report and orders insofar as the certificate granted plaintiff was restricted against tacking, record shows that, in its verified application for irregular-route authority, plaintiff (applicant) denied that the authority sought could or would be joined with any authority then held in order to perform a through service and that recitals in the published notice of the application were consistent with assurances contained therein; in such circumstances, the Commission acted well within its discretion in declining to require that protestants show the actual adverse effect of tacking through abstracts or specific reference to diversions of traffic. Furthermore, the Commission's action in imposing the no-tacking restriction complained of was not capricious or arbitrary, did not constitute an abuse of discretion, and was not in violation of the law; complaint dismissed.—Eagle Motor Lines, Inc. v. United States, 331 F. Supp. 80 (81-2)*.

As stated in 98 MCC 761, tacking of two separate unrestricted irregular-route authorities is permissible as a basic right incidental to holding such authorities, which right does not exist by virtue of any showing of need for through service, but rather as a by-product of the way motor carrier operations are physically conducted on an interchange basis between separate carriers; and, while the Commission may restrict authority against tacking with another in order to perform through operations, such restrictions will not be imposed unless existing carriers establish that they will be materially adversely affected by such tacking operation. A mere showing by protestant that tacking possibilities exist and that applicant may avail himself of them is not sufficient to warrant a restriction against tacking. Thus, when plaintiff (protestant) failed to show how its operations would be materially adversely affected by lack of a tacking restriction, there was no ground for the Commission to impose such a restriction on authority granted intervening carrier. Considered Commission order sustained.—Howard Hall Co., v. United States, 332 F. Supp. 1076 (1082)*.

Where applicant made a positive showing of a need for service, the mere fact that tacking possibilities exist and that applicant plans to avail itself of them although it failed to give advance notice thereof does not warrant the imposition of a restriction in the absence of a showing by protestants that they would be materially and adversely affected. With respect to part (1) of the application, applicant's withdrawal of its objection to protestant's proposed amendment amounts to a stipulation with that protestant that the facts represented warrant imposition of the restriction and such restriction will be attached to the grant of authority in that part. However, as to part (2), protestants either withdrew their opposition or made no showing that their operations will be materially and adversely affected. Further, withdrawal of opposition in reliance upon the examiner's conclusion to impose a no-tacking restriction upon the authority granted is at protestant's peril, and it now cannot be heard to complain that it was denied the opportunity to oppose the application actively.—Truck Transport, Inc.—Extension, 106 M.C.C. 855 (889).

While one applicant did not except to examiner's recommendation that a no-tacking restriction be imposed on heavy-hauling authority granted in consolidated application cases, and need therefor to protect existing carriers does not appear urgent, the applicant is commonly controlled with another carrier whose authority covers substantial east-west heavy-hauling operations in some of the same States; therefore, to minimize duplication in operating rights, authority granted that applicant will be restricted against tacking. However, so to restrict the grants of three other applicants does not appear necessary and would also preclude the performance of needed service.—Dealers Transit, Inc., Extension—Eight Western States, 110 M.C.C. 317 (321, 337-8)*.

Although the existing competitive situation will not be altered by issuance of a certificate to applicant in lieu of its outstanding permit, the authority granted will be restricted against tacking in order to prevent an extension of operations that could not be performed under the contract carrier authority.—Ferree Moving and Storage, Inc. Conversion Application, 110 M.C.C. 375 (379)*.

Review board granted applicant's application for extension of its irregular-route authority subject to a no-tacking restriction. It is a well established policy of the Commission not to encumber grants of authority with restrictions against tacking unless protestants show (or applicant concedes) that they would be materially or adversely affected by failure to impose such a restriction. Therefore, tacking restrictions will not necessarily be imposed in all cases where protestants indicate that a tacking possibility would permit operations in conflict with authority protestants hold. In the instant proceeding, applicant established a need for service from and to points specifically named in its application and in the Federal Register publication. Protestants failed to establish that a grant of the proposed service would have a materially adverse effect on its operations or that they would be prejudiced by an unrestricted grant; therefore, since protestants have failed to show that the nonimposition of a tacking restriction would materially, adversely affect their operations, the no-tacking restriction is not shown to be warranted.—Ruan Transport Corp.—Ames, Iowa, 110 M.C.C. 389 (392, 393)*.

Upon review of record in instant case, Commission found that the modified restriction against tacking at certain points was imposed expressly to bar handling of local traffic within the described areas but without disturbing shipments to and from points outside these areas. Therefore, Commission deleted the modification from the restriction and stated that the routes at issue "may be considered as single routes for purposes of providing through transportation otherwise consistent with the restriction".—Consolidated Freighway Corp. of Del.—Interpretation, 110 M.C.C. 667 (670-1)*.

Authority granted herein is restricted against tacking or handling traffic interlined with other motor carriers. Although protestants have not shown evidence that they would be adversely affected by unrestricted authority, grant of authority was based on unique circumstances detailed herein, and protestants are entitled to protection with respect to long-haul traffic moving to and from points outside scope of applications.—Wehe Common Carrier Application, 110 M.C.C. 798 (812-3).

Two sets of irregular-route operating authorities granted to a carrier in a single proceeding may not be tacked if they comprise but a single grant of authority. Applicant's present certificate forms such a single grant particularly in view of language stating no duplicate authority is granted. Applicant's proposed operation not authorized as it constitutes a cross-haul between two radial points through a base point.—Engel Bros., Inc., Ext.—Arkansas Gateway, 111 M.C.C. 291 (293-4)*.

Commission has long held (as stated in

106 MCC 1, herein cited) that grants of authority ought not to be encumbered by restrictions against tacking or interchange unless protestants show (or applicant concedes) that they would be adversely and materially affected. Protestant motor carrier has shown only that tacking possibilities exist that would conflict with protestant's authority. Such showing does not warrant imposition of tacking or similar restrictions.—Klipsch Hauling Co., Extension—St. Joseph, Mo., 111 M.C.C. 295 (305-7)*.

Authority granted both applicants and restrictions against tacking or interlining placed on both certificates in order to protect protestant's long-range operations from competitive services for which no need is shown or can be inferred.—Wehe Common Carrier Application, 112 M.C.C. 315 (321)*.

Restriction against tacking at St. Joseph, Mo., for purpose of performing through service to Iowa points was found ambiguous because it was not clear whether the restriction applied solely to the municipality of St. Joseph or to all points within the St. Joseph commercial zone. Evidence of public need warranted removal of the restriction by a grant of specific authority as sought herein to conduct the proposed through service. —Byers Transp. Co., Inc., Ext.—Restriction Removal, 113 M.C.C. 50 (52-3, 58).

The Commission's traditional reluctance to restrict grants of common carrier authority against tacking as well as the necessity of assuring the stability of outstanding motor carrier franchises must yield in certain special and limited situations to the need to secure a just result in administative proceedings generally; and where in good faith reliance upon the inadvertent failure of applicant's counsel to apprise them of the fact that an unrestricted grant of the applied-for authority would enable applicant through the tacking of such authority with its existing rights to become a substantial competitor for overhead meat and meat products traffic between mid-central and far western points, existing carriers withdrew their protest to the application and acted with due diligence to protect their interests when they first learned of the situation, applicant was ordered to show cause as to why the subsequently issued certificate should not be modified by imposition of an appropriate non-joinder restriction.—Curtis, Inc., Extension—Meats Over Irregular-Routes, 113 M.C.C. 170 (183).

Although Commission is ordinarily reluctant to impose restrictions against tacking and interlining, the highly experimental nature of the proposed transcontinental operation warrants such restrictions, with certain exceptions, as there is the potential that the applicant may obtain authority by offering better service than it can deliver, thus diluting other carriers' traffic to the detriment of shipping public.—Watkins Motor Lines, Inc., Ext.—General Commodities, 114 M.C.C. 562 (565-6)*.

Defendant tacked authority to transport household goods (a) between Juneau, Alaska, on the one hand, and, on the other, Anchorage and Fairbanks, Alaska, and (b) between points in a specified portion of southeastern Alaska, including Juneau, on the one hand, and, on the other, Seattle, Washington, to perform a through service from Anchorage to Seattle. The necessity for substituting water for motor transportation in order to continue this service when the Alaska Ferry System could no longer be utilized was held to be justified by the Commission.—Wold Storage & Transfer, Inc. v. Alaska Transfer, Inc., 115 M.C.C. 288 (289).

Since applicant had requested an amendment to the application restricting requested routes against the transportation of traffic moving between described area of its regular-route authority in New England, New York, and Pennsylvania on one hand, and, on the other points in the Carolinas and Georgia and beyond, and since there is minimal support therefor, restriction against service, direct or indirect, between the considered areas is warranted. Although "partial" restrictions against tacking and interchange are generally considered undesirable, the complexity and geographical scope of the general commodity authority granted requires the imposition of such a restriction.—Transamerican Freight Lines, Inc., Extension—Columbia, Ga., 115 M.C.C. 416 (430).

Since respondent tacked authority restricted against tacking "with carrier's present authority" with authority obtained subsequent to grant of restricted authority, tacking restriction was inapplicable. The terminology utilized in the authorization of operations which are restricted to the transportation of traffic destined to those destination points specifically named in a certificate has the practical effect of negating application of the general rule that allows joinder of authorities and interline operation. Such a limitation, by corresponding in scope with the grant of authority to which it relates, authorizes only performance of the service specified in the actual grant. Tacking and interlining for movement of shipments to points not so specified are prohibited. Only traffic whose final destination is one of the service points described in a particular grant of authority may be transported pursuant to that authority when a restriction of the type here at issue is imposed.—Hilt Truck Line, Inc.—Investigation of Operations, 117 M.C.C. 9 (24, 26).

The restriction that Doylestown, Pa., "shall be served only in connection with traffic moving from or to Pittsburgh or points in the Pittsburgh area" does not preclude (1) the transportation of shipments which are destined to or originating at points beyond and are moving in interline service, or (2) the combining of a carrier's authorities at common service points to provide a single-line service from or to points beyond. That limitation merely requires that the Pittsburgh area gateway be observed in connection with the intermediate and off-route point service authorized.—Renner Motor Lines, Inc., Extension—Richmond, Ind., 117 M.C.C. 218 (221)*.

Applicant herein seeks to tack authorities granted in two paragraphs of its certificate which are restricted to traffic having an immediately prior or subsequent movement by air. The Commission reaffirms the examiner's conclusion that these restrictions require immediately prior or subsequent movements by air to or from specific airports named in the respective grants and do not permit tacking of separate authorities to serve between points named in one and the airport named in the other. Applicant's certificate constitutes a single grant of operating authority and joinder of separate portions of a single grant will not be permitted.—Conahan Extension—Pennsylvania, 117 M.C.C. 488 (495, 504).

Truckloads: [Vols. 18, 19, 21].—A "truckload lots" restriction is seldom imposed in certificates now, and then only with reluctance because the term is in general inconsistent with some basic concepts of common carriage, and there are certain potential enforcement problems involved. However, when such a restriction exists, it must be given effect by prudent interpretation, with due regard for ordinary meaning of words used and for past interpretations of such restriction; the Commission has declined to remove such a restriction without proof of a real need for the resulting service. Carrier's petition seeking elimination of "in truckload lots" restriction from its authority was not filed until after investigation into its operations was instituted, and the reasons advanced are not convincing; its predecessor did not object to such restriction, existence thereof was a factor in approval of petitioner's purchase of the certificate, and no documentary evidence as to nature of predecessor's operations is offered; petition denied.—Southwest Freight Lines, Extension—Removal of Restriction, 95 M.C.C. 269 (275, 277-8)*.

Although under certain circumstances the Commission has imposed restrictions against the transportation of truckload shipments, proposed restrictive amendments against the transportation of "truckloads of frozen foods" and for transportation in "peddle service," are not imposed on considered grant of authority. Such restrictions, offered solely to eliminate carrier opposition, effectively limit proposed service to the handling of less-than-truckload shipments and are indefinite, impractical, and difficult to enforce. In addition to the refusal to impose considered restrictions, the many complex problems related to the imposition and description of restrictions in motor carrier operating rights are herein reviewed. Fox-Smythe Transp. Co. Extension—Oklahoma, 106 M.C.C. 1 (29-30).

The "in truckload lots only" restriction imposed in applicant's certificate is presently of no force and effect in view of the Commission's decision in 106 MCC 455 to remove such restrictions from all outstanding certificates issued under §206 and §207 of the Act. Accordingly, the issues presented in the complaint premised on the alleged violation of this restriction, are moot and the complaint will be dismissed.—Ben Blinder, Extension—Alternate Routes, 107 M.C.C. 67 (70).

Weight: [Vols. 18, 19, 21].—The Commission is always reluctant to impose restrictions in grants of operating authorities that are administratively undesirable or difficult to enforce. In a grant of express authority to REA, a condition that the shipments be limited to those of not more than 500 pounds from one consignor to one consignee was found to possess both these characteristics and would serve no useful purpose. An arbitrary weight limit is incompatible with the concept of "express service". Restrictions in REA's certificate should deal with the type of service to be performed without reference to any particular type of traffic handled in the performance of such service. Weight restriction removed and certain conditions in conformity with Commission's policy of framing grants of REA certificates are imposed.—Railway Express Agency, Inc., Extension—Traverse City, Mich., 96 M.C.C. 727 (728-9).

Authority requested by applicant limited to "shipments not to exceed 5,000 pounds" is justified by the record. This type of restriction has the advantage of making unnecessary the use of the undesirable vehicle limitation proposed, or any other such limitation; if this restriction does not protect all possible interests of all protestants, they have only themselves to blame for withdrawing from the proceeding on the tenuous assumption that vehicle restriction to station wagons and panel trucks, often rejected by the Commission, would here be found acceptable.—Jet Messenger Service, Inc., Common Carrier Application, 99 M.C.C. 585 (588-9).

Analysis of shippers' testimony indicates a need for expeditious transportation of packages under 100 pounds. Authority to transport articles in excess of 100 pounds would, in effect, amount to authorization of an additional carrier to participate in traffic now being transported by existing motor carriers in a reasonably satisfactory manner. Also, a realistic appraisal of applicant's proposed service indicates that hauling of packages weighing up to 250 pounds would hamper and militate against the expeditious transportation of smaller packages for which a need exists.—Wycoff Co., Inc.—Extension, 107 M.C.C. 776 (779-80).

7. Competition.—[Vols. 10-19, 21].—See also Carl Subler Trucking, Inc., Modification of Certificate case, §206(b), n. 16 *Broadening;* Herrin Transp. Co. Extension case, §207(a), n. 25 *Necessity*.

Commission finds that use of vendor's rights in conjunction with those of vendee to perform a through service is not a wholly new service but the substitution of a single-line service for previously two-line-service, as vendee had interlined with another carrier (not a protestant herein) and would not be a new competitive service. Approved.—Howard's Exp., Inc.—Purchase—Exchange Trucking Corp., 97 M.C.C. 341 (348-9).

Where respondents' services between points in California and Mexicali, Mexico, have existed, although unauthorized, under their state certificates registered with the Commission under §206(a)(7), the continuance of the service under certificates of public convenience and necessity cannot fairly be said to create a new or aggravated competitive situation to the detriment of other carriers since it has been conducted for a number of years, without challenge, under color of right.—Imperial Truck Lines, Inc.—Common Carrier Application, 106 M.C.C. 741 (753).

As the present record does not support protestant's argument that a grant of motor common carrier authority to an air freight forwarder will enable the applicant to discriminate in favor of its customers and gain a competitive advantage over competing certificated air carriers, and since the record does show that applicant has been performing service for another air forwarder under temporary authority, application for a certificate of public convenience and necessity, restricted to traffic having an immediately prior or subsequent movement by air, should be granted.—Direct Air Freight Corp.—Common Carrier Application, 106 M.C.C. 785 (790-91).

Protestants are now and for some time have been faced with effective competition from freight forwarders supporting the instant motor carrier applicants and in view of the past history of applicants' service it is plain that protestants will suffer little, if any, detriment as a result of grants of authority so as to permit applicants to continue to provide the same general service they have in the past. It is at least questionable whether the nationwide van lines and their agents could practically handle the volume of traffic which would become available to them were the instant applications denied, particularly during the peak season, in view of the significant tonnage heretofore handled by applicants. In these circumstances, the grant and not the denial of these applications will best serve to preserve the existing competitive balance.—Central Forwarding, Inc., Extension, 107 M.C.C. 706 (716).

Commission found that unfair competition would not result from grant of authority sought herein. No protestant offers service comparable to that proposed by applicant and denial of application would adversely affect public. Applicant has conducted similar operations under color of right since 1961 with no detrimental effect on protestants.—Federal Transfer Co., Inc., Extension—Seattle, Wash., 111 M.C.C. 559 (567)*.

The existing rates of protestants in fact effectively preclude supporting freight forwarder from using protestants' services, and thus constitute an embargo as to freight forwarder's traffic amounting to a service failure by protestants. By such action protestants have demonstrated a willingness to forego this traffic. Application granted—Armellini Express Lines, Inc., Ext.—F.F. Traffic, 113 M.C.C. 603 (614-5)*.

Harrassment of smaller competitor by filing of successive applications is not condoned by Commission. See also, §206(b), n. 15.—United Parcel Service Ext.—Tenn., Ark, and Miss. Points, 117 M.C.C. 621 (626).

A grant of authority to applicant would make available to institutional group members of the traveling public a usable charter service and inject into the market an element of effective competition which is now lacking. Granted. See also §207(a), n. 25 *Existing carriers*.—Western Mass. Bus Lines, Inc., Com. Car. Applic., 118 M.C.C. 74 (84)*.

Exceptions to the Commission's general policy of not granting authority which would result in common control of a motor common carrier and its supporting shipper are made when it is shown that there is no substantial opportunity to engage in discriminatory practices, despite the relationship, e.g., when shippers other than the affiliated shipper support an application in full awareness of the relationship, and when it appears that the importance of the other shippers' traffic is sufficient to overcome a natural tendency to discriminate. The instant application falls properly within such an exception; authority granted. This control situation does not require express approval of the Commission because §5 of the Act requires approval of common control situations involving carriers subject to parts I, II, and III of the Act, but not part IV carriers.—Sullivan Lines, Inc., Extension—Far West, 118 M.C.C. 801 (812-3).

Carriers under common control: [Vol. 14].—See also Cousins, Inc., Common Carrier Application case, §206(b), n. 18.

Although Commission has on occasion deemed it to be in the public interest to deny an application where discrimination might result from a common control relationship between an applicant and a shipper supporting its application, applicant in this proceeding would have no significant opportunity to discriminate if the authority sought is restricted to the transportation of traffic originating at or destined to the facilities of controlling shipper, which has operations only at Chicago. Further, the evidence conclusively establishes a need for service which is not available from existing carriers, and thus to grant the sought authority would not create unfair competition. Authority granted, so restricted.—SES Corporation Common Carrier Application, 117 M.C.C. 93 (98-99)*.

Existing motor carriers: [Vols. 12, 19, 21].—See also Almeida Bus Lines, Inc., Extension, at §207(a), n. 25 *Existing carriers;* and Carolina Freight Carriers Corp. v. United States at §207(a), n. 9.

There is no invariable rule that a certificated carrier "should be given an opportunity to perform before new service is authorized". When authorized carriers have failed to meet transportation needs of their service areas without valid excuse, they should not be allowed to defeat a new application merely by an offer of, or actual, improvement in their service during the hearing thereon, much less after it; any such rule would discourage new applications and condemn the public to continuation of ineffective service which had provoked them. In instant case, however, certificate was issued to defendant bus line, affording very little service that plaintiff (protestant) cannot render, largely because plaintiff offered no proof of the service being provided under authorities granted after the hearings ended but prior to the examiner's recommended report; yet a Commission review board had denied two protestants' timely request for opportunity to submit precisely such proof. The Commission course of action is not consistent with fair procedure or with the spirit of 5 USC §554(c); order vacated and case remanded for further proceedings.—Blue Bird Coach Lines, Inc. v. United States, 328 F. Supp. 1331 (1332, 1336-7, 1338)*.

Although protestants transport parcel shipments within Iowa in connection with interstate traffic from Des Moines, Iowa, to points within that state, need is shown for the proposed service between points in Iowa and points in other states embraced in application which cannot be satisfied by the Iowa carriers. There is no showing by those carriers that they would suffer from any diversion of their present traffic; but applicant is cautioned that its interstate certificate does not give it the right to transport intrastate traffic. Applicant may not convert intrastate traffic into interstate traffic by routing. While one protestant handles small package traffic between points in Kansas City, Mo.—Kansas City, Kans., commercial zones under partial exemption of §203(b)(8) and in adjoining areas of Kansas and Missouri in intrastate commerce, and also provides interline delivery service for interstate shipments arriving by connecting carrier from outside Missouri to points in that state, such service does not permit the expeditious deliveries from points of origin as proposed by applicant. Moreover, it cannot be concluded that protestant is handling any appreciable traffic or that it is capable of meeting demonstrated broad territorial need as would applicant. Mere existence of a carrier rendering a somewhat similar service in a certain area does not preclude a grant of authority to render service on a wide territorial basis where a need therefor has been shown.—United Parcel Service, Inc., Extension—Midwest Territory, 96 M.C.C. 10 (13).

Since protestant carriers have only recently obtained their certificates, the Commission would not be warranted in granting additional operating authority on this record until such time as their services have been utilized and found deficient. Applicant relies heavily on its deluxe equipment in proving need for the proposed charter operations, yet there does not appear to be any public need for the particular features which protestants are not able to provide; the quantum of public support for the application is extremely small in view of the very populous areas proposed to be served; and witnesses have made no genuine attempt to determine the extent of charter service available to them.—American Buslines, Inc., Extension—Long Island, N.Y., 99 M.C.C. 506 (512-13).

While the now invalid 15,000-pound rule did not and was never intended to authorize heavy-haulers to perform driveaway or so-called "towaway" service, protestants' truckaway operations of motor vehicles weighing 15,000 pounds or more are insufficient to warrant restricting applicants against movement of such traffic. In addition, farm carriers, seeking restriction against movement of farm tractors and farm machinery by applicant, have failed to indicate what proportion of their traffic consists of vehicles weighing over 15,000 pounds and, therefore, have failed to show that their operations would be affected by any material degree.—Ashworth Transfer, Inc., Ext.—15,000 lb. Articles, 103 M.C.C. 404 (411-2).

Where protestants are opposing an application for public convenience and necessity not from the standpoint of any immediate competitive effect, but rather upon the possibility that the applicant would be in a better position to either sell its certificated rights or to obtain additional multi-state rights through purchase or application, protestants apprehensions are rather remote, and, in addition, each would have ample opportunity to oppose any sale or request for additional operating rights by applicant.—Imperial Truck Lines, Inc.—Common Carrier Application, 106 M.C.C. 741 (754).

While inauguration of the operations proposed from the facilities of supporting shipper could conceivably divert to applicant tonnage that protestants might otherwise have enjoyed, the Commission concluded that existing carriers should not be insulated from the introduction of a competitive service where the public is shown to require a new and improved service that existing carriers cannot provide.—Saldutti & Son, Inc., Ext.—Inedible Fish Oils, 118 M.C.C. 58 (64)*.

Express: [Vols. 11-13, 19, 21].—Because the Railway Express Agency is affiliated with railroads within the meaning of §5(2)(b), special circumstances must be shown to exist in order to obtain certificated authority wholly disassociated with rail operations, i.e., operations unhampered by rail-haul restriction. Found, that the opposing carrier herein has not been shown to be providing a service comparable to the bona fide express service here proposed, which fact constitutes special circumstances warranting grant of express authority.—Railway Exp. Agency, Inc., Extension, 96 M.C.C. 727 (730).

Monopoly: [Vols. 12, 13, 16].—See also P.C. White Truck Lines, Inc., Extension, n. 25 *monopoly* below.

The mere existence of a monopoly, standing alone, is not sufficient justification for the establishment of a new operation in the absence of a showing of some inferiority or inadequacy in the transportation service of the existing carriers.—D&M Taxi Co., Inc., Extension—More Passengers, 115 M.C.C. 294 (297).

Motor-carrier membership systems: [Vols. 11, 12].—Major obstacle to issuance of passenger authority sought between Lincoln and Grand Island, Nebr., is that for many years applicant, a member of Greyhound System, and protesting bus line, a member of National Trailways System, have successfully competed for traffic between Lincoln and points east thereof over direct routes. Protestant now operates four round-trip and one one-way schedules between considered termini, and some diversion of its traffic between Lincoln and western points, via Grand Island, will probably occur; however, applicant does not propose to serve intermediate points along proposed route, and record is convincing that amount of traffic diverted would be insignificant in comparison with protestant's total number of passengers. Moreover, Lincoln is a growing commercial center beginning to compete with Omaha, Nebr., and is entitled to a similar quantum of bus service to and from Grand Island; benefits from proposed service more than offset any resulting disadvantages to protestant granted.—Greyhound Corp. Extension, 96 M.C.C. 630 (633-6).

Railroads: [Vols. 11, 12, 19, 21].—Railroads; contention that a grant of authority to transport containerized general commodity freight from west coast ports to points in the United States would result in diversion of traffic is without merit. A grant of authority would not result in a substantial diversion from the railroads but rather a diversion from other motor carriers not offering containerized services. It is the policy of the Commission to promote containerization and, therefore the application was granted, but restricted to the transportation of traffic having a prior or subsequent movement by water.—IML Freight, Inc., Ext.—Containerized Freight, 118 M.C.C. 31 (33).

9. Jurisdiction of the Commission.—[Vols. 10-12, 14, 15, 17-19, 21].—See also Burham Van Service, Inc., Extension—Hawaii, at §208, n. 30; Connecticut Limousine Service, Inc. v. United States, at §207(a), n. 25; Garrett Freight Lines, Inc. v. United States, at §212(a), n. 30; Greenstein Trucking Co. v. United States, at §212(a), n. 30; Midwest Emery Freight System, Inc. v. United States, at §207(a), n. 25; Removal of Truckload Lot Restrictions, at §208(a), n. 2; Towne Services Household Good Transp. Co. v. United States, at §207(a), n. 25 *Household goods;* and Truck Transport, Inc., v. United States, at §207(a), n. 25.

The Commission has the power to grant broader authority than that sought in an application, and such broader authority has been granted in instances where it was limited in scope and proposed restrictions as to service or equipment would be objectionable, unnecessary, or difficult to police. However, practice of granting broader authority than requested should not be extended beyond such limited instances to case where removal of restrictions contained in defendant carrier's extension application, as amended, and accepted by the examiner (without giving any further notice), together with permitted tacking of the new authority with other rights held by applicant, constitutes a grant not contemplated by the application which could adversely and materially affect operations of other authorized carriers. Order and certificate as granted should be republished in Federal Register, with opportunity given to plaintiffs and other interested parties to offer eivdence and be heard; then the Commission will re-examine the evidence and arguments and determine whether its certificate and order should stand or be set aside.—Georgia-Florida-Alabama Transp. Co. v. United States, 290 F. Supp. 764 (766-9)*.

There is no apparent reason why the Commission could not require performance reports from a carrier under its general powers, nor why it does not have sufficient power to police performance under the requirements in order granting a certificate that the holder render reasonably continuous and adequate service. Plaintiffs argue that, in granting certificate to defendant carrier, the Commission should have required advance demonstration of its capacity to perform and should have ordered performance reports as a condition on exercising the rights granted; however, performance reports have never been required until recent months. Moreover, when the Commission conditioned certificate granted in 106 MCC 692 on the filing of annual performance reports, that was apparently an experimental move, not required by statute though commendable if the Commission judged it to be advisable. Since record shows that applicant has the capacity and intends to provide the improved service needed, the Commission's order is sustained.—Carolina Freight Carriers Corp. v. United States, 297 F. Supp. 848 (852)*.

Generally, absent a competing carrier, the Commission may authorize new service shown to be needed and, where there is service, it may even authorize competition in order to compel adequate service; however, in light of the national transportation policy, its powers over competition are not all-inclusive. Thus, when applicant (intervenor) sought authority restricted against transfer of lading between tank vehicles, but the Commission omitted the restriction (because difficult to enforce and administratively undesirable) and granted authority which permits the same service as that offered by plaintiff (protestant), the certificate does not authorize an "improved" or a "new and unique" service and it cannot be approved without a finding based on substantial evidence that existing service is inadequate; no such finding was made and the facts of record would not support such a finding. And since resulting competitive situation is due to the omission of requested restriction in certificate granted, the case is remanded so that the Commission may either (a) correct the certificate, or (2) conduct hearings to develop facts supporting a finding as to adequacy of existing service.—Drum Transport, Inc. v. United States, 298 F. Supp. 667 (670, 672-3)*.

In view of the Commission's statutory authority and its discretion in determination of public convenience and necessity, the theory advanced by plaintiffs in suit to set aside order denying bus line's extension application that, having found some public convenience, the Commission was bound to consider whether approval of the application would unduly prejudice intervening defendant (protestant), while appealing, is beyond the reach of the court's circumscribed competence. The proposition is appealing because an applicant (plaintiff) which appears to meet operational and financial standards proposes to offer increased service to the public over public highways, and there is no substantial indication of harm to existing carrier; however, were such proposition to be accepted, the Commission would be obligated to grant authority to responsible operators whenever any added service was proposed—even if it convenienced only one or two persons. Such minuscule accommodation would not rise to the magnitude of "public convenience and necessity", moreover, plaintiffs' authorities do not really support their proposition. Complaint dismissed.—Town of Montague v. United States, 306 F. Supp. 1227 (1229)*.

It is not the Commission's "unvariable rule" that, where need for additional service is found, existing carriers must be afforded an opportunity to transport all traffic they can handle adequately and efficiently before a new competitive operation is authorized. The Supreme Court held, in 398 US 409, that the Commission's power is not so circumscribed; and that no such limitation has been established by the Commission's decisions or by judicial determination. The public interest in maintaining the health and stability of existing carriers should be considered; however, on the basis of appropriate findings, the Commission may authorize a new operation even though existing carriers might arrange to provide the proposed service. The record amply supports the Commission's conclusion that existing carriers, including two recently authorized, cannot meet the Florida Peninsula's need for better service; therefore, its order granting defendant carrier (applicant) authority to provide needed single-line service should be sustained. Complaint dismissed.—Carolina Freight Carriers Corp. v. United States, 323 F. Supp. 1290 (1295, 1297)*.

In its action to set aside Commission orders granting authority to the three defendant carriers, plaintiff (protestant in Commission proceedings) failed to show that it has a right to be absolutely free from competition in order to be afforded the opportunity to meet the "performance report" requirements which the Commission attached as a condition to the granting of plaintiff's opposing authority. As the Supreme Court stated, in 389 US 409, the Commission's power is not so circumscribed; no such limitation has been established by Commission decisions or by judicial determinations; and, while public interest in maintaining the health and stability of existing carriers should be considered, the Commission may, on appropriate findings, authorize a certificate even though existing carriers might arrange to furnish successfully the proposed service. The challenged commission orders appear reasonable and well founded; sustained. —Curtis, Inc. v. United States, 327 F. Supp. 291 (293-4)*.

If Commission order granting a certificate shows a reasonable relation to provisions of the statute within its administrative responsibility and is supported by substantial evidence, the reviewing court must affirm. However, though charges against the applicant were accepted as true by the review board, it was the Commission's statutory duty to refer application for authority to operate in two States to a joint board for determination where there were bona fide factual issues as to fitness and need for proposed service; therefore, in absence of such referral, considered order of the Commission granting the certificate must be annulled by the court on review.—Land-Air Delivery, Inc. v. United States, 327 F. Supp. 808 (809-10, 811)*.

Congress delegated to the Commission the power to find the facts, and make the reasonable judgments, involved in determining whether or not a certificate of public convenience and necessity should be issued; and, in exercise of its administrative authority and discretion, the Commission not only may issue standards for determining public convenience and necessity but may alter its policies and standards when, in its judgment, the necessity arises. Thus, the Commission has broad discretionary power in application cases to determine from its analysis of the total situation on which side the public interest lies; also, a reviewing court may not substitute its judgment for that of the Commission on factual matters or on mixed questions of fact and law as may have been committed by law to its discretion. Upon review, record in plaintiff's application case shows that the Commission applied the correct rule of law and, also, that denial of the application because no public need was shown for plaintiff's service was not arbitrary or capricious; Commission order sustained.—Feature Film Service, Inc. v. United States, 349 F. Supp. 191 (202)*.

To the extent that motor carrier services are performed on land appropriate operating authority from this Commission is required as well as compliance with other provisions of the Act, although there is a possibility that ferry transportation of motor carriers may be subject to the Shipping Act, 1916, and therefore to the jurisdiction of the Federal Maritime Commission. And in the event such terminal motor carriers establish through routes or joint rates with carriers subject to the Shipping Act, such routes and rates are subject to regulation by this Commission under §216(c), as amended.—

Lindstrom Extension, 98 M.C.C. 647 (652-654).

While in an application proceeding under §207 of the Act a finding must be made concerning applicant's fitness and to that extent possible unlawful operations are pertinent, and while it is also proper for the Commission or any hearing officer to take notice of any unlawful or improper practice duly established in the course of such a proceeding and to deliver an appropriate admonition, the entry of a cease and desist order is inappropriate. Under §204(c) the entry of a cease and desist order requires "notice and hearing" which applicant did not receive in this proceeding; and therefore, §9(a) of the Administrative Procedure Act renders the recommended entry of a cease and desist order ineffective and a nullity. —Frozen Food Exp. Extension, 100 M.C.C. 369 (371-2).

Section 207 of the Act empowers the Commission, in applying the statutory standards of public convenience and necessity, to authorize part or all of the requested operations which, when authorized, must be performed according to its "Requirements, rules, and regulations." The initial problem in framing motor carrier operating rights is how best to describe the reasonable transportation requirements revealed by the evidence of record in any given proceeding, and at the same time protect existing carriers from unwarranted incursions into their authorized fields of service. Thus, the Commission is not, and cannot be, bound by restrictions agreed to by the parties which achieve results inconsistent with public interest and inimical to practicable and effective regulation.—Fox-Smythe Transp. Co. Extension—Oklahoma, 106 M.C.C. 1 (6-8).

Protestant's motion to dismiss that portion of the application covering charter operations beginning and ending at a point in the Washington Metropolitan District and extending to another point in the said District for lack of jurisdiction was properly granted, since the Washington Metropolitan Area Transit Commission has exclusive jurisdiction coextensive with the Washington Metropolitan Area Transit District for the "regulation and improvement of transit" . . . except as otherwise specified in the compact which created the WMATC. An examination of that compact with respect to the granting of certificates of public convenience and necessity discloses no exception that would permit jurisdiction to remain with this Commission, or that would permit this Commission to entertain concurrent jurisdiction relating to such matters with the WMATC. Accordingly, any authority granted applicant herein will be restricted against the transportation of charter parties beginning and ending at a point in the Washington Metropolitan Area Transit District and extending to another point in the District. —Harry Lee Eyre, Jr.—Extension, 106 M.C.C. 851 (855-56).

Although Department of Transportation Act, 49 USC 1655(e)(4), transferred powers to promulgate and enforce safety regulations applicable to interstate motor carriers to that Department, this Commission retained power to issue new authority or attach conditions to existing operating rights. Jurisdiction over these retained powers must conform to our adjudicative responsibilities under the Interstate Commerce Act and the mandate of the national transportation policy to promote "safe, adequate, economical, and efficient service . . ."—Regulations Governing Hazardous Materials, 111 M.C.C. 575 (585-8).

10. Violation of act.—[Vols. 10-16, 18, 19, 21].—See also LaBar's, Inc., and St. Johnsbury Trucking Co. v. United States, at §207(a), n. 25 *Fitness;* and Schenck Tours, Inc., Extension, at §207(a), n. 25, *Past operations.*

On reconsideration, respondent's transportation of 22 representative shipments, moved on one truck on one day, from one consignor (who requested service and paid the costs) at one origin on one bill of lading, found not to violate "truckload lots" restriction in its certificate. Each bill of lading named one consignee at final destination, but called for from 1 to 3 "stop-offs" at separate points and at destination; t.l. rates applied on each shipment with an extra charge for each stop for partial unloading, in accord with lawfully published tariffs. Each such shipment is clearly "in truckload lots" within rationale of 51 MCC 25 in that one bill of lading covered the entire shipment, subject to provisions allowing multiple deliveries en route, each was from a single consignor, and each had the exclusive capacity and use of at least one truck. In view of such indicia, those operations were lawfully performed; and, as record shows that movement of a few shipments together under separate bills of lading was due to inadvertent error, respondent's unlawful l.t.l. transportation cannot be considered a willful violation of the Act.—Southwest Freight Lines Ext.—Removal of Restriction, 98 M.C.C. 607 (610-11)*.

Good faith in conducting unauthorized operations together with a cessation of such operations when they were determined to be unlawful, indicated that applicant is willing to comport in the future with applicable regulations.—Holt Motor Exp., Inc.—Staten Island, N.Y., 113 M.C.C. 478 (483).

Applicant's violative conduct held to be ameliorated by subsequent remedial program, and provisional extension of authority granted on basis of need.—S.T.L. Transport, Inc., Extension—New York Points, 115 M.C.C. 14 (23).

Applicant's "frequent and flagrant" violation of the Act resulted in denial of its application.—Metler Hauling & Rigging Ext.—Loudoun County, Tenn., 117 M.C.C. 557 (558).

11. Status of applicant.—[Vols. 10-13, 15, 16, 18, 19, 21].—See also Fanshaw Extension and International Automobile Delivery, Inc., both at §206(b), n. 18; and National Trailer Convoy, Inc., Extension, at §207(a), n. 25 *Fitness.*

Authority held by applicant's affiliate need not be modified as a condition precedent to a grant to applicant, as that carrier's operations differ substantially from those proposed. However, if the common control of applicant and its affiliate is subject to provisions of §5(2) by virtue of their operating over 20 vehicles in interstate commerce, a grant of authority cannot be made prior to approval of such control. [See 38 MCC 547.] As applicability of §5(2) cannot be determined on the present record, grant is conditioned on applicant's either obtaining such approval if needed or, if it is not, informing the Commission by affidavit that it and any affiliated carriers operate less than 20 vehicles collectively.—White Air Freight Service, 95 M.C.C. 616 (623).

Since if common carrier authority sought is granted, applicant's major stockholder, who is also principal owner of a contract carrier, will control both a common carrier and a contract carrier holding authority from the Commission, such common control must be approved; therefore, authority is granted subject to the filing of an appropriate application under §5 of the act and subsequent Commission approval thereof.—LaBar's, Inc., 95 M.C.C. 773 (775).

It is well settled that any corporate status will not preclude the Commission from considering all pertinent operations. [Citing 86 MCC 369]. Since about 4 years prior to obtaining its present charter authority, applicant, its sole stockholder, and latter's "travel club" have conducted some form of unlawful operations, mainly providing interstate passenger tours under individual ticket arrangements. While the stockholder's relationships with the club (now incorporated) have diminished, record is not convincing that the organization is an independent travel club which only charters buses for its members. Until it obtains a status equal to that of any other similar club, and considering past events, it must be considered (1) as a device used by applicant or its representatives to obtain tour passengers, or (2) as an unlicensed broker.—S & S Bus Service, Inc., 95 M.C.C. 796 (798, note, 802)*.

Applicant's conduct of both regulated transportation in special and charter operations and exempt taxicab service will not be contrary to public interest. Numerous authorized carriers conduct, in addition to their certificated operations, such exempt activities as carriage of unprocessed agricultural commodities and transportation between points in the same commercial zone.—D & M Taxi Co., Inc., 96 M.C.C. 439 (447).

Inasmuch as the State of Alaska does not transport freight under the normal carrier-shipper relation, and, except for the distances involved, operates in exactly the same manner as an ordinary ferry, the services performed by applicants at places served by the State Ferry System cannot be considered as being performed "for" the State Ferry System. Therefore, the proposed operations in interstate or foreign commerce by applicant motor carriers between the points in question, some of which can only be reached by water, are those of motor common carriers subject to part II of the Act.—Lindstrom Extension, 98 M.C.C. 647 (652-653); Alaska Motor Coaches, Inc., Extension, 98 M.C.C. 642 (644).

24. Proceedings remanded.—[Vols. 11, 13-19, 21].—See also Georgia-Florida-Alabama Transp. Co. v. United States, at §207(a), n. 9; and Ray Price, Inc. v. United States, at §206(a)(6)(7), n. 2.

Had the Commission fully explained basis of its conclusion that plaintiff's certificate was "patently ambiguous" and why it resorted to matters behind the certificate, rather than relying solely on language therein, the court would not question its interpretation of the description of the base territory authorized. However, record reveals no reasons to support Commission decision to ignore its well-established rule that a certificate must speak for itself and that, absent a patent ambiguity, extraneous matters will not be considered in construing authority, or to explain why it considered record in the original proceeding in determining ambiguity of the certificate on its face. Under that rule, the prior record was not available; therefore, no other guides being available, ordinary rules of grammar and punctuation entailed in "Doctrine of the Last Antecedent" were proper, pertinent, and logical aids which should have been applied in initial determination that disputed restriction "within 100 miles of Columbus Circle" was patently ambiguous. Remanded for further Commission proceedings consistent with the court's opinion.—T.I. McCormack Trucking Co. v. United States, 251 F. Supp. 526 (529-31, 533-6, 540-1)*.

In action to set aside Commission order granting plaintiff (applicant for authority to transport frozen foods and potato products) authority to transport only frozen fruits, berries, and vegetables and potato products, the Commission's finding that commodity description in the certificate should be so limited is not based on adequate subsidiary findings and its ultimate conclusion is not supported by substantial evidence. Though recognizing evidentiary factors that would support finding that a broader commodity description, such as "frozen foods," was required, the Commission made no such finding; nor did it make findings to support its grant of the lesser commodity description. No evidence supported its "scheme" (which included only potato products and frozen fruits, berries, and vegetables) for determining commodity description in authority granted; and no consideration was given to the copious evidence as to the need for authority to transport frozen foods other than those named. Order set aside and case remanded for further proceedings consistent with the court's opinion.—Dunkley Refrigerated Transport, Inc. v. United States, 253 F. Supp. 891 (894-6)*.

In action to set aside order granting interstate certificate, the Commission's report and order do not set out how or in what way two services offered by applicant—in addition to over-the-road movement of mobile homes—support its findings that (1) applicant was "fit, willing, and able" to provide proposed service and (2) complete service proposed was "required by" public convenience and necessity; thus, rationale of its conclusion that applicant met those requirements is not clear. In order to be sustained, the agency's reasoning must be sufficiently clear so that the reviewing court need not guess as to rationale thereof; furthermore, the court must be sufficiently informed of the Commission's reasoning to enable it to exercise the scope of review entrusted to it by statute. Therefore, order under review is set aside and the case remanded for further Commission action in accordance with the court's opinion.—National Trailer Convoy, Inc. v. United States, 293 F. Supp. 634 (637)*.

Plaintiffs (protestants in application proceeding) were denied procedural due process when, after publication of, and hearing on, the application (including proposed restrictions) as filed, the Commission deleted the multiple pickup and delivery restrictions originally sought by applicant and substituted a "mixed load" restriction of its own, without any further notice or hearing. The Commission's action is not held to be wrong; however, at some point in the proceeding plaintiffs should have been given an opportunity to urge that it was wrong and to show, if they could, the pernicious consequences they now claim. Upon a full hearing, the Commission may conclude that its determination was correct, but plaintiffs are entitled to a chance to show the gravity of the substitution at a hearing; that opportunity has been arbitrarily denied. Therefore, the matter must be remanded for further consideration by the Commission.—Refrigerated Transport Co., Inc. v. United States, 297 F. Supp. 5 (6-7, 9)*.

Two other facets of the controversy, developed at the court hearing, may be of help and could satisfy the demands of all concerned. Plaintiffs state that if the Commission would (1) define the phrase "mixed loads" as used in the certificate issued to intervenor, and (2) require him to operate within such definition, their objections might well disappear; those questions are commended to the Commission. In any event, the order and certificate as granted should be republished in the Federal Register, with plaintiffs given an opportunity to offer evidence and to be heard; the Commission will then re-examine the evidence and arguments and determine whether its action and order should stand or be set aside. So ordered.—Id., pp. 8-9..

While new authority may be granted for a proposed service that would be a "substantial improvement" over existing service or constitute a "new and unique service not presently available" to shippers, those are proper standards for granting a certificate if the application thereof is supported by proper findings based on sufficient evidence and if actual certificate granted is not inconsistent with the Commission's findings. However, the "new and unique service" standard is not applicable where, though applicant (intervenor) sought authority restricted against transfer of lading between vehicles, the Commission omitted the restriction (because difficult to enforce and administratively undesirable) and, without finding present service inadequate, granted authority that would permit intervenor to offer the same service which plaintiff provides. Grant of considered new certificate, with requested restriction removed, cannot stand without a finding supported by substantial evidence that existing service is inadequate; no such finding was made and record does not set forth facts that would support such a finding. Case remanded to the Commission for action consistent with the court's opinion.—Drum Transport, Inc. v. United States, 298 F. Supp. 667 (669, 670-3)*.

In Hawaiian carriers' appeal from Commission order in proceeding on 28 applications for household goods authority between points in Hawaii and those in mainland United States, insofar as it granted authority to 19 mainland carriers, scope of judicial review is limited; however, the Commission has a duty to set forth facts from which its findings and conclusions can follow rationally and to apply the relevant law thereto. Findings of the Commission show that mainland applicants expected to continue their same operating methods, whether granted authority or not; nothing therein indicates that shippers using the "motorvan-seavan" and "through container" arrangements for land-sea-land movement of the traffic from origin to destination were receiving a substandard type of service; that the shipping public would be given any different interline service if mainland carriers were not granted authority; or that those carriers would be adversely affected by denial of their applications.—HC&D Moving & Storage Co., Inc. v. United States, 298 F. Supp. 746 (747-9)*.

Moreover, there is no showing of either need for additional service in the Hawaii end of considered traffic, or that existing service would be improved by additional physical services in that State which wholesale certification of the mainland carriers would make possible. In light of the relevant law, therefore, the Commission's findings are not sufficient to support its conclusion that the Hawaiian situation was "unique" —in that mainland applicants had solicited Hawaiian household goods business for years and had individually handled mainland end of such traffic; and that tenuous "unique factor" is insufficient for its disregard of the well-established legal principle that two carriers cannot each rely on the same physical operations as support for a grant of authority based solely on past operations. Since the court will not substitute its judgment for the factual expertise of the Commission, the case is remanded for such further proceedings (including further evidence if necessary) as the Commission deems necessary for its subsequent decision and order, in light of the court's ruling.—Id., pp. 750-2.

Certificate granted defendant-intervenor authorizing it to transport "passengers and their baggage, in round trip special operations, limited to not more than nine passengers in any one vehicle" between points in designated areas, over irregular routes, fails to specifically describe the authorized special operation for which public need and convenience was found. The record amply showed that considered operation is unique, but it is no answer to the lack of specificity to say that evidence of record restricts the authority granted. The Commission has sufficient expertise and artistry to frame the certificate in such terms and language as not to deprive the special operation of its unique nature and flexible characteristics; also, while it has a rulemaking program regarding special operation certificates now in process, that administrative problem cannot justify a certificate that might allow non-unique operations for which no need was shown. Remanded to Commission for imposition of appropriate restrictions; and in drafting the final certificate, the guidelines, as set forth in 28 MCC 91, have been established by the Commission itself.—Hudson Transit Lines, Inc. v. United States, 314 F. Supp. 197 (203-4)*.

Inasmuch as the Commission inadvertently overlooked consideration of a former Commission regulation bearing directly on the rolling of certain explosives (i.e., prohibits rolling packages or containers of explosives, except barrels or kegs) during the time involved in the consolidated case before the court, the cause must be remanded so that the Commission may reconsider its findings and opinion in the light of that regulation and its bearing, if any, on the matters involved. Additionally, the Commission may find it desirable to take additional evidence or make a further record concerning several factual matters which counsel have raised on appeal to the court, Case remanded to the Commission for rehearing and reconsideration.—International Transport, Inc. v. United States, 318 F. Supp. 763 (764-5)*.

Where plaintiff bus lines (protestants in the Commission proceeding) had applied for extension authority before learning of intervening defendant's similar application, and the applications were approved after close of hearings on defendant's application but before recommended report was filed; and where defendant bus line appeared in plaintiff's application proceeding but failed to urge that new authorization be withheld until its own application had been decided, the Commission abused its discretion by refusing to accord plaintiff bus lines a fair opportunity to present evidence concerning service rendered under the new authorities and which could not effectively have been submitted during hearings on defendant carrier's application. And because of abuse of its administrative discretion, the court remands for further consideration on a reopened record. The Commission's order granting intervenor's certificate vacated; cause remanded for prompt further proceedings consistent with the court's opinion. —Blue Bird Coach Lines, Inc. v. United States, 328 F. Supp. 1331 (1332, 1337-8)*.

Operation; Extension

25. Necessity, demand, for service, in general.—[Vols. 10-19. 21].—See also American Buslines, Inc., Extension, at §208(c), n. 4; Caravelle Express, Inc. v. United States, at 5 USC *Judicial review;* Exley Exp., Inc., Extension, at §207(a), n. 30; Feature Film Service, Inc. v. United States, at §207(a), n. 9; Iowa Beef Packers, Inc. v. United States, at 5 USC *Judicial review;* Key Trans-port Service, Inc., at §203(b), n. 40; and Traf. At or Near U.S.—Can. Boundary Lines, at §204(a)(6), n. 2.

The Commission is vested with broad discretion in determining whether public convenience and necessity will be served by a grant of authority and, unless it acts arbitrarily or capriciously in establishing and administering criteria to that end, it will not be reversed upon review. Moreover, in action to set aside the Commission's denial of plaintiff's application, it is not the court's function to make factual findings, though it might have reached other conclusions from the same record. The Commission's findings and order are supported by substantial evidence on the record; sustained.—Neptune World-Wide Moving, Inc. v. United States, 284 F. Supp. 135 (138)*.

In action alleging invalidity of Commission order granting special and charter-party passenger authority to intervenor, criteria by which the Commission chose to make determinations of convenience and necessity are not subject to review by the court. The statute does not expressly delineate factors to support such a determination; thus, Congress has entrusted the Commission with wide discretionary authority to draw its conclusions from the varied circumstances that may occur in specific instances. Courts have held that the fact that there is no finding of inadequacy of existing service, or that existing service would not be injured, does not invalidate a Commission order; and, as most recently stated in 389 US 409, a specific finding of inadequacy of existing service is not a prerequisite to a grant of authority. However, record in instant case shows that deficiencies existed in plaintiff's service and that the authority granted was limited to preclude undue encroachment upon services of existing carriers in the destination area; sustained.—Greyhound Lines, Inc. v. United States, 285 F. Supp. 318 (321-2)*.

Congress entrusted to the Commission, not to a reviewing court on a *de novo* consideration, a sound discretion in the exercise of a specialized knowledge in the field of interstate transportation. In order to properly determine the existence of public need or necessity for a grant of authority, the Commission must consider, weigh and balance against each other, and decide numerous complex and complicated quesitons; one element to be considered is the adequacy of existing carriers' service, but the Commission may find that additional service is needed in a particular area without specifically finding that existing service is inadequate. Under facts and circumstances of record, the Commission's judgment (following remand), that need existed for additional service authorized by the certificate in issue, cannot be found arbitrary, capricious, an abuse of discretion or otherwise unlawful, or not supported by substantial evidence. Accordingly, plaintiffs' motion for summary judgment is without merit; defendants' motion to dismiss pursuant to reversal and remand by the Supreme Court, 389 US 409, sustained.—Dixie Highway Exp., Inc. v. United States, 287 F. Supp. 473 (474-5)*.

In suit to set aside grant of operating authority between Mobile, Ala., and Pensacola, Fla., to defendant carrier, the Commission erred in failing to apply the same standard for determining need to all points where joint line service of plaintiff and intervening plaintiff, Bay Line, is available. The Commission found that GFA-Bay Line were rendering timely and efficient joint line service between Mobile and Panama City, Fla., by interlining at Dothan, Ala., and authority granted was restricted against "traffic moving solely between" those points. However, it failed to restrict the certificate similarly to other Bay Line points which the record shows have the same efficient joint line service of GFA-Bay Line available; moreover, there was no finding of any material inadequacy of service available between Mobile and those points. Order and certificate as granted should be republished in Federal Register with opportunity to plaintiffs and others interested to offer evidence and be heard; the Commission will then re-examine the evidence and arguments. —Georgia-Florida-Alabama Transp. Co. v. United States, 290 F. Supp. 764 (768-9)*.

In action to set aside Commission report and order denying plaintiff's application for common carrier authority because it failed to establish that existing service was inadequate, the Commission did not use an improper standard in requiring applicant (plaintiff) to make such a showing. Plaintiff's reliance on the decision in 389 US 409 as supporting its assertion that it need only show that its proposed service would be unique or superior to that presently available, not that existing service is inadequate, is misplaced; grant of additional authority in the cited proceeding was premised on a Commission finding of inadequacy of existing service. There is substantial evidence of record to support the Commission's conclusion that since applicant failed to demonstrate that existing service was inadequate, no need was shown for its proposed operation; sustained.—V. Van Dyke Trucking, Inc. v. United States, 291 F. Supp. 97 (98)*.

In action to set aside Commission order granting intervening defendant carrier a certificate authorizing single-line transportation of meats and packinghouse products from Chicago to certain eastern States, scope of the court's review is limited to determining only whether the Commission's findings are supported by substantial evidence on the record, as a whole, and whether its conclusion as to public convenience and necessity has a rational basis in the facts found. Criteria by which the agency makes a determination of public convenience and necessity are not subject to review; and the statute expresses no delineation of factors to support such a determination. Congress has entrusted the Commission with wide discretionary authority to draw its conclusion on that matter from the variety of circumstances which may be present in specific instances.—Midwest Emery Freight System, Inc. v. United States, 293 F. Supp. 403 (405)*.

Commission finding that applicant (defendant carrier) was not a new competitive factor in the area, since it had handled considered traffic in joint-line service for several years, is supported by substantial evidence; and, in circumstances presented, its past performance is a relevant consideration to grant of the certificate sought. Further, no specific finding of inadequacy of existing service is necessary in order to find need for additional service in a particular area. In addition, the Commission's conclusion that any restriction of the authority granted would preclude applicant from continuing service it had performed for years, and would adversely affect shipper and interlining carrier making use thereof, finds substantial basis in the evidence. The decision made, and procedures followed, by the Commission are consistent with applicable law, and its findings and conclusions are supported by substantial evidence on the record as a whole; sustained.—Id., pp. 405-6, 408.

In action to set aside the Commission's grant of authority to three carriers to transport meats and packinghouse products from Colorado origins to points in several states, the reviewing court may not disturb the Commission's findings as to whether or not public convenience and necessity justify issuance of a certificate if they are supported by substantial evidence in the record, even though record may also contain substantial evidence supporting (or the court might reach) a contrary conclusion. Conclusions of the Commission (1) that, in light of expansion and extension of supporting meat shippers' business, potential traffic in origin area was real and not ephemeral and (2) that public convenience and necessity required the various services proposed by applicants, some of which existing carriers (plaintiffs) could not provide, are supported by specific findings; and since those findings and conclusions are supported by substantial evidence, the Commission's orders are sustained.—Midwest Emery Freight System, Inc. v. United States, 295 F. Supp. 112 (117-9)*.

In suit to set aside the Commission's grant of certificate to intervening defendant authorizing regular-route motor bus passenger service over approximately same routes as existing limousine service of plaintiff (protestant), the lower fare bus competition will undoubtedly cause plaintiff to lose some potential passengers; however, the question of whether the two services can exist, side by side, filling successfully a wider public need than either alone is for the Commission's judgment. Accordingly, since evidence of need for bus service was sufficient and the Commission's weighing of probable effects of competition and deciding the two services could so exist was well within its competence, its grant of considered authority (as interpreted by the court) is justified on the record. Action of the Commission was not without substantial evidence on the record as a whole, or in disregard of statutory mandates; complaint dismissed.—Connecticut Limousine Service, Inc. v. United States, 295 F. Supp. 1335 (1336-8)*.

In action challenging the Commission's grant to defendant carrier of authority to transport general commodities between Birmingham, Ala., and Houston, Tex., but only insofar as intermediate-point service is authorized at Beaumont, Tex., the reviewing court may not substitute its judgment for that of the Commission on far reaching technical questions which it was created and empowered to decide. The record amply supports Commission determination that there was need for improved service between the Southeast and Texas, contains abundant evidence of need for motor carrier service to and from Beaumont and, also, supports the Commission's conclusion that existing carriers would not be adversely affected by the applicant's proposed service. The deference which is due the Commission's expertise in matters of interstate commerce is justified, not impugned, by the record; therefore, since its action was within its statutory authority, is based on adequate findings, and is supported by substantial evidence, the Commission's order is sustained.—Herrin Transportation Co. v. United States, 297 F. Supp. 529 (530, 531-2)*.

Though plaintiffs (protestants in Commission proceeding in which defendant carrier was granted authority to transport general commodities between Charlotte, N.C. and Florida) hold authority to transport some but not all freight from Charlotte to some but not all points in Florida, none of them provide complete service to North Carolina shippers. Applicant's proposed regular pick-up at Charlotte, prompt transport to Florida, and prompt delivery to outlying Florida points would materially improve present service and, also, supply service not now being rendered. Viewing the record as a whole, evidence abundantly supports Commission findings that existing service is unsatisfactory and inadequate and that public convenience and necessity justify and require the additional service authorized. And while there may be doubt that applicant could carry out its "hearing room promises" as to proposed service, evidence supports Commission decision that it should be given the opportunity. Record shows that applicant has the capacity and intends to perform a service which will be in the public interest; grant of authority sustained.—Carolina Freight Carriers Corp. v. United States, 297 F. Supp. 848 (850-2)*.

Whether or not a given proposed operation could prosper and provide a viable service is a matter particularly within the Commission's expertise; and it properly concluded that proposed service would not meet the supposed need when plaintiff (applicant) offered no positive evidence that its own service would be any more adequate than that provided by protesting carrier. In denying plaintiff's application, the Commission clearly used its old and well established criteria, i.e., whether the new operation will serve a useful public purpose, responsive to a public demand or need; whether that purpose can be served as well by existing carriers; and whether it can be served by applicant without endangering or impairing operations of existing carriers contrary to the public interest. However, had it departed from its basic criteria and precedents, as plaintiff asserts, or had it changed them, that would not be a basis for annulling considered order. Commission decision that, in view of existing service and of the shapeless nature of the proposal, no need was shown for proposed service is in accord with the law and supported by substantial evidence on the whole record; complaint dismissed.—Jerry Lipps, Inc. v. Interstate Commerce Commission, 299 F. Supp. 942 (945-6)*.

Congress specifically provided that the Commission can, and must in some cases, make a determination of need for proposed service on the basis of what will be required in the future. Such a decision is particularly within the Commission's expertise and, indeed, in instances where future transportation needs are unclear, grant of additional authority in order to clarify the situation and provide an assured transport base is both within the Commission's power and in furtherance of the national transportation policy. Commission decision complained of, that public convenience and necessity required grant of authority sought, was based on (1) future need in the area and (2) the competitive situation; and the evidence and legitimate inferences drawn therefrom, it being the Commission's province to draw such inferences, support its findings and conclusions that the grant was warranted. The decision is rational, in accordance with the law, and based on adequate findings supported by substantial evidence on the whole record; complaint dismissed.—Truck Transport, Incorporated v. United States, 300 F. Supp. 159 (161-2)*.

In suit to set aside the Commission's grant of common carrier authority to serve various points in southern Mississippi, including the Gulf coast, the court's sole function is to determine whether the Commission order is supported by substantial evidence and is in accord with the applicable law. The Commission is given wide latitude, in granting certificates, to determine what constitutes public convenience and necessity; the reviewing court cannot make such a determination anew, but decides if the agency observed legal requirements and whether its conclusions as to convenience and necessity had a rational basis in the facts found which are supported by substantial evidence of record. Evidence amply supports findings of fact that (1) shippers were familiar with, and had tried, available service, (2) available services were inadequate in terms of transit time, claims and reliability, and (3) proposed service would improve conditions and eliminate inadequacies. Considering the entire record, Commission decision and order is not arbitrary or capricious, is supported by the evidence, and is in accord with applicable law; sustained.—West Brothers, Inc. v. United States, 303 F. Supp. 1171 (1172-4)*.

In carriers' suit to set aside issuance of a certificate to another carrier, fact that the Commission considered specialized service and equipment available from the applicant does not show that it used contract-carrier standards in determining need for common-carrier service. In establishing the inadequacy of existing service, an important element in determination of public convenience and necessity, the Commission properly looked at whether plaintiffs' (protestants) equipment was satisfactory for shippers' needs. Applicant's equipment was neither more highly specialized than that available to protestants, nor specifically tailored for individualized needs of shippers, and the other carriers also used sophisticated equipment in attempting to meet shipper needs; however, mere availability of sophisticated equipment cannot keep a carrier from receiving a certificate. Also, the Commission noted that existing carriers had not supplied either adequate service or standard equipment on numerous occasions; and equally important, services of the applicant under temporary authority could be, and to some extent were, performed by common carriers. Commission order sustained.—Superior Trucking Co. v. United States, 306 F. Supp. 872 (876-7)*.

The statute predicates issuance of certificates on a finding by the Commission that the proposed service is "required by the***public convenience and necessity;" thus, the Commission is given exclusive discretion to determine public convenience and necessity. On the record as a whole, in suit to set aside Commission order denying plaintiff bus line's application for passenger authority between East Northfield and Springfield, Mass., the court cannot find that the Commission's conclusion, that "relatively small additional convenience to passengers" did not warrant authorization of a new through service duplicative of existing bus service, was unsupported by substantial evidence. Accordingly, the Commission's decision and order must be approved; complaint dismissed.—Town of Montague v. United States, 306 F. Supp. 1227 (1229)*.

In suite to set aside Commission grant of a certificate to defendant-intervenor, authorizing a car pool commuter service for passengers, in small groups, the Commission and not the reviewing court is the arbiter of the public interest. Congress has entrusted it with broad discretion, in the exercise of its expertise, to grant or deny authority for a particular operation provided, always, that there is warrant in the record; and, in clear exercise of its expertise and judgment, the Commission concluded that the grant of authority was justified because of the applicant's distinctive type of commuter service. Scope of the court's review is limited to determining whether the agency's findings are supported by substantial evidence of record, and whether its conclusion as to public need for proposed services has a rational basis in fact and is legally permissible. Therefore, since record before the Commission, which is replete with evidence that carrier's special service was distinctive, amply contained a rational basis for its conclusions, the Commission's grant of special common carrier authority is sustained.—Hudson Transit Lines, Inc. v. United States, 314 F. Supp. 197 (200-202)*.

Plaintiffs complain of Commission order granting defendant carrier authority to transport general commodities and explosives between certain Utah and Nevada points primarily because, as no interline restriction was imposed, it authorizes carrier (applicant) to interline shipments without a showing of need therefor. Interlining generally is a right and duty of common carriers and, since undesirable complications result, the Commission imposes such a restriction on new authority only where it is shown to be necessary in the public interest. Uncontroverted evidence showed need for proposed general-commodity service in sparsely-settled northeastern Nevada area and for limited interline of shipments from or to points therein; once need was shown for basic grant of such new authority, the right to interline Utah-California overhead traffic followed as a reasonable concomitance of providing the needed service within Nevada. Thus, since protestants (plaintiffs) failed to show that a restriction against interlining was warranted, and evidence supported the Commission's findings of need for such service in northeastern Nevada, the grant of unrestricted general-commodity is sustained.—Ashworth Transfer, Inc. v. United States, 315 F. Supp. 199 (201-3)*.

But evidence consisting only of sworn but equivocal statements of two users of explosives is not sufficient to show need for grant of additional unrestricted authority for movement of classes A and B (dangerous) explosives; neither user indicated volume, frequency or type of explosives used, nor was it shown that they had sought services of existing carriers. Though the explosives grant was made simultaneously with that for general commodities, the Commission report places no reliance on relationship between the two grants, but instead bases explosive authority granted upon need for a new explosives carrier in the area. Review of the Commission order is limited to an appraisal of its action solely upon the grounds invoked by the agency; and the inquiry as to those grounds is whether its decision has rational basis supported by substantial evidence on the whole record. Therefore, since evidence of record does not sustain Commission findings of need for proposed transportation of explosives, the grant of unrestricted explosives authority is set aside. Otherwise, Commission order under review is affirmed in all respects—Id., pp. 203-4.

In motor carriers' action for judicial review of the Commission's grant of authority to another carrier, the question of whether a public need exists and, hence, whether there is need for additional motor carrier service, is a matter for Commission determination; but such finding must be supported by substantial evidence. Commission finding that requirements of shipping public were not being met, in the transportation of l.t.l. shipments, was supported by substantial evidence of record; thus, there was adequate basis for the grant of extension authority to applicant carrier.—Georgia Highway Exp., Inc. v. United States, 331 F. Supp. 906 (909-10)*.

Also, since determination of whether or not the authority granted should be restricted against interchange is within discretion of the Commission, and since it concluded that protesting carriers had not shown they would be materially and adversely affected by failure to impose requested interchange restriction on applicant's certificate, the Commission's refusal to impose interchange restrictions on authority granted applicant was not an abuse of discretion.—Id., p. 911.

In suit to annul and vacate Commission order converting outstanding permit of defendant carrier (applicant) into a certificate, court review is limited to determining whether the facts and the law warranted the Commission action; the court is not concerned with soundness of the Commission's reasoning or the wisdom of its decision. The Act does not define public convenience and necessity; that is a matter within the discretion of the Commission which has expertise in transportation matters, and to which Congress entrusted the execution of the national transportation policy. Evidence in the record showed need for applicant's service as a common, rather than a contract, carrier; the Commission considered all relevant factors of public convenience and necessity and, on the facts before it, was warranted in finding that applicant qualified and was entitled to a common-carrier certificate in lieu of its contract-carrier permit. Commission report and order under review is substantially supported by the evidence and accords with the applicable law; sustained.—Perkins Furniture Transport, Inc. v. United States, 333 F. Supp. 879 (882-4)*.

Supporting witnesses from banking institutions require an expeditious door-to-door pickup and delivery service on cash letters during nonbanking hours, which will permit the banks' transit departments to have daily letters available at the beginning of work. Transit or remittance time is important, as the money paid for checks is unavailable to the banks until the checks have been presented to the bank on which drawn, and the amount credited to account of the country bank or remitted to the correspondent bank. Applicant's proposed 2-day service would reduce amount of uncollected money or credit which is unusable until the letters are collected. Most of the traffic presently is moving by U.S. mail or bus, but such service does not include the convenience of a pickup and delivery or the 2-day remittance time. Moreover, the weight of cash letters varies from a few ounces to 10 to 12 pounds, and in practically all instances, the rate proposed will permit substantial savings.—Continental Dispatch, 95 M.C.C. 483 (487).

Although service to portions of area sought is not directly supported by witnesses, numerous banks therein operate under similar procedures, and as no existing carrier is authorized to provide such service, applicant should be permitted to make it available to them. Granted, except between certain points served by protestant.—Id., p. 487, 488.

Because of slow rail transit time, perishable nature of bananas shipped, and because they cannot serve all destination points involved, protestant railroads are unable to satisfy supporting shippers' needs with respect to expeditious movement of a substantial portion of the banana traffic involved; shippers require motor carrier service in addition to rail service, and the only motor carrier protestant has only one refrigerated vehicle and has never transported bananas. Need is shown for proposed service from Balitmore and the New York harbor area to points specified, and, in addition, to points in Michigan and West Virginia (those States being within shippers' normal distribution territory). However, since applicant's fitness is presently in issue in another proceeding, proceeding is held open for further consideration of that issue.—Midwest Emery Freight System, Inc., 95 M.C.C. 642 (645-6, 648-9).

The Commission recognizes that termination of related proceeding in applicant's "interim" application under §7(c) of Transportation Act of 1958, while leaving open its §207 proceeding pending determination of its fitness, may cause interruption of service applicant heretofore provided and for which a continuing need is found; however, where there is need for service in a territory having no carrier service capable of meeting such need, an appropriate remedy is available under §210a.—Id., p. 648.

Manufacturer of small toys and playground equipment shows need for applicant's proposed service on inbound shipments of materials and supplies from designated points in California to shipper's plant in Pennsylvania and on outbound shipments of its products from the plant to designated points in California. Inbound shipments would be greatly facilitated since present shipment by rail in unsatisfactory; shipper's plant is not located on a siding and consequently shipment has to be loaded onto trucks and hauled to the plant site. The extra handling causes inconvenience and frequent damage to the lading; additionally, outbound shipments would be greatly expeditied for with the use of proposed service, time in transit can be cut to about six days from the 14 to 21 days required by rail transportation.—La Bar's, Inc., Common Carrier Application, 95 M.C.C. 773 (776).

Another supporting shipper establishes a present need for applicant's proposed service from Burwick, Pa., on outbound shipments of designated commodities to 4 of 7 destination states sought, and a definite future need into one other, Ohio, to which it is in the process of expanding its marketing area. However, there being no concrete evidence of need as to the other 2 states sought, grant of authority only to described points within those states sufficient to meet the present and foreseeable needs is warranted; prospect of future need of service to points other than those so described is too vague and speculative to form the basis for a grant of operating rights. On inbound shipments of raw materials necessary to shipper's operations, evidence establishes a need for inbound service only from Ohio; a shipper's mere desire for more authority than it has definite plans to use is not sufficient grounds to grant such additional authority. Granted in part.—Id., pp. 776, 777.

While shipper asserts a need for applicant's proposed service to some 10 states, the evidence of record shows need for service to only 4 of those 10 states. Therefore, while a wide grant of authority as was requested might be of some convenience to the supporting shipper at some remote future date, authority will be granted only on the basis of the shipper's present or reasonably foreseeable future transportation requirements.—Skinner Motor Exp., Inc., Extension, 96 M.C.C. 135 (142).

Some 3 months after applicant filed for certificate to transport fiberboard or pulpwood boards and walls in "converta" van type trailers or flat-bed trailers, it applied for alternate-route authority to move general commodities over the same route, from Meridan, Miss., to Birmingham, Ala. Applicant was already handling 30 percent of the single supporting shipper's traffic, having to route it through Mobile, Ala. There were two protestants who showed they had necessary authority and were presently participating in the movement for shipper's remaining 70 percent, and while shipper experienced occasional difficulty in obtaining converter vans, there was no evidence of how a grant of the authority sought would make any additional equipment available to the shipper. Applicant apparently does not intend to add equipment to its fleet, and its claim that a grant of the application would enable it to improve its service seems inconsistent with its position that it took in asking for alternate authority that authorization to operate between Meridan and Birmingham would not materially better the quality of its service. Application denied.—West Bros., Inc., Extension, 96 M.C.C. 490 (499).

Existence of contract carriage providing satisfactory service to a shipper is not ordinarily a bar to a grant of coextensive common carrier authority.—Tajon Trucking Co. Extension, 96 M.C.C. 591 (595).

Where a need for service is shown and more than the necessary number of carriers seek to fulfill that need, it is the function of the Commission to determine which applicant or applicants should be granted authority. Primary considerations are the amount of prospective traffic at different points and the capabilities, if any, of existing service, the location of terminal facilities and availability of appropriate equipment, and applicants' sphere of operations under present authority in relation to the proposed operation.—Transport, Inc., Extension, 96 M.C.C. 671 (678).

A change in the technique of marketing cement has resulted in numerous applications for the same motor carrier authority to handle distribution of ex-rail traffic in states where, generally, there is no established existing service. Also in those states, there are several competitive supporting cement shippers as well as competitive rail carriers, and the competitive services of two motor carriers is required; however, the Commission is not bound by any numerical formula, and selection of an appropriate number of carriers to be given authority will vary according to competitive circumstances in any particular case. Accordingly, in one instance four carriers are selected to operate in North Dakota because of the relatively slight quantity of equipment operated by the smaller carriers and the highly competitive situation between motor carriers and rail carriers; in Minnesota and South Dakota, several applicants are selected to receive authority over one applicant that does not have terminal facilities or intrastate operations in these states.—Id., p. 681.

Public convenience and necessity is a fact and once established it is not the property of any particular carrier. Normally, in determining which one of two applicants should be selected to provide a proposed service, requiring only a single carrier's service, an important consideration would be what carrier produced public support. Herein East Coast, which produced the most public support, has failed to establish that it is fit. In view thereof and of the public need shown for service, shippers should not be penalized for Refrigerated's failure to produce greater public support for its application. Granted in part.—East Coast Trucking, Inc., Extension, 98 M.C.C. 594 (600-601).

While the Commission is not bound by limitations in one applicant's intrastate certificate, it is required to determine whether all service proposed between Washington, D.C., and Richmond, Va., is calculated to meet a public need or whether, if all proposed service were authorized, it would so divide existing traffic as to cause both applicants' operations to become uneconomical. In this light, only the other applicant is authorized to serve intermediate points between Springfield, Va., and Richmond along proposed route, since it already serves most of these points, since possibility of future residential development is insufficient to establish need for two carriers along the same route, and since proposed overabundance of service could seriously affect the operations of both carriers.—Virginia Stage Lines, Inc., Extension, 102 M.C.C. 568 (571).

Supporting shippers have demonstrated distinct need for irregular-route multiple pickup and delivery, service proposed by applicants. Protestant rail carriers offer a stop-in-transit service, but this lacks the speed and flexibility of proposed service; in addition protestant regular-route motor carriers have failed to show that, as a practical matter, they can provide a similar service. Fact that supporting shippers seek proposed service in order to lower transportation costs does not invalidate their support of applicant, since it would be unjust to deny shippers the inherent advantages of truckload service and force them to use more costly and generally less efficient less-than-truckload service. Granted.—Watkins Motor Lines, Inc., Ext.—North & South Carolina, 103 M.C.C. 227 (246-8).

Record in proceedings on four applications, seeking similar authority, is convincing that California shippers of frozen, refrigerated, and nonrefrigerated foods require a more flexible and responsive service than that presently available to them. Shippers also have shown clearly that availability of the type of service proposed would facilitate development of new markets for their products throughout the destination area sought; and based on their present volume of shipments and the reasonable foreseeable increase therein which would result from a more responsive service, need is shown for services of two additional carriers. While all four applicants are equally capable of performing proposed services, since services of only two carriers are required, authority is granted to the two named who, being established carriers in the area handling considerable traffic, merely would expand the range of commodities which they are authorized to transport in the territory.—Frozen Food Express Extension, 103 M.C.C. 913 (916-7)*.

As to selection of specific carriers to receive authority among multiple applicants, it is appropriate to observe the criteria set forth in 102 MCC 336, and, while prior report did not specifically so indicate, it is apparent that all applicants were considered equally qualified in light of those criteria, except in one respect, i.e., the extent of their existing authorities. However, on the basis of a third applicant's "grandfather" operations in transporting frozen fruits, berries, and vegetables between points in the four-State area, it should have been considered on the same basis as the two previously selected. On reconsideration, therefore, in view of the particular traffic involved (which will often consist of frequent shipments in small lots) and the significance of applicants' existing service, and applying the applicable criteria, prior grant to the two applicants is affirmed and authority is granted to third named applicant as well.—Id., 106 M.C.C. 161 (163-4)*.

Need is shown for proposed transportation of meats and packinghouse products from supporting shipper's Fremont, Nebr., packinghouse plant to points in Oklahoma. Applicant is not satisfactorily serving the shipper from considered plant to States adjacent to Oklahoma and to parts of that State; existing carriers are unable to provide the required service; and a grant of authority sought will insure the rendition of a complete and flexible service. Furthermore, initial opposition to the application appears to have been based primarily on a desire that restrictions be imposed on any authority granted to applicant, rather than on any real or active interest of protestants in providing the service required by the supporting shipper.—Fox-Smythe Transp. Co. Extension—Oklahoma, 106 M.C.C. 1 (30).

Although Florida is often referred to as essentially a consumer State since traffic to points in Florida is considerably heavier than traffic moving out of Florida, that fact does not justify inadequate service; this traffic imbalance must be weighed against the lack of a reasonable fast and consistent service which the Florida shippers are not receiving, for which they have established a need, and to which they are entitled. Factors establishing need for proposed service include: (1) protestants' reluctance to interline truckload traffic at Charlotte, N.C., (2) their inability to interline traffic between Florida points, and (3) excessive and erratic transit time of L.T.L. shipments between Charlotte and Florida points. Applicants, therefore, granted regular route authority between Charlotte and various Florida points and between specified Florida cities; in addition all points in Mecklenburg County, N.C., all points in Florida and Florala, Ala., not on the described routes are to be served as off-route points in connection with the described routes.—Alterman Transport Lines, Inc., Extension, 106 M.C.C. 402 (418-22)*.

A proper public convenience and necessity finding may be made upon an appropriate record pursuant to §208(a) of the Act without carriers' first filing an application under §207 of the Act. To conclude otherwise would be to read provisions of §208(a), particularly those starting "at the time of issuance and from time to time thereafter," right out of the statute. Congress in enacting this provision was aware that a sound job might not be done initially and left the door open to correct any resulting deficiency. —Removal of Truckload Lot Restrictions, 106 M.C.C. 455 (476)*.

Were air carriers, direct or indirect, able to utilize motor contract carrier service beyond the air carriers' air terminal area, the control and direction of such traffic clearly would reside with the air carrier, regardless of whether or not the shipments move on through air bills of lading or on separate bills of lading for the air and surface portions of the entire movement. By extending their control and direction over traffic beyond their air terminal areas, the air carriers would constitute themselves as surface freight forwarders under part IV of the Act, and appropriate authority to act in such a capacity would be required. Since applicants' operations would be to serve the general public rather than the air carriers, the proposed operations would be those of common carriers by motor vehicle as defined in the Act. Contract carrier authority denied; common carrier authority granted. —Theodore Savage Contract Carrier Application; 108 M.C.C. 205 (212-13)*.

Applicant, a common carrier by motor vehicle, seeks authority to transport such merchandise as is dealt in by wholesale, retail and chain grocery and food business houses, and applicant also seeks to have a prior rail-haul restriction in its certificate removed. Removal of the restriction would enable applicant to provide a through single-line motor carrier service to points in the sought destination area that it is now precluded from serving because of the prior rail-haul restriction in its certificate. Removal of the restriction is justified to enable applicant to regain some of the traffic which it previously moved and which it has now lost because of shippers' preference for motor service instead of rail service. However, applicant has not shown that it should receive the broad commodity authority it seeks to serve the destination area. Issuance of such broad authority would enable applicant to institute service that would be potentially disruptive of the operations of certain existing carriers that are providing adequate service for other shippers to and from the involved area. Authority granted as to service from one origin point, denied as to the other orgin point.—Auclair Transportation, Inc., Extension—Wilder, Vt., 108 M.C.C. 604 (605, 611, 612).

Supporting shipper has shown a need for single-line service for the transportation of gelatin. Shipper has used applicant's service under color of right and characterizes its service as outstanding. Protestant does not have single-line authority to service many of the involved points, but proposes to serve shipper by interlining with other carriers who are not parties to this proceeding; such proposal is entitled to little weight inasmuch as there is no evidence of record that these carriers with which protestant would interline are suitably authorized and available for the movement of the involved traffic; application granted.—Rowley Interstate Transp. Co., Inc.—Investigation, 110 M.C.C. 285 (292).

The impressive number of shippers who support one or all of considered applications must be given weight in assessing the public requirements at issue in the proceedings;

however, expressions of public interest, even though numerous, are insufficient standing alone to warrant certification of new motor carrier services. Under its statutory mandate, the Commission must scrutinize all the evidence presented with a view toward determining to what, if any, extent proposed operations are required by the public convenience and necessity; and when such proposals involve several distinct phases, the requisite determination must be made as to each aspect individually. In that connection, tests to be applied are, in substance, (1) whether the new operation will serve a public purpose, responsive to public demand or need, (2) whether that purpose can or will be served as well by existing lines or carriers, and (3) whether it can be served by applicant's proposed new operation or service without endangering or impairing that of existing carriers contrary to the public interest.—Dealers Transit, Inc., Extension, 110 M.C.C. 317 (332-3)*.

Authority to operate as a regular-route common carrier of passengers and their baggage between named airports and indicated destinations granted. The dramatic increase in number of air passengers in recent years shows a need for proposed service, and with the advent of jumbo jets such need can be expected to increase. Authority granted herein will enable applicant to provide a complete service responsive to the demands for an efficient intermodal transportation system. Only one protestant offers service comparable to that proposed by applicant, but protestant's service is territorially limited and consists of ordinary bus service while applicant proposes a luxury-type operation at twice protestant's rates. Mere possibility that applicant may institute competitive service is no basis for denial of authority where substantial public benefit is shown.—Connecticut Limousine Service, Inc., Modification, 110 M.C.C. 830 (836-7).

On reconsideration, Commission granted authority as general-commodity carrier, with certain exceptions and upon compliance with certain specified conditions, between described points. Where record demonstrates that supporting shippers require service in transportation of wide range of diverse commodities belonging to numerous different classes, this Commission will regularly grant general-commodity authority rather than limit authorization to those various specific commodities which the evidence discloses will be shipped.—Comet Messenger & Deliv. Serv., Inc., Com. Car. Applic., 111 M.C.C. 13 (16)*.

Commission granted applicant two-way authority between points in Middlesex County, N.J. and Baltimore, Md., although applicant sought only one-way authority since Commission has duty to authorize a viable operation and this allows applicant to render complete and practicable service without unduly affecting existing carriers' operations. Application is supported by two named shippers and is unopposed by any existing carrier.—Swan Messenger Service, Inc., Ext.—General Commods., 112 M.C.C. 26 (34)*.

Commission found that the emergency transportation situation created by the temporary closing of West Virginia Highway 2 required a general finding of public convenience and necessity and the inclusion of affected carriers in a special limited certificate to ensure continuous service between indicated West Virginia points via described Ohio highway. Only those carriers now engaged in intrastate transportation of goods or those holding West Virginia certificates of registration are eligible for inclusion under such certificates.—Special Relief for Motor Carriers, 112 M.C.C. 323 (329-30).

Authority granted where consignees require multiple pickup of mixed, less-than-truck-load shipments of (1) so-called dry-line grocery store items, and (2) dry-line grocery store items and frozen foods, combined, for over-the-road movement, in truckloads, a service existing regular-route carriers are unable to provide due to commodity and territorial limitations in their authorities.—Montana Express, Inc., Extension, 113 M.C.C. 73 (79-81)*.

The record establishes that the four supporting shippers each require motor transportation services, not adequately available from existing motor carriers, as a supplement to rail transportation which mode handles the predominant portion of the commodities shipped, during the "potash season" which generally extends from October to April of each year and when expeditied deliveries and other services characteristically supplied by motor carriers are essential.—Steere Tank Lines, Inc., Extension, 113 M.C.C. 118 (126)*.

As the supporting shipper's customers order less-than-truckload quantities for delivery at jobsites throughout the southeastern States, necessitating the provision of up to 10 stops for partial unloading at points in the considered territory, and as protestant offers a maximum of 3 such stops and failed to reply to applicant's petition for reconsideration, a grant of the requested authority to transport sheet metal products to all points in Florida and Georgia was found to be warranted.—Pittsburgh & New England Trucking Co. Extension, 113 M.C.C. 385 (389)*.

Requirements of supporting steel fabricators and warehousemen for complete service featuring special equipment, timed, split, and jobsite deliveries, found to warrant grant of additional authority.—Tanksley Transfer Co. Extension—Iron and Steel Articles, 113 M.C.C. 423 (427).

Authority to conduct passenger round trip charter operations beginning and ending at High Point, N.C., and points in its commercial zone, and extending to points in Florida, Georgia, South Carolina, Tennessee, Virginia, Maryland and the District of Columbia, granted when existing charter operations found not to be responsive to the particular needs of user public supporting the application.—City Transit Co. Common Carrier Application, 113 M.C.C. 471 (476)*.

Application granted when health and safety of persons in the involved communities depend directly upon an adequate and immediate supply of equipment during adverse weather conditions, which protestant alone is unable to meet, and shipper's present volume of traffic is sufficient to support all three involved carriers and protestant will continue to participate proportionately.—Mohawk Trucking & Salvage Co., Ext.—Sodium Chloride, 113 M.C.C. 579 (584-6)*.

Commission issued a special certificate of public convenience and necessity to any carrier meeting the special eligibility requirements detailed herein inasmuch as a need for transportation of "waste" products for recycling and reuse has been shown by the national concern for our environmental quality and the deterioration of our natural surroundings.—Transportation of "Waste" Products for Reuse, 114 M.C.C. 92 (109-10)*.

Proposal for a National finding of public convenience and necessity to expedite the transportation of new furniture rejected as there does not appear to be the broad range of support that should exist for the adoption of proposal which would affect large segments of the shipping public and the motor carrier industry.—Motor Service on Shipments of New Furniture, 114 M.C.C. 144 (160-2).

The Commission favors sufficient carrier capacity to encourage competition and provide incentives for innovation and improved service. However, multiple-application proceedings require care not only to avoid proliferous operating authorities not needed by the public but also to select carriers with ability to perform needed service. When evidence of record justifies grant to only one of several applicants for basically similar authority, selection of the carrier to receive authority requires consideration of: (1) existing authorities and operations of all applicants; (2) location of their terminal facilities and equipment they operate; (3) relative date of filing the applications; and (4) carrier which produces the evidence supporting a finding of public need.—Herrin Transp. Co. Extension—Atlanta, Ga., 114 M.C.C. 571 (601-2)*.

In application proceedings, the paucity of evidence relating to the weight or other basic characteristics of the supporting shipper's commodities negates rather than establishes the heavy haulers' right to handle such commodities. Issuance of certificate conditioned upon compliance with the requirements established in 111 MCC 151.—Sammons Trucking Extension, 115 M.C.C. 36 (41, 43)*.

While there are numerous carriers presently operating in the area of the proposed service, evidence adduced from a large number of shippers, most of whom ship less-than-truckload amounts, indicates a need for complete, expeditious, single-line service. The grant of authority made is conditioned on applicant's filing of the annual performance report specified.—Transamerican Freight Lines, Inc., Extension, 115 M.C.C. 416 (426, 429).

Public need found to require transportation by applicant of refuse containers and compactor systems, and of commodities used in the manufacture and distribution of refuse compactor systems and refuse containers (except commodities in bulk), from 2 points in New York to points in 15 additional states.—Indian Bow Truck Lines, Ltd., Extension—15 States, 117 M.C.C. 671 (675)*.

In an embraced proceeding, public need found to require a grant of authority to only one of four applicants, to transport certain commodities to points in 18 states from East St. Louis, Ill.—Behnken Truck Service, Inc., Ext.—East St. Louis, 117 M.C.C. 825 (833)*.

Alaska: [Vols. 18, 19, 21].— See also AADA Systems, Inc. Case, *Truckaway* below.

Due to the fact that there is no overland highway connection between any of the named places in the southeastern Alaska panhandle, which are separated one from the other by water or extremely difficult mountainous terrain over which no land highways have been constructed, the only surface means of travel between them is by water. Therefore, operations proposed by applicant, utilizing the services of vessels of the State Ferry System, found to be over a regular route within the meaning of the statute. The report notes the possibility that the port-to-port service might be found to be that of a carrier subject to Shipping Act, 1916; however, such duplication is no bar to the Commission's exercise of jurisdiction over such operations. Applications granted.—Alaska Motor Coaches, Inc., Extension, 98 M.C.C. 642(645); Lindstrom Extension, 98 M.C.C. 647 (650).

Commercial competition: [Vols. 18, 21].—It was held that the evidence of record clearly establishes a public need for the services generally proposed by each applicant. While most of the protestants have participated in some of shipper's traffic, many have carried only minimal volumes of the involved traffic, and therefore will not suffer any substantial loss of revenue. With respect to those carriers which are now transporting substantial portions of shipper's traffic, the evidence indicates that shipper's present and future production will assure sufficient traffic for existing carriers as well as applicants. This, coupled with unexplained instances in which no equipment was available to the shipper, leads to the conclusion that little, if any, adverse effect will befall protestants as a result of the grant of these applications.—Kroblin Refrigerated Xpress, Ext.—Sterling, Colo., 118 M.C.C. 869 (874)*.

Commercial zones: [Vol. 18].—See also Arkansas-Best—Purchase—Indianhead, at §5(2), n. 15 *Commercial.*

A grant of authority to conduct passenger charter operations beginning and ending at points within a commercial zone of a named municipality is proper.—City Transit Co. Common Carrier Application, 113 MCC 471 (476)*.

Commodity description: [17-19, 21].—See also Ecoff Trucking, Inc., Extension, at §204(b), n. 7 *Liquid chemicals;* Morrison Application, at *Existing carriers* below; and Olson Transportation Co. Ext.—Dry Plastics, at *Existing service* below.

In action to set aside the Commission's order granting plaintiff authority to transport frozen fruits, frozen berries, frozen vegetables, and potato products, the record, in its entirety, warrants a commodity description broad enough to enable plaintiff to transport "frozen products". Supporting shippers manufacture or market, or expect to market, frozen potatoes, other frozen potato products and vegetables and processed meats; and while the Commission recognized that the consolidated record evidenced "the shippers' desire that the carriers serving them be awarded a commodity description broad enough to enable them to transport each of the food products they handle", it did not make such a finding. Instead, it referred to a "scheme" unsupported by evidence to which each application should conform and restricted, in accordance therewith, the authority granted. Remanded for further proceedings in conformity with the court's opinion.—Dunkley Refrigerated Transport v. United States, 253 F. Supp. 891 (894-5,6)*.

Claim of plaintiffs in suit to set aside and annul the Commission's grant of authority to another motor carrier, that commodity description "iron and steel articles" in the certificate permits transportation of a broader category of articles than the evidence warrants, is not in accord with supporting shippers' testimony of record. Review of that shipper testimony makes vividly evident the importance of the Commission's established policy of favoring broad commodity descriptions, such as that in question, in order to provide comprehensive service to an industry and avoid the need for recurrent extensions of an original narrow grant. Moreover, in granting a broad certificate, the Commission does not require an applicant to show need as to each article; such a showing as to a representative number of items in a category establishes need for a grant covering a broader group including those representative items.—Superior Trucking Co. v. United States, 306 F. Supp. 872 (876-7)*.

While some of commodities dealt in by supporting shippers are not "construction supplies" (the authority applied for) but "construction materials" as those terms are construed in certificates issued by the Commission, fact that applicant has been transporting such commodities under its intrastate authority for several years without objection from the Idaho Public Utilities Commission strongly suggests that the State regulatory body places a broader construction on "supplies" than does the Commission; and, in absence of any evidence that applicant's intrastate authority has been interpreted by the issuing agency to exclude transportation of what the Commission would term "construction materials," its prior transportation of such materials has been conducted in good faith and under color of right. In the circumstances, applicant is entitled to have all its past good-faith operations considered in determination of issue of public convenience and necessity.—Statewide Transport, Inc., Extension, 95 M.C.C. 57 (63-4).

Proposed operations would be more responsive to shippers' needs than the intrastate service applicant presently affords, and authorization thereof would not have materially detrimental effect on operations of existing carriers. However, while some of the construction materials and items requiring use of special equipment transported by applicant may have been intended for use by mining and logging industry, no real justification is shown for grant of specific authority to transport mining and logging machinery, equipment, materials and supplies; granted accordingly.—Id., pp. 64, 65.

Protestant's argument that the commodity description "scrap iron" rather than "scrap metal" should be used in the authority granted is without merit; evidence is clear that scrap metals other than "iron" are involved.—Skinner Motor Exp., Inc., Extension, 96 M.C.C. 135 (142).

In coordinated rail-motor movement of cement where the cement moves by rail to a storage area and then by motor movement to individual consignees, to movement of the ex-rail cement "in packages" and "in bulk" because such restrictions would not be responsive to the needs of supporting shippers and would not allow them to receive a comprehensive service.—Transport, Inc., Extension, 96 M.C.C. 671 (681-2).

The evidence establishes an undisputed need for applicant to transport salt, salt products and mineral mixtures in bulk since there is no authorized salt carrier and since the protestant's authority to transport chemicals in bulk does not include the handling of such commodities because considered raw materials have not lost their identity through any chemical process. Granted in part.—Schwerman Trucking Co. Extension, 98 M.C.C. 350 (353-354).

Applicant's present "groceries" authority limits it to the transportation of "articles for human consumption which are customarily served as food, or which are used in the preparation of food" and does not authorize the transportation of inedible commodities even though such commodities may be purchased in a grocery store. Since need for the transportation of these inedible commodities is evidenced, authority granted applicant to transport "such commodities as are dealt in or sold by grocery stores."—Interstate Grocery Distribution System Ext., 98 M.C.C. 546 (547-548).

Considered nitrogen fertilizer solution is composed of nitrogen, anhydrous ammonia, urea and water. Anhydrous ammonia, a compound of hydrogen, nitrogen and water, is itself a nitrogen fertilizer solution and the base material from which all other nitrogen fertilizer solutions are derived and, since it is manufactured by combining hydrogen derived from natural gas or petroleum with nitrogen extracted from the air, it is a petroleum product. However, although applicant has shown need for proposed service, it has failed to show that the considered fertilizer is a petroleum product and as such excluded from protestants' authorized service which is restricted against the transportation of petroleum products. Accordingly, authority granted limited to points not within protestants' respective territories.—Delaware Exp. Co. Extension, 98 M.C.C. 733 (737-8).

Authority to transport "pipe, pipeline material, machinery, and equipment incidental to and used in connection with the construction, repairing, or dismantling of pipelines" is not authority to transport waste disposal pipe; "pipeline" is understood to be a means by which water, gas, oil or other liquids are conveyed from one place to another, and not service pipes or connecting lines of consumers.—C&H Transp. Co., Inc., Extension, 99 M.C.C. 112 (115).

Since petitioner's authority to transport "photographic equipment and photographic equipment parts" does not permit it to perform the service needed, the commodity description in its certificate is amended to include "sound recording, sound reproducing, and sound amplifying equipment, parts, and supplies used in connection with ***photographic equipment, parts, accessories, materials, and supplies."—I. L. & C. Corp. Petition for Modification of Certificate, 99 M.C.C. 400 (403).

Authority, as extension, granted to one of four applicants on consolidated record to transport coal tar and creosote oil, based on future need for service as established by sales solicitation. Objections are lack of pubic notice raised when commodity description "wood preservatives" amended to "coal tar and creosote oil" dismissed; amendation considered restrictive rather than expansive.—Hearin-Miller Transporters Ext.—Point Comfort, Tex., 100 M.C.C. 50 (50-57).

Authority sought to transport "trailers designed to be drawn by passenger automobiles," does not embrace transportation of "double-wide" units [two separate trailer units designed for use as a single structure], and since evidence also shows limited need for transportation of such units, the authority as originally sought is amended to authorize the needed transportation of prefabricated buildings, in sections, in addition to "trailers designed to be drawn by passenger automobiles." As a result, the grant of authority herein is conditioned upon publication in the Federal Register of notice of Actual authority granted.—National Trailer Convoy, Inc., Extension, 100 M.C.C. 101 (106-7, 109).

Demonstrated need for transportation of "air, water, and gas cooling and heating equipment and materials, accessories, and supplies used in the installation thereof, which because of size or weight require the use of special equipment" or which do not require special equipment but move in the same vehicle or as part of the same shipment as such commodities requiring special equipment, warrants a grant of such authority, allowing applicant to perform service on highly specialized items, and on mixed loads, which neither general commodity nor heavy hauling carriers can now perform. Granted.—Daily Exp., Inc., Extension, 100 M.C.C. 208 (213).

In framing grants of operating authority, the Commission attempts to utilize generic terms which afford meaningful yardsticks. Therefore, rather than attempting to authorize service by naming individual commodities, by classifying each group of commodities manufactured by aerospace industry under specific descriptions reflecting an intended use test, or by attempting to distinguish between those craft that operate in space and those that are operable both within and beyond the atmosphere, all products manufactured and shipped by aerospace industry, including "aircraft," should be subsumed under one broad commodity description. In this light term "aerospace craft" will be employed to refer to those commodities manufactured by aerospace industry, which operate within or beyond the earth's atmosphere or which are adaptable for flight within either performance spectrum. This description, while sufficiently flexible to accommodate new products and technological improvements in the industry, is susceptible of workable, day-to-day application.—U.S.A.C. Transport, Inc., Extension—Missiles, 103 M.C.C. 23 (33-35).

In light of need shown, 56 applicants are granted authority to operate as common carriers by motor vehicles, in interstate or foreign commerce over irregular routes, of (1) earth drilling machinery and equipment and (2) machinery, equipment, materials, supplies and pipe incidental to, used in, or in connection with (a) the transportation, installation, removal, operation, repair, servicing, maintenance, and dismantling of drilling machinery and equipment, (b) the completion of holes or wells drilled, (c) the production, storage, and transmission of commodities resulting from drilling operations at well or hole sites and (d) the injection or removal of commodities into or from holes or wells, from and to/or between points in their respective territories. Roy L. Jones, Inc., Ext.—Earth Drilling Equipment, 103 M.C.C. 447 (456)*; modified as to proper description of territorial authority sought by respective applicants.—Id., 103 MCC 823 (829)*.

The record evidences need for applicant to transport "iron and steel articles," not "iron and steel" and "iron and steel articles." "Iron and steel articles" includes rough or semifinished articles such as nails, bolts, castings and tubing, as well as a number of building-material items, none being complex items such as a piece of machinery made from an assemblage of many different items, nor approaching the character of a finished replacement part or tool such as is used in the repair and maintenance of tractors or engines; in addition to these articles this description also includes those basic materials embraced by the description "iron and steel" such as pigs, ingots, blooms, slabs, billets, scrap, bars, rods, strips and sheets, if intended for future fabrication or shaping. Other items also embraced within authority as granted are structural steel, stampings and fabricated steel, steel door frames and tractor-trailer couplers. Granted in part.—Smith's Truck Lines Ext.—Iron & Steel Articles, 103 M.C.C. 635 (638-9).

Since protestants' authority to transport petroleum and/or coal tar products does not authorize them to transport liquid gilsonite asphalt sealer, need for applicant's proposed motor carrier service established. Although liquid gilsonite asphalt sealer resembles petroleum asphalt both in appearance and in use, it is the product of neither petroleum nor coal tar and, since the underlying purpose of 61 MCC 209, is to establish commodity lists under class or generic headings specifying commodities which can be transported thereunder, it cannot be transported under protestants' existing authorities. Granted.—W.S. Hatch Co., Extension—11 States, 103 M.C.C. 731 (734).

Since many past formulations of classifications and descriptions have proven inadequate and have fallen into disuse, because they were either ignored or because changes in technology and development of new products have outmoded them, general guidelines as to appropriate commodity descriptions, which accurately reflect the needs of supporting shippers, are set forth. Instructions appended to application should be read; commodity descriptions formulated in 61 MCC 209, should be used where appropriate, or commodity descriptions, already found in Commission grants of authority, should be employed; if some other description is necessary, it should be clear, definite and employ no duplicating or overlapping terms. Also, as a general policy the Commission favors use of broad commodity descriptions, where a carrier serves a particular class of shipper; rationale for such policy is that, in an industry constantly developing new products, the shipper should not have to be confronted with the recurring problems of obtaining transportation for each new product.—Fox-Smythe Transp. Co. Extension—Oklahoma, 106 M.C.C. 1 (24-25, 28).

Basically applicant pipeline commodity carriers desire authority to transport commodities already embraced in their Willett authorities (See 89 MCC 427), when such items are intended for use in construction of water and sewerage projects. Supporting shippers have been marketing or utilizing considered items increasingly in connection with construction of water and sewerage systems, and in light of many considerations, particularly growing government support, it appears that volume of such freight will continue to increase. Furthermore, since considered commodities possess several unique handling and transportation requirments with which applicants are already familiar and since the end use of many consignments is unknown when tendered, broadening of applicants' existing pertinent authorities would, at a minimum, materially lessen confusion and delay. However, with two exceptions, evidence lacks necessary precision to broaden territorial grants beyond their present scope or to remove standard restrictions on movements from or to pipeline right-of-way. Granted accordingly.—Willett Extension—Pipeline Machinery, 106 M.C.C. 354 (357, 363, 364-5).

Protestants' authority to transport frozen fruits, frozen berries, frozen vegetables, and potato products, frozen and not frozen, is not broad enough to encompass all the various commodities involved herein; this narrow fragmented authority does not meet the proven needs of supporting shippers even with respect to the commodities which they are authorized to transport, because shippers require shipment on the same vehicle of various commodities. Futhermore, as new frozen foods are constantly being developed, consignees are making smaller orders at more frequent intervals, in order to alleviate inventory problems caused by this multiplication. To remedy this situation one applicant proposes to ship mixed frozen foods and the other applicant proposes to ship frozen foods mixed with nonfrozen or canned foods.—United Buckingham Frt. Lines, Extension, 106 M.C.C. 539 (545-7).

Some shippers have tried to cope with these trends by combining their shipments with those of other shippers in order to get small shipments moved. The addition of canned goods to shipments of frozen foods is another way of attempting to deal with this problem. On this record it is clear that existing carriers have been unable to cope with the developing situation due, in part, to the commodity limitations in their authorities. Accordingly one applicant granted authority to transport over irregular routes frozen foods and potato products, not frozen, when moving in the same vehicle with frozen foods; the other applicant is granted authority to transport over irregular routes frozen foods, potato products not frozen, and canned goods, subject to finding this applicant fit in another proceeding [see 107 MCC 506].—Id., pp. 550, 552-6.

Aluminum dross, the nonmetallic skimmings and residue of melting operations, is not embraced by the commodity description "chemicals" since it is not considered as such by common usage.—Truck Transport, Inc.—Extension, 106 M.C.C. 880 (882-83).

Upon application of the principles used in construing certificates authorizing heavy hauler transportation as they are summarized in 108 MCC 717, the Commission found that iron and steel articles that applicant proposes to transport (including steel bars less than 40 feet long and weighing under 200 pounds, lightweight fence posts and roof decking) are susceptible to hand loading and unloading and are not within protestant's heavy hauler authority. However, a portion of the application was denied for failure to show public need or to demonstrate deficiencies in protestant's joint-line service. Thus, protestant would be deprived of revenues important to its conduct of a balanced operation without a concomitant benefit to the shipping public. Application granted to extent specified.—Steel Haulers, Inc. Ext.—Tulsa, Okla., 110 M.C.C. 612 (617-20)*.

Many articles commonly transported by heavy haulers, though within the academic definition of machinery, have names, characteristics, and uses of their own and may not be transported under the commodity description "heavy machinery." It is therefore clear that authorities framed by reference to the commodities which may be transported, such as "heavy machinery", are not as broad as those certificates phrased in terms of the service provided.—North Penn Transfer, Inc.—Petition for Modification, 115 M.C.C. 208 (214).

The phrase "raw materials" was held to be restricted by the phrase "used in the manufacture of piece goods", since to grant unlimited authority to transport raw materials would have been an absurd act, and the term "materials" has been consistently held to be used only in connection with a particular industry.—Skyline Transport, Inc.—Investigation & Revocation, 115 M.C.C. 807 (823).

The Commission found no reason, on the record, to make a distinction between motorized campers and motor homes for purposes of motor carrier regulation. Despite the lack of certain sanitary facilities, they are fundamentally the same type of vehicle as a motor home. Some shippers apply the term "camper" to the slide-in type of units which are mounted on pick-up trucks. These units, although somewhat analogous to automobile or truck bodies, are not motor vehicles.—American International Driveaway Ext.—Hawaii, 117 M.C.C. 63 (68).

"Double-wides" are sectionalized buildings, and are not embraced by the commodity description "mobile homes".—Chandler Trailer Convoy, Inc., Ext.—Lexington Trailers, 117 M.C.C. 653 (657)*.

Since the term "pesticides" includes insecticides, herbicides, fungicides, and rodenticides, only "pesticides" was used in a grant of authority embracing the transportation of the foregoing commodities.—Behnken Truck Service, Inc., Ext.—East St. Louis, 117 M.C.C. 825 (833)*.

Applicants' contention that their proposed transportation of "antipollution systems" and related "equipment, materials, etc." is supported by the "field of service" doctrine is incorrect. The "field of service" doctrine represents long-established Commission policy allowing specialized carriers to keep pace with technological changes and new product developments in their specialized industry; it is not intended to authorize a new service. Applicants herein hold Mercer authority to serve the oil and gas industries and it is readily apparent that applicants propose an operation of vast and indeterminate scope encompassing a highly diverse range of commodities not readily identifiable with the gas and oil industries. Application denied.— Jones, Inc., Ext.—Antipollution Control Commodities, 118 M.C.C. 253 (271-73).

Motor homes come in various sizes and configuraEions and the motor home body is either placed on a separately manufactured chassis or converted from a separately manufactured van. Motor homes usually contain the following features: automatic transmission, power steering and brakes, mud flaps, 40- to 50-gallon fuel tank, power converter electrical system, city water hookups, lights throughout the interior, storage cabinets, cold food storage unit, range, bathroom, manual water system, and interior outlets for electrical appliances. Motor homes may range in length up to about 28 feet.—Nationwide Petition for Declaratory Order, 118 M.C.C. 468 (473).

Motor homes, even those consisting of a motor home body mounted upon a truck chassis, are not included within the definition of the term "trucks". On the other hand, a carrier authorized to transport motor vehicles or recreational vehicles is authorized thereby to transport motor vehicles or recreational vehicles is authorized thereby to transport motor homes. The Commission has recognized, and will continue to recognize, motor homes as a unique category of motor vehicle separate and distinct, for commodity description purposes, from all other types of motor vehicles.—Id, p. 475.

The term automobiles does not include motor homes, and a motor carrier which has authority to transport automobiles, trucks, chassis, or buses is not authgrized thereby to transport motor homes. Likewise, a carrier authorized to transport motor homes may not transport automobiles, trucks, chassis, or buses pursuant to such authority.—Id, p. 474.

It has been the general practice of the Commission, notwithstanding a number of minor and immaterial inconsistencies, in granting certificates and permits authorizing the transportation of motor vehicles, to distinguish between automobiles, trucks, tractors, buses, and certain other specific types of over-the-highway vehicles including motor homes. The term "automobile" has long had a specific and well-defined meaning as a particular type of relatively small passenger-carrying motor vehicle; and there is no basis for concluding that, as used in operating authorities, it should be construed to include motor vehicles in general or even all passenger-carrying vehicles.—Id, p. 474.

***Conversion to common carrier operation*:** [Vols. 17-19, 21].—Even considering the application as one for common carrier authority, applicant has failed to demonstrate that there is a need for any additional motor carrier service or that he is willing to perform proposed operation. Supporting shipper appears to have a mere preference for applicant's service and a desire to provide him with a profitable backhaul to balance his northbound transportation of soda ash; furthermore, the services of existing carriers have not been shown to be inadequate. Denied.—Gorski Extension, 95 M.C.C. 514 (517-8).

Applicant argues that it has proved need by showing past lawful operations. However, this is insufficient in light of 95 MCC 312, which states that in support of an application for conversion of contract carrier rights to those of a common carrier under §207 applicant should submit a detailed statement of past lawful operation under the authority sought to be converted, offer to surrender authority which has not been the subject of past operations, and offer shipper testimony demonstrating need for its services as a common rather than a contract carrier. Herein applicant has failed to produce shipper testimony demonstrating need for its proposed common carrier services and this need cannot be inferred from the resume of applicant's past operations and industry practices.—Eastern States Transp., Inc., 99 M.C.C. 524 (530-531) [But see dissent]

Since conversion applications are subject to the same evidentiary standards generally used to determine whether common carrier operations are required by public convenience and necessity, applicant has failed to show requisite need. Supporting statements fail to disclose any salient facts with respect to past operations performed by applicant's contract carrier affiliate, the volume or distribution patterns of supporting shippers' traffic, or the experience of these shippers regarding available for-hire motor service in the affected territory; therefore, the expression by each of these shippers of desire for continuation of "Schilli service" is not corroborated by any specific evidence. Denied.—Schilli Motor Lines, Inc., Conversion Application, 105 M.C.C. 90 (94-5).

Dilemma that forced applicant to file instant application, specific purpose of which is conversion of its permit into a common carrier certificate because (in recent common carrier application) issuance to it of a certificate for the service shown to be needed is being withheld pending elimination of the possibility that unlawful dual operations might result from applicant's holding both a permit and a certificate, cannot be ignored; but specific consideration thereof is unnecessary, since applicant has satisfied criteria in 95 MCC 312, for issuance of a certificate in lieu of a permit. Record shows the history of applicant's past lawful operations; supporting shipper shows continuing need for the services applicant is providing under its permit, whether performed under a permit or certificate; and applicant's current service comports as well with common as with contract carriage. Moreover, grant of authority sought will not adversely affect any party, and the existing competitive situation will not be altered. Certificate granted.—Ferree Moving and Storage, Inc., 110 MCC 375 (376, 378-9)*.

In converting a permit to a certificate under §207(a), an applicant must submit detailed proof of past lawful operations for a substantial period, and also a public need for proposed service. Applicant herein has presented such proof even though its past operations were not lawful contract carriage, applicant honestly believed they were lawful and they are no basis for denial. However, contracts entered into after commission of such unlawful operations are entitled to no consideration. Granted, upon compliance with indictated restrictions and condition.—Cleveland General Transport Co., Inc., Conversion, 114 M.C.C. 536 (546-7).

That a contract carrier seeking to convert certain of its authority to common carrier authority utilized the services of a broker, dealer, and agent does not constitute unlawful operation, since applicant entered into a contract only with the shipper named in its permit, it did so to serve a purpose of the contracting shipper, and the contracting shipper guaranteed payment of freight charges.—P.C.M. Trucking, Inc., Extension—Allentown, Pa., 117 M.C.C. 201 (206)*.

When it appears that a contract carrier has engaged in deliberate, rapid expansion of diverse operations, seeking to serve a number of multi-faceted industries, its operations must be closely observed and must be limited so that it may not claim, *ipso facto*, common carrier status and obtain conversion of its authorities without giving existing common carriers any real opportunity to defend their existing rights under the criteria of §207 of the Act.—Crete Car. Corp.—Maremont Contr.—Auto Parts, 117 M.C.C. 634 (640)*.

***Delay*:** [Vols. 11, 17-19, 21].—All indications were that consignor's tender of freight to protestant was the controlling factor which determined the day of delivery to consignee. The Commission, therefore, shared protestant's view that the difficulty which consignee experienced of late and uncoordinated shipments appeared to be attributable more to a lack of coordination between consignee and consignor than to any shortcoming in protestant's service. Denied.—Nationwide Carriers, Inc., Ext.—Television Antennas, 118 M.C.C. 757 (760)*.

***Denied*:** [Vols. 11, 18, 21]—On reconsideration, application for authority to transport radioactive waste denied as application is supported only by one carrier who evinces requirements which can be adequately met by protestant.—Long Island Nuclear Service Corp. Com. Car. Applic., 110 M.C.C. 398 (404)*.

Involved applications to transport size-and-weight commodities in mixed loads with non-size-and-weight items denied. Supporting shippers' evidence did not show that lack of proposed service caused them any disadvantage or that protestants were unwilling or unable to meet shippers' transportation needs. Therefore, applicant has failed to show that the proposed service is required by public convenience and necessity.—Ashworth Transfer, Inc., Ext.—Colo. and N. Mex., 111 M.C.C. 56 (64-6).

Application for authority as common carrier of passengers denied as applicant's evidence is insufficient to warrant granting of any authority. Applicant's contention as to procedural errors in this matter were found invalid.—Carolina Transit Lines, Com. Car. Applic., 111 M.C.C. 630 (633)*.

Non-size and non-weight items may be combined with size-and-weight items if the smaller items are related to size-and-weight items. General commodity carriers can also provide proposed service if size-and-weight commodities are handled by shippers and consignees. Application by heavy-hauler carriers for authority to combine and transport non-size and non-weight items with larger items when the smaller items are not related to the size-and-weight items transported is denied as shippers' testimony on need for such service is so generalized and lacking in specific details as to prohibit reasonable analysis by Commission.—Ashworth Transfer, Inc., Ext.—Complete Service, 111 M.C.C. 652 (660-1).

Where existing interline service was not shown to be inadequate and a grant of the application herein would have an adverse effect on communities receiving "peddle" service from the sole protestant, application was denied.—Bowman Transp., Inc., Ext.—Jackson, Ala., 113 M.C.C. 633 (636)*.

Commission, citing 86 MCC 536, denied application as no plan was put forward showing the involved ex-rail "commodities in bulk" will indeed move in future and applicant is supported only by a connecting rail line that seeks intermodal transportation in its own interest.—Commercial Carrier Corp. Extension—Dade County, Fla., 113 M.C.C. 684 (686)*.

Commission denied application herein in light of the findings that existing service was not shown to be inadequate, protestant would be adversely and materially affected, and that the "follow the traffic" aspect of the application was virtually the only factor weighing in applicant's favor (see 61 MCC 748).—Theatres Service Co. Ext.—Duluth, Ga., 113 M.C.C. 744 (751-2)*.

Applicant's proposed operations found to be common carriage of general commodities, rather than alleged contract carriage, and evidence of record does not warrant the granting of motor common carrier authority as no need for additional service has been shown.—C-Line, Inc., Extension—Precious Jewelry, 114 M.C.C. 226 (232-3).

Applicant has not shown that additional irregular-route, general-commodity service of an essentially short-haul nature is needed as supporting shippers have failed to solicit protestants for service or otherwise show protestants' service inadequate.—Jayne's Motor Frt., Inc., Ext.—Southampton Township, N.J., 115 M.C.C. 700 (705-6)*.

Applicant's petition for permanent extension of authority held on a temporary grant was denied when evidence adduced by protestants revealed that supporting shipper did not make a concerted effort to utilize other available carriers whose service to points in question was considered adequate by Commission. It has been held frequently that emergency transportation demands during peak periods of shipping activity do not afford a proper basis for a grant of permanent operating authority.—Gra-Bell Truck Line, Inc., Ext.—Coloma, 115 M.C.C. 872 (879-880)*.

Applicant sought authority to transport clay from Thomas County, Ga., to points in 27 States (with exceptions). Evidence in support of the application failed to show a future need for service to all States west of the Rocky Mountains, where, admittedly, shipper had no customers and was not soliciting business. Division 1, on reconsideration, concluded that shipper's evidence was generally vague and nonspecific as to present transportation needs and that the services of one protestant had not been shown to be inadequate in any material respect. Therefore, applicant failed to demonstrate a need for any portion of the proposed service. Denied.—Caravan Refrigerated Cargo, Inc., Ext.—Clay, 118 M.C.C. 690 (693-4)*.

Desire for connecting link: [Vols. 12, 19, 21].—See Alterman Transport Lines, Inc., Extension Case, *interchange*, below.

Desire for particular carrier: [Vols. 11, 12, 16-19, 21].—See also Schilli Motor Lines, Inc., Conversion Application, at §207(a), n. 25 *Conversion*.

Mere desire of supporting shippers for applicant's service, rather than an actual need therefor, does not justify granting authority sought. Therefore, since the testimony of supporting shippers is indicative only of a preference for the proposed service and demonstrates that vendee's proposed operations would not substantially meet any demand for service not presently being satisfactorily provided by existing carriers, application denied.—Eagle Motor Lines, Inc.—Purchase—Victory Frt. Lines, Inc., 101 M.C.C. 368 (375)*.

Supporting shippers' statements do not establish a real need for proposed additional service but rather are at most only indicative of shipper preference for applicant's proposed service. Moreover, grant herein would effect substantial diversion of traffic from protestants whose services have not been shown inadequate. Denied.—Commercial Motor Frt., Inc., Ext.—Crawfordsville, Ind., 114 M.C.C. 500 (523)*.

Economy and efficiency: [Vols. 12, 18, 19, 21].—See also AADA Systems, Inc., at §207(a), n. 25 *Truckaway;* and Dieckbrader Express, Inc., Extension at §207(a), n,25*Special equipment*.

The operating rights applied for could not be operated profitably solely as a regular local service in view of the sparse population of the area; therefore, a need for the service having been shown, a restriction against overhead traffic, which would make the proposed service feasible, is not warranted.—Garrett Freightlines—Control and Merger—Eastern Oreg., 104 M.C.C. 515.

Applicant's proposed operation must be sustained by a reasonable daily volume of traffic in order to be economically feasible. Protestant's experience based upon actual operations between the points under consideration indicates that there is insufficient traffic moving between Memphis and Florida points to sustain applicant's proposed schedules and, as a consequence, applicant, if this application were granted, would be unable to maintain the flexibility of an irregular-route operation.—Bowman Transportation, Inc., Extension, 107 M.C.C. 876 (881)*.

The Commission granted authority for extension of applicant's regular route operations to Michigan and the Midwest from points in the Southeast, in order to create single-line service. The joint-line service available was found to be inadequate in terms of the economy and efficiency of its operations, and therefore protection was not considered justified.—Ryder Truck Lines, Inc.—Ext.—Mich. and Short Routes, 114 M.C.C. 852 (860-861)*.

Applicant seeking to modify its 11 passenger restriction to a 20 passenger restriction in transportation between Wilmington, Del. and Philadelphia and between an airport in New York City and points in Pennsylvania, on the basis of economy and needed improvements, failed to substantiate adequately either the alleged economy or the improvements to be derived from the proposed modification. Specifically, applicant did not indicate any consideration of cost difference between operation of the different size vehicles required to transport the differing number of passengers, and failed to consider that passengers may not all simultaneously require the transportation offered. Application denied.—Salem Transp. Co., Inc. Ext.—Additional Passengers, 117 M.C.C. 405 (409)*.

Extended authority to transport sectionalized buildings ("double-wides") granted, inasmuch as authority will result in efficiency and operating economies redounding to the benefit of the supporting shipper, and whatever slight effect limited additional competition from applicant may have upon protestants was found to be outweighed by shipper's need for additional service.—Chandler Trailer Convoy, Inc., Ext.—Lexington Trailers, 117 M.C.C. 653 (658-659)*.

Applicant was not a newcomer in the area of proposed operation, and would be able to utilize its existing equipment and facilities more efficiently and with greater economy if it were to receive the interstate charter rights sought in this application. Not only would applicant's operating efficiency be enhanced by a grant of such authority, but also the chances for its continued economic viability would be materially improved, resulting in the continuation of local transit service, under private ownership, to the residents of the small communities of the area. Granted.—Western Mass. Bus Lines, Inc. Com. Car. Applic., 118 M.C.C. 74 (83)*.

Applicant would offer generally small shippers located in Mississippi efficient and economical single-line motor common carrier service to Memphis, by obtaining authority to operate over additional routes. The single protestant had no direct authority to serve Memphis, and on numerous occasions its joint-line through the Memphis gateway proved unsatisfactory to supporting shippers. Granted.—Merchants Truck Line, Ext.—Hattiesburg, Etc., Miss., 118 M.C.C. 87 (94)*.

Environment: Although the environmental impact of the outcome in this proceeding is not of great significance when considered in its isolation, applicant's commendable plan to acquire propane-fueled buses, in order to reduce noxious exhaust emissions, is a feature of public importance and should be accorded due consideration. Granted.—Western Mass. Bus Lines, Inc., Com. Car. Applic., 118 M.C.C. 74 (84)*.

The Commission disagrees with applicants' position that established criteria governing applications for certificates of public convenience and necessity must give way to more "liberal" standards of proof when the commodities to be transported will arguably have a beneficial effect upon the environment. We believe that adherence to existing standards of public convenience and necessity will best achieve goals of the National Environmental Policy Act (NEPA). However, we believe also that it would be contrary to letter and spirit of NEPA, as well as our duties under the Act, to adopt rigid rules or presumptions for cases where environmental issues are alleged or found to be present. Service proposed may be adequately provided by existing carriers, including applicants under their present broad authorities. Proposal authorizes operation of vast and indeterminate scope presenting substantial possibilities for abuse. Application denied.—Jones, Inc., Ext.—Antipollution Control Commodities, 118 M.C.C. 253 (266-71).

Existing carriers: [Vols. 12, 18, 19, 21].—See also Click Messenger Service, Inc., Ext.—N.Y. & N.J., at §207(a), n. 25 *Express;* Drum Transport, Inc. v. United States, at §207(a), n.9; Frozen Food Express Ext.—Four States, at §207(a), n. 25; and M. R. & R. Trucking Co., Extension—Birmingham, at §207(a), n. 25 *Existing service.*

Grant of new authority for proposed service over irregular routes between designated points is not warranted where record is devoid of specific complaints respecting services offered by 45 protestants whose operations blanket the territory sought to be served; protestants operate sufficient equipment, maintain terminals throughout the territory and have shown their willingness and ability to handle additional traffic. Additionally, shippers require, essentially, a less-than-truckload service, and their desire for continuance of satisfactory service rendered by applicant under its authority restricted to "truckload lots" does not show need for proposed service.—Southwest Freight Lines Ext.—Removal of Restriction, 95 M.C.C. 269 (278-9)*.

As protestant holds recently issued permit to transport cash letters in part of area wherein applicant seeks similar common carrier authority, duplicative service by applicant should not be authorized.—Continental Dispatch, Inc., 95 M.C.C. 483 (489).

Owing to circuity, interchanges required, and excessive transit time of existing motor carrier service available between Nashville, Tenn., and points in northern Mississippi, existing service is clearly inadequate. Nashville shippers are at a disadvantage compared to their competitors in Birmingham, Ala., and Memphis, Tenn., in trying to serve present customers or gain new ones in the northern Mississippi area. Authority granted between Selmer, Tenn., and Nashville, serving Selmer for purposes of joinder only, and restricted against transportation between Nashville, on the one hand, and, on the other, any point in Tennessee, will enable applicant to provide the single-line, overnight service shown to be needed.—Dean Truck Line, Inc., Extension, 96 M.C.C. 184 (189-91).

Shipper of variety of canned and frozen foods showed need for services of either of two applicants both of whom are experienced and possess equipment and terminal facilities suitable for shipper's needs. One carrier, however, presently participates extensively in movements to two of the three destination States involved so that the authority sought would be merely an extension of its present operations, whereas the other shipper would be conducting a new service. While the shipper has reason to complain of instances of breakage, the carrier participating in the movement has conducted experiments to reduce this breakage and has installed special equipment, and although that service is less than perfect, it is not so deficient to be ruled inadequate and the carrier providing it should be granted the authority.—Willis Shaw Frozen Exp., Inc., Extension, 96 M.C.C. 225 (228, 230-31).

Grant of authority sought will cause protestant to lose revenue it receives, under lease agreements with applicants, on shipments moving from considered origins to interchange points; however, since applicants have been rendering in effect a single-line service, operations of protestant connecting line (that exercises little control over the interchanged equipment and does little more than collect payments for applicant's use of its rights) would be neither endangered nor impaired.—Kroblin Refrigerated Xpress, Inc., Extension, 96 M.C.C. 233 (240)*.

Shipments of frozen foods from Oregon and Idaho to Wyoming, Nebraska and Nevada and Nevada generally involve less-than-truckload quantities which are handled in connection with shipments en route to final destinations in Colorado, Arizona and California. Applicant's request for authority to serve these states was denied on a showing that one or more of the six protestants has authority to transport and drop off shipper's traffic at all points and areas embraced in application. The relatively few occasions when shipper was troubled by rejected shipments carried by protestants appear to have been isolated and to have occurred during periods of extreme shipping activity and are not sufficient to justify a finding that protestants' services have been inadequate to a material degree.—Willis Shaw Frozen Exp., Inc., Extension, 96 M.C.C. 560 (563-5).

While it was recognized that the phenomenal growth of the frozen food industry has generated a need for additional motor carrier service, existing carriers are entitled to the opportunity to provide the needed service before a new competitive operation may be authorized. During this proceeding, the protestants pointed out in their exceptions that they had applications filed and pending with the Commission for various authorities which would duplicate, in whole or in part, the authority applicant seeks. After service of examiner's report and the filing of exceptions and replies, the Commission granted the protestants' pending applications, and on the basis that protestants now possess authority to provide the services for which the shipper professed a need in the proceeding, the application was denied.—Id., pp. 564-5.

As charter revenues are becoming increasingly more important to passenger carriers, the holders of charter rights, incidental or otherwise, should not be subjected to the added competition of a carrier offering similar service without a clear showing that there is a substantial demand for that service. Protestants collectively hold authority to provide regular-route service at, and incidental charter service from, the major population centers of nine Iowa or Nebraska counties where applicant seeks charter authority, and applicant has not shown that they are unable or unwilling to meet the reasonable charter transportation requirements of the traveling public in those areas. Accordingly, no new charter service will be authorized that will infringe upon protestants' operating rights.—Arrow Stage Lines, Inc., Investigation and Revocation, 96 M.C.C. 572 (579).

Protestants have not shown they will be seriously injured by a grant of authority which would enable applicant to continue the service shown to be needed; evidence presented by protestants with respect to loss of traffic remains unsubstantiated, and there is no evidence produced to show to what extent they have been injured by applicant's interstate operations conducted under color of his registered authority. Additionally, protestants cannot provide the type of service performed by applicant, shown to be required and they cannot be said to rely upon such traffic.—Bowser—Investigation of Operations, 98 M.C.C. 170 (178-9).

If existing carriers' authority enabled them to transport the considered commodity, they still could not service the whole of the proposed territory. Therefore, application granted, limited to areas not served under protestants' existing territorial authority, because applicant failed to show that the protestants could not transport liquid fertilizer under their existing authority, which prohibited them from transporting petroleum products.—Delaware Exp. Co. Extension, 98 M.C.C. 733 (739-40).

Protestant carrier cannot provide the needed service because its authority to transport "pipe, pipeline material, machinery, and equipment incidental to and used in connection with the construction, repairing, or dismantling of pipeline" is not authority to transport waste disposal pipe; the considered waste disposal pipe is not a "pipeline" as used in the construction or transportation industry and as employed in protestant's commodity description; thus, protestant is not authorized to provide needed service—C&H Transp. Co., Inc., Extension, 99 M.C.C. 112 (115).

Protestants' authority to transport trailers designed to be drawn by passenger automobiles does not authorize them to transport considered individual units of prebuilt houses which, although tendered for initial transportation on wheeled undercarriages equipped with frames and hitch ball connections for towing by power units, are intended for use in permanent, as opposed to mobile, residences and are suitable for use only after they are joined together at their destination to form complete houses. Granted.—Morrison Common Carrier Application, 99 M.C.C. 617 (619-20).

Protestant railroads offer a service similar to, but lacking flexibility of, that proposed; and although protestant regular-route motor carriers also offer a similar service, evidenced by their tariffs, they have failed to show, as a practical matter, that such service is generally available to supporting shippers. Thus, no existing carriers provide needed irregular-route multiple pickup and delivery service proposed by applicant. Granted.—Watkins Motor Lines, Inc., Ext.—North & South Carolina, 103 M.C.C. 227 (248-250).

As an authorized carrier whose services have not been shown to be inadequate, and which stands to lose traffic if requested authority is granted, protestant would normally be entitled to protection against additional competition; however that policy is not absolute. Since protestant is commonly controlled through management with a competitor of one supporting shipper, and is the only motor carrier offering service of the type proposed, possibilities for discrimination and favoritism are present. A shipper should not be required to choose between inadequate transportation and the dangers of using a carrier with interests inimical to its own; therefore, since the public interest will best be served by grant of authority to a carrier not afflicted with a conflict of interest, applicant is granted authority to transport audit media and other business records.—American Courier Corp., Extension, 103 M.C.C. 298 (303-4)*.

The quality of for-hire bus service used by patrons of six casinos supporting applicant's proposed passenger service, particularly the type of equipment furnished and convenience of schedules afforded, is a vital factor upon which success of the casinos' operations largely depends. As stated in 99 MCC 506, bus passengers, especially those using pleasure tour services, are interested in and entitled to more than mere expeditious transportation and, in such situations, evidentiary standard of "convenience and necessity" implies more than mere adequacy or availability of agencies whereby a traveler is conveyed from one point to another. Record discloses that scheduling and equipment deficiencies in protesting bus lines' operations, manifested by the casinos' complaints, are sufficiently material to justify a finding of reasonable public need for applicant's proposal; and protestants failed to show that they can remedy the deficiencies and provide the type of service needed. Authority granted will inject improvement in present services and will serve as a deterrent to future service deterioratios.—Gray Line Scenic Tours, Inc., 103 M.C.C. 807 (813-16)*.

Existing carriers' practice of leasing their equipment does not necessarily give rise to a need for motor service, which can be cured only by private ownership of equipment operated by carriers' own personnel. This does not mean, however, that such arrangements may not be considered when they have resulted in carriers' inability to meet shippers' needs for adequate transportation service.—Point Transfer, Inc., Extension, 105 M.C.C. 634 (658-9)*.

Existing operations of any opposing carriers become an important element for consideration in determining whether public need for an applicant's proposed service is shown; however, that cannot be the limit of the Commission's inquiry, especially in a proceeding which involves passenger services between highly populated areas. Accordingly, in ruling on application for authority to transport passengers between Wareham, Mass., and New York, N.Y., consideration must be given to the maintenance of a balanced passenger transportation "system" within scope of the application; also, factors such as the existence of sufficient carrier capacity to encourage competition, incentive for real innovation and improvement in services to the public, and constraint against monopolistic-bus operations must be evaluated.—Almeida Bus Lines, Inc., Extension, 106 M.C.C. 311 (323)*.

Applicant's proposed service will provide travelers with several contrasting schedules that will serve the expressed need of that section of the traveling public which desires direct and favorable schedules more suitable to their needs. Moreover, grant of the application will generate new traffic from those who have not traveled because of personal inconvenience of existing bus service or from persons now using other modes of transportation and, in addition, the indicated public support shows that territory proposed to be served can support more than one passenger carrier. Opposing carriers will not be deprived of a significant amount of traffic that would threaten their continuation of service, in view of the restrictions and limitations of the authority granted. However, as New London is the only community in Connecticut having adequate support for inclusion as a service point, authority to serve other intermediate points in that State is not justified. Granted in part.—Id., pp. 325-6.

While on a collective basis there appears to be a fairly sizeable quantum of service available from existing carriers, it is not sufficient to meet the foreseeable future needs as developed on the record. Accordingly, applicants' *Willett* commodities authority (89 MCC 427, which excluded service on behalf of builders or operators of water systems and sewerage lines from applicant carriers engaged in pipe-stringing operations) expanded to enable them to provide pipe industry shippers with a complete service at various rights-of-way within their respective currently licensed territories. Such action is consistent with numerous Commission decisions, where the Commission has taken into account the effect of changing industrial patterns on carriers serving particular industries.—Willett Extension—Pipeline Machinery, 106 M.C.C. 354 (357, 363-4).

Inadequacy of existing service is clearly shown by protestant carriers' (1) reluctance to interline truckload traffic at Charlotte, N.C., gateway, (2) inability to interline traffic between points in Florida, and (3) excessive and erratic transit time in transporting less-than-truckload shipments between Charlotte and points in Florida. Moreover, carriers serving Charlotte have tariff restrictions or operational procedures which impair the movement of traffic from Charlotte to points in Florida, and carriers, authorized to serve points in Florida do not meet need established by supporting shippers for a reasonable, consistent transportation service between these points and Charlotte, either by single or joint-line movement. Application granted accordingly.—Alterman Transport Lines, Inc., Extension, 106 M.C.C. 402 (415-20)*.

Although the Commission has often stated that existing carriers are entitled to transport all traffic they can handle adequately and efficiently before a new carrier may be authorized to enter the field, need for proposed authority stems basically from the growing number of frozen food products on the market and from the need or desire of shippers' consignees to keep their inventories as low as possible. The trend is away from truckload shipments of one food from one origin to one destination; consignees are ordering smaller lots of different foods, more frequently, and hence the increase to L.T.L. shipments, which due to the diversity of foods produced at different points require pickup and delivery at multiple origin points in order to fill out a truckload. Therefore, since protestants' regular route authority is not adequate to meet needs of supporting shippers, considered applications to transport mixed shipments of frozen foods and commodities over irregular routes granted.—United Buckingham Frt. Lines, Extension, 106 M.C.C. 539 (550-56).

The preponderance of evidence militates against any grant of authority in that (1) shipper testimony is unconvincing that the present interline service results in unreasonable delays, (2) testimony pertaining to shipments that were delayed is vague and contradictory, and (3) opposing carriers provide ample single line service between heavy-volume shipping points. Thus there is no specificity to establish any general pattern of real service inadequacies, and the grant of applicants' requested extensions would only serve to diffuse the available traffic among the competing carriers.—Cushman Motor Delivery Co., Extension, 106 M.C.C. 809 (818-19).

Protestants are not authorized either collectively or separately to perform the service for which applicant seeks authority, since one protestant's ambiguous certificate is interpreted to authorize his service from only 2 of the 12 origin points and only to 6 destination points, while another protestant may not tack his round-trip charter authority to his regular route authority for lack of a point of service common to both; another protestant has not established by significant evidence that its incidental charter authority extends to all points within 10 miles of its regular routes as he claims, while another who has shown that it may transport charter parties as a matter of right by tacking its round-trip and one way charter operations to the District of Columbia with its regular route authority out of the District of Columbia would, as a practical matter, conduct an inadequate service involving backtracking and circuity.—Harry Lee Eyre, Jr.—Extension, 106 M.C.C. 851 (857-61).

Applicant has demonstrated a need for service which clearly is not counter balanced by any possible adverse effect which a grant of authority might have on protestant since applicant is shown to be an active participant in the movement of all types of contractors' machinery and equipment under color of right; moreover, the protestant carrier is shown to have prospered to a somewhat greater extent than has applicant during the period in which they have been competitors. Accordingly, a grant of the authority would not create a new or aggravated competitive situation to the detriment of other carriers.—Mayfield Sons Trucking Co.—Removal of Restriction, 106 M.C.C. 892 (896)*.

Applicant's proposed service differs materially from that provided by the mass transportation media in that it offers door-to-door service, with all expenses paid, eliminates the inconvenience experienced by commuters in transferring from one carrier to another, often accompanied by delays; the need of using private transportation or walking some distance to reach the existing service; and will permit the passengers to enjoy all the comforts of personal transportation without the attendant disadvantages, a service which cannot be made available to the general public served by protestants. Applicant desires to operate over irregular routes, which further distinguishes its service from that of the protesting regular-route carriers and will better meet the need expressed by the supporting witnesses.—Monarch Associates, Inc., 107 M.C.C. 277 (284-85)*.

Grant of authority for proposed transportation of mushrooms and mushroom products (including canned mushrooms) in refrigerated equipment is warranted by applicant specializing in transportation of perishable and frozen foods; when supporting shippers have demonstrated a clear need for less-than-truckload shipments in single-line service because of the highly perishable nature of the commodity; and protestants, although they hold adequate authority to provide the proposed service, have failed to show a willingness to provide service on less-than truckload shipments.—Belford Trucking Co., Inc. Extension 108 M.C.C. 5 (7, 15)*.

Applicants' fleet of vehicles includes air-ride suspension trailers designed solely for carriage of nuclear materials, and its drivers are specially trained in handling of radioactive materials. Both applicants offer supporting shipper on-call service, and will provide timed deliveries tailored to customer specifications. Shipper requires, on both inbound and outbound movements, pickup and delivery service in exact accordance with Atomic Energy Commission rules. Protestants, all heavy-haulers, lack either experience in nuclear transportation or the air-ride equipment required. Although the forecast as to origin and destination of such traffic is, of necessity, somewhat imprecise, it is obvious that from the actual and planned construction of atomic reactors that there exists potential nationwide market for such service which cannot be met by existing carriers; applications granted.—Tri-State Motor Transit Co., Ext.—Radioactive Mats., 108 M.C.C. 228 (231-34).

Modification of the review board's decision with respect to movement of sugar from Baltimore to points in Ohio and Michigan is required when supporting shipper's complaints relating to existing carriers' inability to supply sufficient equipment at all times and the failure of such carriers to return pallets used on outbound movements of sugar from Baltimore is not substantiated by the evidence. There is no substantial evidence to show when and how often these shortages of equipment occurred, or from and to what points needed transportation was denied shipper. Shipper was unable to give any specific testimony concerning lost sales due to protestants' unwillingness to return pallets. Therefore, that portion of the application relating to movement of sugar from Baltimore is denied. Since protestants are unable to render complete and flexible service required by remaining shipper, grant of authority to serve this applicant is affirmed.—Bilyeu Refrigerated Transp. Corp. Ext.—Baltimore, 108 M.C.C. 238 (241-43)*.

Supporting shipper requires transportation of cooling towers from its plant sites at or near Stockton, Calif., to points in Arizona, California, Idaho, Nevada, Oregon, Utah, Washington, and Wyoming. Protestant offers no service to points in Arizona and Nevada; while to points in Utah and Wyoming a joint-line trailer interchange service is offered in connection with a carrier limited to "size and weight" commodities, which connecting service is not sufficiently shown in the record to be willing or able to participate in such movements. The somewhat piecemeal transportation available from protestant cannot meet the supporting shipper's reasonable requirements for a flexible, complete and economical source of motor distribution for its products. Application Granted.—C & H Transportation Co., Inc., Extension—Stockton, Calif., 108 M.C.C. 395 (396-400)*.

Common carrier authority is granted to applicant, a specific-commodities carrier, to transport pipe, plate or sheet, steel roofing, iron or steel and similar articles, from Beechbottom, Va. and Steubenville, Martins Ferry, and Yorkville, Ohio to various points in the destination states. Public need for the proposed service has been shown by the supporting shippers since heavy-hauler protestant cannot provide shipper with a complete service. Authority granted is subject to certain conditions. In the embraced proceedings a need has been shown for the transportation of agricultural machinery and parts thereof when moving incidental to and in the same vehicle with said agricultural machinery subject to certain conditions. However since applicant's fitness is in issue in another of its application proceedings, this proceeding will be held open for further consideration of applicant's fitness after final determination of applicant's fitness in the other proceeding.—Herr's Motor Exp., Inc., Extension—Wheeling Steel, 108 M.C.C. 626 (627, 631-37)*.

Before this application proceeding, shipper successfully supported 26 motor carriers for authority to transport the involved commodities to points in its destination territory. Each of those applicants was granted authority to transport the involved commodities (chemicals and fertilizers) which commodity description embraces the products involved in this application. Nevertheless, the shipper alleges that it has experienced numerous difficulties in obtaining equipment. Shipper has used the services of only five of these carriers. Shipper does not state that it has requested service from any of the others nor that those others have been unable or unwilling to provide the needed service. Two of the 26 carriers which shipper originally successfully supported oppose this application. They express an interest in moving the traffic, yet have been given limited opportunities by the shipper. Preference for a particular carrier's services is not enough to warrant a grant of authority, and the mere fact that other existing motor carriers do not oppose the application is not, of itself, sufficient to warrant the conclusion that they are unable or unwilling to meet the normal transportation requirements of the shipper; denied.—Umthun Trucking Co., Extension—Colorado, 108 M.C.C. 669 (671, 674)*.

The decision of the Commission to grant an extension of nationwide nonradial authority to applicant constitutes a reversal of a prior ruling (107 MCC 556), and is the first such grant in several decades. The principal basis of the decision was the inability of extant carriers to provide timely service. That the applicant specifically solicits and handles substantial amounts of national account business did not defeat its cause, particularly since it was shown to advertise, solicit, and handle a considerable tonnage of c.o.d. business and intended to continue to do so if the authority sought were granted. Proceeding designated as one involving issues of general transportation importance.—Fernstrom Storage & Van Co. Ext.—Nationwide, 110 M.C.C. 452 (455-457)*.

Application for authority to transport osseine between indicated points denied as protestant has the authority and equipment to perform the involved transportation and should be afforded an opportunity to provide the service.—Bonded Freightways, Inc., Ext.—Osseine, 111 M.C.C. 137 (143).

Authority for nationwide transportation of described commodities granted to extent that existing carriers lack commodity or territorial authority to provide such service. although service by existing carriers considered individually is satisfactory, shippers' testimony shows that their products are marketed on a nationwide scale and proposed service is required to fill operational voids resulting from certificate restrictions on existing carriers which preclude such carriers from offering a complete service.—Warren Transport, Inc., Ext.—Vehicles, 112 M.C.C. 264 (266-70)*.

Protestants' failure to reply to applicant's petition for reconsideration is an indication of lack of interest in the involved traffic and such action detracts from the weight that their opposition would normally be accorded. Since this lack of interest shown reflects that fact that they will not be affected by the grants of authority requested, application is granted.—Morgan Drive-Away, Inc., Extension, 113 M.C.C. 137 (138, 140)*.

Except for one protestant no existing carriers can offer the supporting shipper the complete and flexible service required. Shipper's volume of traffic is considerable, encompasses the entire proposed service area, and is likely to increase. An additional carrier is needed in order to provide the complete and flexible service required.—Holt Motor Exp., Inc., Staten Island, N.Y., 113 M.C.C. 478 (483).

A grant of authority to applicant would divert desirable traffic from protestant short-haul carrier's lines, and impair if not destroy protestant's ability to serve other shippers in the area.—Theatres Service Co. Ext.—Duluth, Ga., 113 M.C.C. 744 (752)*.

At the instigation of a petition for reconsideration filed by protestant, a prior report and order was modified to restrict applicant's authority in two states which conflicted with protestant's authority. Supporting shipper had no complaint as to protestant's LTL service to the two states, and had not utilized his truckload service. Protestant should be given opportunity of meeting shipper's need before new service to same points is authorized. Applicant's petition for authority to three other states and the District of Columbia was unopposed, and granted.—Oliver Trucking Co., Inc., Ext.—Delaware, 115 M.C.C. 554 (557)*.

Shipper's utilization of its primary carrier (Mason and Dixon) found to belie the contention of Chemical Leaman (secondary applicant) that a trend toward bulk shipment justifies or requires an additional carrier, since shipper's use of its primary carrier declined in preceding years. Secondary application denied.—Mason & Dixon Tank Lines Ext.—Florida Chemicals, 117 M.C.C. 539 (547)*.

Supporting shippers and receivers of general commodities, with exceptions, between Portland, Oreg., and Seattle, Wash., require consistent overnight service, scheduled pickup, available specific types of equipment and a carrier willing to handle the involved traffic; and shippers have shown that the existing joint-line service is not meeting their reasonable transportation requirements. Applicant has provided satisfactory single-line service under temporary authority and shippers have indicated that they wish to be able to continue using it. Application granted subject to conditions.—Trans West Exp., Inc., Ext.—Seattle-Portland, 118 M.C.C. 1 (10, 11).

The record established that intermodal containerized movements of general commodities, with exceptions, in containers, and empty containers on return, between ports of entry located in California, Oregon, and Washington, on the one hand, and, on the other points in United States, except Hawaii, require a greater flexibility than regular-route carriers are efficiently capable of providing; that protestants lack the capacity to serve broad territorial areas and do not transport loaded containers from ports of entry to inland break-bulk points; that protestants are not providing shippers with a container service comparable to that proposed; that protestants must interline to pickup or deliver shipments beyond the scope of their limited authorities and that shippers have found such interline services unsatisfactory. Since it is the policy of the Commission to promote containerization the application was granted, restricted to the transportation of traffic having a prior or subsequent movement by water.—IML Freight, Inc., Ext.—Containerized Freight, 118 M.C.C. 31 (32).

The Commission cannot blind itself to the possible demise of a critically needed local transit service upon which the public relies, under the guise of protecting an existing carrier from a relatively insubstantial amount of harm resulting from the establishment of a competitive service in the more lucrative interstate charter business. Equitable considerations as well as sound public policy must be applied.—Western Mass. Bus Lines, Inc., Com. Car. Applic., 118 M.C.C. 74 (84)*.

Inability or unwillingness of existing carriers to supply enough equipment to meet shipper's reasonable requirements resulted in extension of authority to applicant to transport meat and meat products to three states.—Coats Freightways, Inc., Ext.—Swift Meats, 118 M.C.C. 739 (744)*.

Existing service adequate: [Vols. 11, 18, 19, 21].—In action to set aside the Commission's grant of a certificate to intervening defendant carrier, plaintiffs assert that the evidence did not show existing service in the area to be inadequate or unsatisfactory, and stress the examiner's failure to make a finding that existing service was inadequate; however, the Commission was not obligated specifically to find that plaintiff carriers' services were inadequate in order to find need for additional transportation service in the area. That was merely one of the elements to be considered but was not an indispensable finding, although, as recently stated in 389 US 409, the Commission should consider the public interest in the continued health and stability of existing carriers. As a whole, the record supports the Commission's findings and conclusions; sustained.—Midwest Emery Freight System, Inc. v. United States, 293 F. Supp. 403 (406-7, 408)*.

In action to set aside Commission order denying plaintiff's application for authority to provide single-line service between St. Louis, Mo., and points in Florida, there is substantial evidence of record on which the Commission could base a finding that protesting carrier's single-line service was adequate to meet the shipping public's needs.

Although interline or multiple-line service was not fast enough for supporting shippers' needs, during pendency of the hearing the merger of two affiliated protestants provided those shippers with requested single line service and, while there is some indication of inadequacy of that post-merger single line service, evidence supports the Commission's finding that such service is reasonably adequate and will probably improve. Certainly, contrary to plaintiff's assertion, the Commission did not err in considering that service when determing existence of a public need for plaintiff's service. The Commission's decision, being in conformance with the law and supported by substantial evidence on the record, as a whole, must be upheld; complaint dismissed.—Jerry Lipps, Inc. v. Interstate Commerce Commission, 299 F. Supp. 942 (945-6)*.

In suit to set aside Commission order denying plaintiff's application for permanent authority to transport iron and steel, to replace temporary authority granted it to meet the increased traffic caused by threatened nationwide steel strike, the Commission must weigh the requirements of public need and convenience; and its judgment, not the court's must prevail, if it has support in the record and the law. Applying the rulings in 340 US 474 and 385 US 57, as to extent that the record must support the Commission's conclusions, considered decision should be affirmed. The Commission was justified in refusing to accord much importance to volume of shipping requirements during months of union negotiations when virtually all statistics thereon showed dramatic decrease in volume when the strike was averted; thus, it acted wisely in measuring adequacy of existing services against the market norm. Viewing the record as a whole, substantial evidence supports the Commission's decision that existing services were adequate, both in quantity and quality, to meet shippers' demands and needs; complaint dismissed.—Yourga Trucking, Inc. v. United States, 308 F. Supp. 625 (626-8)*.

Applicants have not shown need for their proposed service over irregular routes transporting carbonated canned beverages, from NY point to certain points in designated states; applicants are presently authorized to provide a goodly portion of the service in the area involved since, under their authorities to transport "canned foodstuffs" and "canned and preserved foodstuffs", the involved commodity can lawfully be transported. Additionally, available service of the protestants is sufficient to meet all of shipper's requirements and obviates any need for applicants' additional service. Denied.—Stevens Truck Lines, Inc.—New England, 95 M.C.C. 63 (68-9).

As proof of public need for proposed limousine service between Fort Dix., N.J., area and New York and Philadelphia airports, applicant relies almost exclusively on the fact that as a taxi operator it has transported a number of passengers to and from many of involved points. It adduced virtually no user testimony, and record as a whole shows no significant public demand or need for additional limousine service. Thus, there is no indication that service provided by opposing carriers within limits of their certificates is other than satisfactory, and applicant's ability to develop an economically viable limousine service under a grant excluding those portions of New York and Philadelphia covered by one protestant's authority is doubtful. Grant of authority for limousine service would therefore not be warranted.—D & M Taxi Co., Inc., Common Carrier Application, 96 M.C.C. 439 (445).

The protestants to an application for an alternate interline point are short-haul carriers, who, although able to meet the reasonable requirements of the shipping public in usual circumstances, are tardy with transportation in emergencies, on weekends, or afternoons. While the existing services are somewhat slower than the supporting shippers would desire, they appear able to meet the reasonable transportation needs of the shipping public and application will be denied.—Brada Miller Freight System, Inc., Extension—Kokomo, Ind., 96 M.C.C. 473 (476-7).

Even assuming that protestant is authorized to transport coal from Pennsylvania counties to western N.Y., which is service area sought by applicant, protestant's operations would involve a circuity of routing through an Ohio gateway which, with its tariffs based on mileage, would render its service less than adequate. Rail service is inadequate, because it lacks the flexibility required by supporting shippers, a quality inherent in motor service. This portion of authority requested, granted.—Tajon Trucking Co. Extension—Specified Commodities, 96 M.C.C. 591 (594).

Absence of specific valid complaints indicates that existing service is generally adequate. Applicant's argument regarding service advantages, being in the abstract, is not concretely related to specific needs of shipper for machinery, parts, and attachments. Considering the few actual stopoffs made, asserted need for stopoff service is insignificant, and, in addition, the service record lacks specific traffic figures on shipments of 5,000 pounds or less, although this is the traffic primarily involved. Also, existing carriers would lose substantial traffic if requested authority were granted. Denied.—C & H Transp. Co., Inc., Extention—Compressors, 98 M.C.C. 1 (9).

Applicant Canadian carrier has shown material inadequacy in present service on specified commodities from proposed U.S. origins to port of entry at Buffalo on traffic moving to Canadian destinations. Rail service does not meet need for expedited service and direct deliveries to various Canadian points; none of protestant motor carriers serving any of the U.S. origins involved have arrangements with the protestants serving ultimate destinations within Canada; and carriers serving Canadian points, although they attest to interchange arrangements with other carriers serving internal U.S. points, do not show extent of the operations authorized or whether they involve the type traffic under consideration. None of the protestants are authorized to serve one of the origin states, and there is no showing that any of them can provide the service shown to be required from the other points recommended by the examiner. Also, none of the protestants which may serve supporting shippers operate automatic unloading equipment necessary for efficient, economical, and damage-free delivery at final destinations. Granted in part.—Balzas Common Carrier Application, 98 M.C.C. 522 (526-7)*.

Existing transportation services are adequate to meet the shipping public's reasonable requirements. Neither supporting shippers were aware that protestants could, under their combined authorities, render service from Nebraska origins to California and Colorado, or that they hold out through-trailer service involving no physical transfer of lading. Not only do these carriers appear fully capable of meeting the shippers' requirements, but the shippers themselves have also indicated their willingness to use any satisfactory available for-hire service. Thus, since existing carriers should be afforded the opportunity to transport all traffic they can handle adequately, economically and efficiently in the territory they service before a new carrier is permitted to enter the field and since applicant has not sustained the burden of proving that such carriers cannot or will not satisfactorily perform proposed new service, application denied.—Curtis, Inc., Extension—Diary Products, 102 M.C.C. 388 (391-2).

While the supporting shippers testified to need for specialized transportation of large, heavy, complex, and in some instances fragile machinery and equipment, there is no definitive showing that existing service is materially inadequate to meet the shippers' needs. Shippers' testimony is vague and not supported by specific examples; it merely reflects a desire for the services of as many carriers as possible. In addition, although statement of facts discloses some minor dissatisfaction with joint-line service, it falls far short of establishing that interlining is productive of any significant delay in transit time at the interchange points. Also, interline service between two or even among three carriers cannot be said to be *per se* inadequate particularly where, as here, some very long hauls are involved. Denied.—Leonard Bros. Transfer, Inc., Ext.—California-Texas, 103 M.C.C. 263 (265-67).

On the record, the existing operations of protestant carriers do not reflect an overall pattern of service deficiencies which, *per se*, warrant grant of authority to applicant. Although many of the supporting shippers express dissatisfaction with the general level of protestant Ryder's service, said service has not been shown to be in excess of the standard of reasonableness (determined by considering various factors, including the theoretical over-the-road running time, past comparable operations by applicant and protestants, pick up and delivery time, and terminal handling time). Moreover, most of the shippers who express said dissatisfaction have not been concerned enough about receiving an improved service to acquaint themselves with other protestants' existing services, nor have they made a reasonable effort to move their traffic by means of the other services available. Protestants conduct services similar to those proposed, and applicant has failed to show any significant deficiencies in them. Denied.—Terminal Transport Co., Inc., Ext.—Birmingham, 103 M.C.C. 699 (714).

In view of the plethora of direct and indirect service, still untied by supporting shippers, applicants have failed to show need for their proposed service, especially when the only shipper complaints are not directed to substantive defects in the existing service. In addition protestants' present authority to transport in bulk plastic pellets permits them to transport plastic liners as an item incidental to that authorized, since the liners are required to safeguard the pellets from contamination and, in light of past attempts, it is impractical for the liners to be transported in any other manner.—Olson Transportation Co. Ext.—Dry Plastics, 103 M.C.C. 919 (923-4).

The record does not show any lack of existing service which might warrant granting applicant authority between Birmingham, Ala., and the Florida Panhandle. An examination of the demonstrated standards of operation and the number of carriers who are competitive participants in the overall existing motor common carrier transportation "system" between Florida Panhandle and northern Alabama commercial centers shows that the single-and joint-line services provided, or which are available and untried, are reasonably adequate to meet needs of the shipping public. However, as to application for authority to operate between Mobile, Ala., and Panhandle points, there is little indication by existing carriers of any significant interest or demonstrated willingness and ability in meeting expressed needs of supporting shippers for movement of traffic through the Mobile gateway; accordingly, authority sought in embraced proceeding, as restricted, is granted.—M. R. & R. Trucking Co., Extension—Birmingham, 105 M.C.C. 69 (81, 83)*.

Although in prior report there was no showing that protestants or other existing carriers are unable or unwilling, or are not, in fact, presently providing adequate service in the handling of considered traffic, a determination as to the adequacy of the service of existing carriers is not, in the circumstances here present, a controlling factor as to whether proposed service is required by public convenience and necessity, inasmuch as this service has existed, albeit unauthorized, under color of right for a number of years. Therefore, continuance of this service cannot be said to create a new or aggravated competitive situation to the detriment of other carriers. Granted.—Dixie Ohio Exp., Inc., Investigation and Revocation, 105 M.C.C. 835 (841-2)*.

Since opposing carriers provide ample single line service between heavy-volume shipping points, and shipper testimony is unconvincing that the presently used interline services result in unreasonable delays, testimony pertaining to such shipments being vague and contradictory, the preponderance of the evidence militates against any grant of authority in that it lacks specificity to establish any general pattern of real service inadequacies. Grant of applicants' requested extensions would only serve to diffuse the available traffic among the competing carriers.—Cushman Motor Delivery Co.—Extension, 106 M.C.C. 809 (818-9).

Existing carriers are entitled to all the traffic they can handle adequately, efficiently, and economically within the limits of their authorities before a new competitive service may be authorized. In the instant proceeding, each protestant has the authority to perform the proposed service. In the proposed service area, protestants collectively (a) have numerous terminals and over 500 assigned vehicles which, through efficient communication systems, can be supplemented by equipment from other areas, (b) attempt to attract traffic by means of extensive advertising, (c) are able and willing to comply with service requests within a reasonable time, and (d) are actually handling the involved traffic. Further, only one actual user of the proposed service supports the application, and complaints about existing service consist primarily of general allegations. Of the two specific complaints about existing service, one is so remote in time as to be of minimal probative value, and the other, a delay in the pickup and delivery of a trailer resulting from weather conditions and mechanical failure, is of minor significance. Denied.—Hintze, Common Carrier Application, 107 M.C.C. 348 (356).

Applicant's proposed performance of accessorial services in the transportation of mobile homes does not warrant a grant of the instant application, since protestants do perform and are willing to perform, or to secure the performance of, any accessorial services of any consequence mentioned by the supporting witnesses herein. The record shows that requests by shippers for various services, in addition to the line-haul service, are dependent to some extent on financial and other considerations and not the availability of such services. Further, applicant's evidence fails to establish that he is in compliance with, or even aware of, the state of Maryland's provisions regarding the performance of plumbing services.—Id. at 357-8.

Seventeen public witnesses support this application for authority as a common carrier of passengers and their baggage in charter operations. Of the seventeen public witnesses, four witnesses characterize the services of the protestants as satisfactory. Ten other witnesses indicate that the services of either one or both of the protestants has not been used. A few complaints have been registered against one of the protestants, but, where such was the case, the service of the other protestant has not been used. Protestants own equipment suitable for charter operations, employ drivers experienced in transporting charter parties, and actively solicit charter business in the involved area. The Commission does not consider mere preference for a particular carrier sufficient to warrant a grant of authority. The record shows that the existing service, as a whole, has not been tested and shown to be inadequate. Protestants have demonstrated that they are able to meet the reasonable transportation requirements of the traveling public; denied.—Roesch Extension—Eleven Western States, 108 M.C.C. 706 (707, 713, 714).

Normally, existing service must have been used and found deficient to support a conclusion of inadequacy. There has been no pertinent use of protestants' service by supporting shippers herein; but, however, only two of the protestants are capable of furnishing the required heavy-hauler service, and they have expressed minimal interest in shippers' traffic in the past because of the great distance they must deadhead to provide such service Granted.—Wehe Common Carrier Application, 110 M.C.C. 798 (808-9).

Application for authority to transport printer's ink from Buffalo, N.Y., to Sylacauga, Ala., denied as applicant has failed to establish any inadequacies in protestant's service. Protestant's authority to transport "liquid chemicals" was found to include printer's ink.—Ecoff Trucking, Inc., Extension—Buffalo, N.Y., 111 M.C.C. 395 (399).

Applicant has not met the burden of proving that the existing service performed by protestant motor carriers on secondary, truckaway movements of housetrailers is inadequate. Shippers' complaints against protestants' service are few and represent only occasional service failures normally occurring in transportation business. Applicant's extra accessorial services are infrequently required and protestants have met such requirements in past by use of hired third persons. Application denied.—Martin Trailer Toters, Inc., Common Carrier Application, 111 M.C.C. 841 (857-9)*.

Since existing for-hire carrier service is reasonably adequate to meet supporting shippers' transportation requirements, no need is shown for proposed service. Mere desire for more expeditious service is insufficient to warrant grant of new authority; denied.—Overnite Transp. Co. Elimination of Gateway, 103 M.C.C. 135 (144, 146); although supporting shippers desire improved service, desire is counterbalanced when consideration is given to limited traffic flow to and from involved area. Protestant's single-line service may not reach optimum adequacy and may leave room for improvement, but does not reflect an overall pattern of deficiencies; denied.—Bowman Transportation, Inc., Extension, 107 M.C.C. 876 (880)*; protestant's successful answer of all complaints of supporting witnesses without rebuttal proves its service not inadequate. Supporting witnesses' vague preference for applicant's service is insufficient basis for grant; denied.—Everett Charter System, Inc., Com. Car. Applic., 111 M.C.C. 214 (215-6)*; applicant has failed to meet burden of showing protestants' charter service inadequate, as no public witness indicated any inadequacy on protestants' part but only supported applicant for sake of convenience and proximity of a locally based charter operator; denied.—Pathfinder Bus Lines, Inc., Common Carrier Applic., 111 M.C.C. 609 (611)*; on reconsideration, application for extension of authority as expedited messenger service denied in certain respects specified herein, as protestant provides same type of service as that proposed, and supporting shippers have shown only a desire for services of an additional carrier.—Swan Messenger Service, Inc., Ext.—General Commods., 112 M.C.C. 26 (33-4)*; Midwestern Express, Inc., Extension—Paper, 117 M.C.C. 720 (723)*; applicant's petition for permanent extension of authority held on temporary grant denied when evidence adduced by protestants reveals that supporting shipper has not made concerted effort to utilize other available carriers whose service is considered adequate by Commission.—Gra-Bell Truck Line, Inc., Ext.—Coloma, 115 M.C.C. 872 (879-80)*; supporting shipper's statement of intentions to expand its operations is inadequate to establish future need, the more so since shipper has not used existing service to an appreciable extent, and has not shown such service deficient.—Frostways, Inc., Extension—Livonia, Mich., 117 M.C.C. 209 (215)*; application to transport meats, meat products, and meat byproducts from St. Louis, Mo., and points in Illinois to points in 3 States denied, on basis of adequate existing service.—Ill.-Pac. Coast Transportation Co., Ext.—Three States, 117 M.C.C. 455 (458)*.

On reconsideration, Commission limited authority granted herein to those areas not served by protestants in light of criteria for such grants as stated in 1 MCC 190, as to whether shipper's needs can be served by existing carriers. Although shipper anticipates increased volume of shipments, facts of record do not show a need for service over routes duplicative of those protestant is authorized to serve.—Central Transport, Inc., Extension—Barite, 112 M.C.C. 410 (412-3)*.

Application denied as protestant holds appropriate authority to provide sole supporting shipper with comprehensive service to all destination States for which need is asserted, has suitable equipment available, is experienced in transportation of canned goods, has already provided some pertinent service for shipper without complaint, and has a traffic embalance which would be partially corrected by the involved traffic. Proposed operation poses no significant improvement over protestant's service. In the embraced proceeding, however, existing service is found to be inadequate when same protestant cannot serve all destination States for which same shipper now asserts need, and a denial to extent of protestant's authority would fragment shipper's distribution operation.—Kroblin Refrigerated Xpress, Inc., Ext.—Michigan, 113 M.C.C. 306 (312-3)*.

Although protestant can provide the service sought to some extent, inasmuch as applicant's service has existed, albeit unauthorized, under color of right for many years, continuance of these operations cannot be said to create a new or aggravated competitive situation to the detriment of existing carriers.—Cotter Garage Corp. Common Carrier Application, 113 M.C.C. 589 (595-6).

Application denied when the evidence establishes that (1) existing carriers are willing and able to perform that portion of the proposed service for which a need was shown, and (2) the remaining portion of the authority sought does not satisfy the standards set forth in 103 MCC 555 (1967).—Cloud Common Carrier Application, 115 M.C.C. 77 (79)*.

Applicant granted authority as sought, with the major exception of Hopkinsville, Ky. The evidence of the proceeding demonstrated that the 20 shippers located in that city had received a consistently satisfactory service from protestant.—Pulaski Highway Express, Inc., Extension—Ky., 117 M.C.C. 552 (554)*.

Supporting shipper's assertion that the location of protestant's closest terminal at Mineola, Tex., is more than 100 miles from

Shreveport, La., and would lead to the late delivery of needed equipment, resulting in inadequate service, serves as no basis for depriving protestant of an opportunity to serve it where, as here, protestant has made clear its intention to spot equipment at shipper's Shreveport facility when necessary and when given adequate notice. Existing authorized carriers normally are entitled to all the traffic that they can handle adequately, efficiently, and economically within the territories which they are authorized to serve, without the added competition of an unneeded service not shown to be warranted by other factors.—Eagle Trucking Co. Ext.—Shot and Grit, 118 M.C.C. 108 (112-13)*.

Applicant did not meet those facets of its evidentiary burden dealing with existing service. Although the Commission was informed that shippers are dividing their size-and-weight and nonsize-and-weight traffic among a number of carriers including applicant, other heavy specialized carriers, and conventional transporter of general freight, such testimony does not establish that presently available services are inadequate to shippers' expressed transportation needs. Denied.—Eagle Motor Lines, Inc., Ext.—Machinery, Tools, 118 M.C.C. 604 (612).

A major question in motor carrier application cases is whether advantages to the public that would use the proposed service outweigh disadvantages, real or potential, that may result upon existing services and those dependent upon them. See 118 MCC 74. Even if we do not find existing service inadequate in any material respect, we are not precluded from finding that other factors require the proposed operation. See 111 MCC 645. In the instant case, existing service has not been poor enough to be characterized as wholly inadequate, but it is clear that supporting shippers are not receiving all the service needed to operate their businesses efficiently. Proposed service would benefit shippers by making more refrigerated vehicles available and by facilitating transportation of LTL shipments through more frequent service. Application granted.—Onley Refrigerated Transp., Inc.—Foodstuffs and Drugs, 118 M.C.C. 715 (721-22)*.

One of the basic elements in determination of public need is a showing of the inadequacy of existing services. See 105 MCC 634. Normally, existing carriers should be afforded an opportunity to transport all the traffic they can handle in an adequate manner without added competition of new operation. In instant case, we do not view multiple telephone calls by shippers to locate a carrier with equipment available as a service deficiency in the absence of definite evidence that unreasonable delays subsequently occurred. In any event, shippers' complaints concerned less than two percent of all involved shipments and few complaints concerned the area petitioners served. However, to extent that other applicants in this consolidated proceeding (who were not subject to petitions for reconsideration) were granted authority by original review board decision, applicant herein will also be granted authority to serve these nine States and District of Columbia.—Colonial Refrigerated Transp., Ext.—Cherokee Meats, 118 M.C.C. 731 (736-37)*.

See also American Courier Corp., Extension case, §207(a), n. 25 *Existing carriers*; Chemical Leaman Tank Lines, Inc., Ext. case, §206(b), n. 18; Dixie Highway Exp., Inc. v. United States case, §207(a), n. 25 *Necessity in general;* Drum Transport, Inc. v. United States case, §207(a), n. 9; Gra-Bell Trucking case, §207(a), n. 25 *Through service*; Kenosha Auto Transport Corp. Ext.—Secondary Movements case, §207(a), n. 25 *Truckaway*; National Bus Traffic Association v. United States case, §207(a), n. 25 *Special service*; Point Transfer, Inc., Extension—Pa. and Ohio Origins case, §206(b), n. 18; Schilli Motor Lines, Inc., Conversion Application case, §207(a), n. 25 *Conversion*.

Express: [Vols. 19, 21].—Motor express authority has been granted in some instances when substantial operating economies are established, but only in particular circumstances as when the mode of transportation used materially handicaps the rendition of express service, when there is no significant change in the character of service, and when the opposing carriers, in the absence of adequate service, can not provide a complete express service. While some economies would result from proposed operation, including saving in operation and the savings of 1 day in transit for some shipments and 2 days for others, there is no indication of inadequacy of underlying rail transportation which would handicap applicant's existing express service or that REA and other carriers are not providing adequate transportation to shippers. Described reductions in transit time involve substantial service improvements which would result in a new service; and improvements implicit in applicant's proposal likely would result in additional diversion of traffic from existing carriers. Denied.—Railway Exp. Agency, Inc., Extension—Atlanta and Greenville, 96 M.C.C. 127 (133-4).

A material reduction in passenger train service and the protestants' failure to provide suitable express service constitute special circumstances which warrant granting to R.E.A. authority, unburdened with either a rail-haul or key-point restriction, to transport general commodities in express service, a bona fide express service viewed in light of the report in 323 ICC 468.—Railway Exp. Agency, Inc., Ext.—Rochester-Albany, N.Y., 98 M.C.C. 341 (345-7).

Supporting shippers, many of whom have used applicant's service where it is authorized, require extremely rapid service in the proposed territory for the movement of a wide range of commodities in very small shipments. Although both protestants hold authority to perform the service, it is apparent that neither provides anything approaching the expeditious type of service required and that the shippers' needs can only be met by the applicant. Moreover, considering the differences in quality between the proposed service and the services of protestants, comparing the vast potential rapid shipment market to New York City area with the small size of the existing service, and noting the lack of past development of this territory by existing carriers, service herein authorized will not have a material effect upon protestants.—Click Messenger Service, Inc., Ext.—N.Y. & N.J., 103 M.C.C. 851 (855)*.

Applicant has been rendering 24-hour on call airfreight service on small shipments to both supporting shippers between Standiford Field, Kentucky, and thirteen Kentucky counties. Applicant specializes in expeditious same day service, and will provide emergency service when requested. Shippers' experience with regular-route carriers is unsatisfactory. Protestant does not offer flexible and specialized surface motor transportation on air traffic. It holds itself out to provide no better than an overnight service. The prime benefit of airfreight, namely its speed, is neutralized if expeditious motor carrier service is not available for moving the merchandise to or from the air terminal. Grant of this application will enable applicant to perform a more complete service for each of the supporting shippers. Extension authority granted subject to a prior or subsequent movement by air restriction.—Kato Express, Incorporated, Extension—Standiford Field, 108 M.C.C. 222 (223-4, 226)*.

Fitness in general: [Vols. 10-12, 14-19, 21].—See also n. 10, above. See also AADA Systems, Inc. case, §207(a), n. 25 *Truckaway;* Herr's Motor Exp., Inc., Extension—Wheeling Steel case, §207(a), n. 25 *Existing carriers;* Sawyer Transport, Inc.—Purchase—R.C. Wilson case, §5(2), n. 110 *Fitness;* United Buckingham Frt. Lines, Extension case, §207(a), n. 25 *Commodity.*

In action to enjoin and set aside Commission order denying plaintiff's common carrier application, evidence of record supports the Commission's findings and conclusions that, in view of existing common control of applicant and its principal supporting shipper (which could create opportunity for favoritism and discrimination), plaintiff had failed to establish its fitness to operate as a common carrier that would serve all shippers impartially; and those findings and conclusions are not erroneous as a matter of law. Determination that a substantial opportunity for favoritism and discrimination exists is a matter peculiarly within the Commission's expertise; moreover, a review of the entire record shows that such determination in instant case was entirely rational, reasonable, and supported by substantial evidence. Accordingly, the Commission's decision is sustained and temporary restraining order currently in effect is vacated.—Alter Trucking and Terminal Corp. v. United States, 299 F. Supp. 819 (822-4)*.

In action to review Commission decision and order which found plaintiff (applicant) unfit to receive the authority sought and denied its application, the judicial function is exhausted when it is found that the agency's conclusion has rational basis in the evidence. Record contains substantial evidence of violations of the law and Commission rules and regulations and a basis therefrom for inferring that the applicant was unreliable and insincere and that the past violations would persist in the future; and the case was peculiarly one for expertise and experience of the agency and its evaluation of the implications of the evidence. Determination of whether leniency should be accorded to the erring applicant is a matter for the Commission's discretion; and, even though the reviewing court might have reached other conclusions from the same record, such a difference of opinion would not be a basis for setting aside the Commission's action.—Consolidated Carriers Corp. v. United States, 321 F. Supp. 1098 (1100)*.

While it is argued that the Commission should have found that plaintiff was a fit applicant because it had been granted temporary authority, and had operated thereunder for a considerable period of time prior to final denial of its application, the grant of temporary authority created no presumption of fitness in plaintiff's favor. Plaintiff also contends that considered order should be set aside because it was made on the recommendation of an examiner who had not conducted the oral hearing; however, since the hearing officer had retired before rendering his report, the Commission properly assigned a substitute examiner to prepare the initial or recommended decision. Complaint dismissed.—Id., p. 1100.

Questions of fitness and paramount public interest are uniquely committed to the Commission's expertise; and scope of the court's review in action to set aside Commission order granting extension authority to defendant carrier (applicant) is limited to determining whether there is warrant in the law and fact for the agency's action. Plaintiffs' claim that the applicant's failure to produce evidence of its ability to comply with Commission rules and regulations makes it *per se* unfit, and mandates a remand, is not in harmony with realities of the case. Compliance with operating regulations was not in issue before the Commission, as the carrier was merely seeking enlargement of its existing authority; applicant produced evidence from which a conclusion could properly be drawn that it was not unfit financially; and in making the basic finding of fitness, the Commission considered question of regulation compliance though it was not seriously in issue. Furthermore, the court finds no prejudicial departure from provisions of the law that requires remand of the case for further consideration. Complaint dismissed.—St. Johnsbury Trucking Co. v. United States, 326 F. Supp. 938 (940, 943)*.

Inasmuch as it has been found that appropriate authority is required for considered transportation service, applicant's past operations have been unauthorized. While these operations are not condoned, evidence indicates that applicant conducted its service in good faith and under a mistaken color of right; further applicant promptly filed instant application when informed of the impropriety of his actions. A finding of fitness, therefore, is warranted.—Nilson Extension—South Carolina, 95 M.C.C. 326 (329); protestant's contention that applicant is unfit to perform proposed service because of past unauthorized operations found not justified as evidence of record shows such operations performed under color of right. Applicant was diligent in testing that right and in applying for appropriate authority upon learning that its operations might be unauthorized.—Mohawk Trucking & Salvage Co., Ext.—Sodium Chloride, 113 M.C.C. 579 (586)*; applicant operated under color of right for several years, and, although such continued operation without authority since filing application cannot be condoned, the record does not establish that applicant intended to flout statutory requirements; finding of fitness warranted.—Cotter Garage Corp. Common Carrier Application, 113 M.C.C. 589 (595).

While operation without proper authority is by no means to be condoned, fact that applicant's prosecution for operating as a for-hire carrier without authority grew out of unlawful equipment leasing arrangements, a refinement of Commission policy that laymen might not understand, suggests that its assertion that these violations were innocent might be the case. In any event, the cooperative attitude reflected by applicant's compliance to Commission policy since the prosecution, entitles it to a finding of fitness.—La Bar's, Inc., Common Carrier Application, 95 M.C.C. 773 (774-7).

Record is convincing that applicant and parties have conducted some form of unlawful operations since 1948; for about 4 years, bus service was furnished without authority from the Commission, and, after obtaining the present charter authority, certain operations were conducted beyond the scope of such authority as shown by a criminal conviction and a cease and desist order from the Commission. Except for the injunction proceeding now pending in a Federal court, there have been no formal proceedings brought against these parties since 1957; however, unlawful operations have continued, consisting of providing tours under the individual ticket arrangements to ski resorts, race tracks, and other points. Also there have been trips to points beyond applicant's territorial authority. Since the violations are willful and continuing, applicant is not fit to receive a grant; denied.—S & S Bus Service, Inc.—Special Service, 95 M.C.C. 796 (802)*.

The contention that there was some basis for applicant's past activities, since the original grandfather certificate of its predecessor authorized "special or charter service," is not consistent with its other argument concerning the veil of legality surrounding applicant's activities with other parties. Furthermore, this claim arose after an extended history of unlawful operations, and the certificate applicant now holds is clear on its face. Applicant could, but has not sought to have its certificate modified to reflect the actual operations conducted in the "grandfather" period, and there are continuous willful violations of the Act. Applicant is not fit to receive a grant.—Id., p. 803.

Although applicant's fitness is being questioned in another proceeding and it would be inappropriate to make a finding with respect to its overall fitness, where alternate-route application proceeding does not involve institution of a new competitive service but only services which are to be used as a convenient alternative to those already performed, applicant can properly be found fit, willing and able to perform proposed operation. However, this conclusion is specifically limited to the instant proceeding and should not be construed to foreclose, in any manner, a possible contrary conclusion in any other proceeding involving applicant.—The Overland Express, Limited Extension—Alternate Route, 96 M.C.C. 24 (27-8).

Viewing the record in its entirety, applicant, by repeated and willful violations of the Act, has failed to establish that it meets the standards of fitness requisite to the granting of authority under §206. Evidence shows that applicant, without appropriate authority, had transported several bus loads of passengers from and to points specified; had entered into an illegal "lease arrangement"; and had operated unlawful charter trips to Canada. Applicant, who is an experienced motor carrier, is charged with knowledge of Commission's rules and regulations especially since a cease and desist order had been entered against it because of its unlawful activities. It is not being overly harsh to say that subsequent to examiner's reports, and certainly after issuance of prior report, applicant should have been aware that its operation would be carefully examined by the Commission before further operating authority was granted. In view of described violations, applicant has not demonstrated since that time that it is disposed to comply with the Act. Therefore, it cannot be found fit to receive the extension authority sought. Denied.—Schenck Tours, Inc., Extension—Nassau, 96 M.C.C. 66 (71-8)*.

Neither of two applicants seeking broad territorial authority for transportation of used automobiles by driveaway has submitted a fully thought-out proposal which would permit the proper determination whether it would or could comply with the requirements of the Act and the Commission's regulations, and whether proposed operation would be conducted with a view to protecting interests of the automobile owners and other users of the public highways. Applicants are not regulated motor carriers, and, although their managerial personnel have had varying degrees of experience in performing for-hire transportation, officers of one admitted lacking familiarity with the Commission's safety and other regulations and director of the other was unable or unwilling to name a single point where it would establish offices. Neither has indicated how it would enforce driver compliance with the safety regulations or what arrangements it would provide in the broad area through which it seeks to operate to permit the making of claims by automobile owners; denied.—Autocar Shipping Co. Common Carrier Application, 96 M.C.C. 357 (364-5).

Although applicant and its affiliate have admittedly performed substantial interstate operations without appropriate authority, its claimed taxicab operations were conducted under a not wholly unreasonable interpretation of exemption of §203(b2). Applicant's impression that its operations were a bona fide taxicab service was based on legal advice, and its activities apparently were not questioned by Commission personnel, warranting finding that they were not conducted in willful disregard of the law and that applicant is fit to receive authority granted. However, applicant is reminded that with issuance of certificate it becomes subject to all regulatory requirements and must conduct its operations accordingly.—D & M Taxi Co., Inc., Common Carrier Application, 96 M.C.C. 439 (443, 447-8).

Although applicant has been engaged in round-trip charter operations originating at points not within its regular-route territory, in violation of §206(a), such past violations apparently resulted from misapprehension of the applicable law rather than from defiance of the Commission's charter service regulations or any willful purpose to evade them. In the circumstances, the Commission is reluctant to deny authority for rendition of the limited round-trip tour service shown to be needed by the public; applicant is therefore found fit to conduct the special operations authorized.—Arrow Stage Lines, Inc., Investigation and Revocation, 96 M.C.C. 572 (581).

The Commission would be remiss in its duty if it were to ignore the concurrent finding in investigation proceeding, heard on consolidated record with extension application, that applicant has been in willful violation of the Act, and at same time allow applicant to be found fit to receive additional authority. Applicant's continued performance of of unauthorized transportation and continued violations of the Commission's leasing and safety regulations demonstrate either intentional disregard of, or plain indifference to, the Act and regulations, and preclude a finding of fitness. Application denied.—S & C Transport Co., Inc., Investigation and Revocation, 96 M.C.C. 642 (646).

Although applicant has shown public need for a grant of the additional authority requested, certain questions have been raised in another application proceeding which cast doubts on applicant's compliance with the Commission's safety and leasing regulations, and hence on its fitness to receive the authority requested herein; authority requested withheld pending such determination.—W. T. Byrns Motor Exp., Inc., Extension—Rooseveltown, 96 M.C.C. 765 (770); applicant has brought certain aspects of its operation into compliance, but the evidence is insufficient to resolve certain other questions related to fitness. Application conditionally granted, but proceeding set for further hearing on the limited issue of fitness.—Distributors Service Co. Extension—Foods, 113 M.C.C. 129 (136)*; inasmuch as proceedings involving fitness of two applicants in this consolidated proceeding are pending, it is considered inappropriate to determine their fitness.—Kroblin Refrigerated Xpress, Ext.—Sterling, Colo., 118 M.C.C. 869 (875)*.

Applicant's past unauthorized single-State operations in interstate commerce under its registered state authority, do not preclude a finding that he is fit and able properly to conduct proposed irregular-route operations between designated Pennsylvania points for which a need has been shown. Unlawful operations conducted by applicant were the result of some misapprehension by him of applicable law rather than any defiance of the Commission's regulations or willful purpose to evade them. The operations have been conducted openly and without any element of disguise or concealment.—Bowser—Investigation of Operations, 98 M.C.C. 170 (178).

Since the issue of common control between applicant East Coast and Ontario is involved in another proceeding, it should not be prejudged herein; however, there is another matter reflecting upon East Coast's fitness. East Coast gives 95 percent of its gross revenues to East Coast Trans. Corp. (ECTC), with all responsibility resting in ECTC for payment of East Coast's expenses; furthermore. employees of ECTC are conducting East Coast's operations. In other words, the certificated operations of East Coast, are conducted by ECTC, which is not authorized to conduct such operations. It has long been the policy of this Commission to deny a grant of authority to a motor carrier which does not intend to conduct operations thereunder; under these circumstances East Coast has failed to establish that it is fit properly to conduct the operations proposed herein. Denied.—East Coast Trucking, Inc., Extension—New York Counties, 98 M.C.C. 594 (599-600).

Although applicant has limited opportunity to achieve competitive advantage at expense of protestant, by reason of its affiliation with supporting shipper Mobilease, it is not automatically unfit; since applicant and protestant are vigorous competitors for automobile trailer traffic throughout much of the country, since applicant as a common carrier will be obligated to publish and to observe tariffs stating rates and rules governing performance of its services for all shippers, and since other supporting shippers are aware of this affiliation between applicant and Mobilease, there is little opportunity for favoritism or discriminating practices among users of applicant's services and therefore applicant is not deemed unfit as a result of this affiliation. However, should the activities of Mobilease develop in any significant scope or form to warrant a reexamination on our part, it will be open to protestant or any other person, as well as our field staff, to bring such facts to our attention.—National Trailer Convoy, Inc., Ext.—Initial Movements, 100 M.C.C. 101 (102, 105).

Although there is need for proposed transportation of wearing apparel, applicant cannot be found fit solely on basis that there is no other carrier able to provide the service required, because such a finding would be in contravention of Commission's duty "to protect the public from carriers whose conduct demonstrates an unwillingness to operate in accordance with the requirements of regulation". Applicant's unlawful operations viewed in their entirety indicate an attitude of conscious indifference to Commission regulation and a design to evade it whenever expedient. Under such conditions applicant is deemed unfit. Denied.—Fanshaw Extension—Emporia, 100 M.C.C. 173 (178, 180).

In an application proceeding under §207 of the Act, a finding must be made concerning applicant's fitness and to that extent possible unlawful operations are pertinent. And since the record is clear that applicant has violated conditions in its temporary authority which prohibited it from transporting traffic from or to origins or destinations other than those named in the temporary authority itself, either entirely by it or by interline with another carrier, these unlawful operations are pertinent. However, although such conditions may be occasionally and unwittingly violated, on a proper showing they can be and often are relaxed or eliminated entirely. Consequently a general compliance with these conditions should be expected of all motor carriers in the future. Application denied.—Frozen Food Exp. Extension—Indiana and Ohio, 100 M.C.C. 369 (370-2).

Fact applicants lease equipment, standing alone, plays no part in disposition of instant applications; it is well established that applicants' fitness and ability to provide adequate service should not be measured by the extent to which they financially invest in privately owned and operated equipment and that applicants may not be found unfit simply because they use leased equipment, provided the leasing arrangements and operations thereunder are lawful and proper.—Point Transfer, Inc., Extension—Pa. and Ohio Origins, 105 M.C.C. 634 (658)*.

Applicant has failed to establish that it is fit and able to perform proposed operations; if a carrier is not in substantial compliance with applicable safety rules and regulations it is axiomatic that such carrier is a threat to the public. Although applicant has intensified its efforts to comply with these rules and regulations, remedying certain of its problems, especially with respect to proper logging, it has failed to bring a reduction in the number of its vehicles placed out-of-service. However, as the aim of the Commission is compliance, not punishment, this proceeding held open for a year during which time applicant may petition for further consideration in order to show that its operations have been brought into and maintained in substantial compliance with the applicable rules and regulations; moreover, the Commission noted that since the national average is not to be considered as the standard of compliance required, such comparisons are not determinative, although entitled to consideration along with other factors.—Midwest Coast Transport, Inc., Ext.—Duluth, Minn., 105 M.C.C. 724 (732-5)*.

However, on further consideration the Commission found that, based upon applicant's operational record during a 12 month period, the fruits of applicant's revitalized safety and maintenance programs have begun to ripen; the out-of-service problem appears to have been alleviated. Therefore, applicant's operations now are in substantial compliance with the applicable safety rules and regulations; furthermore, continuation of applicant's renewed safety and maintenance programs should also show greater results in the reduction of its overall accident frequency rate, especially those in the so-called "preventable" category. In view of these circumstances applicant is fit to conduct the operation for which authority is sought herein.—Id., 106 M.C.C. 380 (383)*.

Although applicant admits that on numerous occasions over a 10-month period, it has engaged in unauthorized operations and other improper practices pertaining to bills of lading, drivers' logs, and extension of credit, the evidence, considered as a whole, justifies conclusion that considered successor partnership is fit to receive authority for which need has been shown. However, applicant is warned that a record of past substantial noncompliance makes its burden of establishing the firmness of its resolve and its ability to maintain compliance more difficult and that in any future application proceeding it will be expected to show affirmatively the continuing nature and extent of its efforts to assure compliance with the Act and regulations thereunder.—L & M Express Co., Extension—Crewe, Va., 106 M.C.C. 334 (338-9).

Respondents' continuation of unauthorized operations in foreign commerce under their state certificates registered under §206(a)(7) of the Act does not reflect adversely upon their fitness notwithstanding their failure to file immediate applications for certificates of public convenience and necessity, considering the conflicting opinions of the Bureau of Enforcement as to the legality of such operations; the lack of action by the Commission after the investigation by the bureau; the aura of uncertainty that surrounded respondents' operations; and the character of the operations and the apparent commencement of such operations under color of right.—Imperial Truck Lines, Inc.—Common Carrier Application, 106 M.C.C. 741 (750-1).

In considered circumstances, applicant is found fit and able, financially and otherwise, to conduct proposed operations in transportation of passengers assembled into small groups, in vehicles leased by carrier to a group and operated by a member thereof, who are commuting between their homes and employment. While applicant had not realized a profit from operating, at time of the hearing, it had begun the operation (believing it was not subject to Commission regulation) about 6 months earlier, using eight vehicles, and had incurred certain expenses in organizing its new business, but it was operating 14 vehicles when the hearing closed 8 months later. Financing for its cars is obtained from a local bank; and its stockholders are willing and able to advance any necessary additional funds. Furthermore, as to ability of applicant to comply with the safety regulations concerning hours of service of drivers, the transportation time of 2 hours a day, 5 days a week, plus the normal 8 hours at work will not exceed either the allowable 60 hours per week or the aggregate 10 consecutive hours driving time within a 24-hour period; however, to insure conformity with the safety rules, necessary conditions may be imposed in the future.—Monarch Associates, Inc., Common Carrier Application, 107 M.C.C. 277 (285-6)*.

Applicant has failed to establish its fitness since portions of its reply dealing with efforts toward compliance with the Commission's cease and desist order concern events which occurred after the record was closed. However, in view of the change in applicant's management several months prior to the hearing in these proceedings, and the final determination by the Supreme Court of the issues in the investigation case one month after the hearing, applicant should be afforded an opportunity to show that its operations have been brought into substantial compliance. The proceeding will be held open for a period of one year in order that applicant may file a petition for further consideration.—Whitehouse Trucking, Inc., Extension, 107 M.C.C. 486 (493).

Applicant's failure to observe gateways in its present operations does not warrant a finding that it is unfit to perform the proposed operations since the challenged movements cannot be found to be of a representative or recurring nature, considering the few violations admitted and alleged, in light of applicant's authority, scope of operations, and number of shipments moving through the gateway. Further, where applicant has discovered that its drivers have failed to observe gateways, it has taken disciplinary action, and the decrease in the number of gateway violations between the periods checked show its compliance efforts. These factors taken together with those in prior proceedings concerning the fitness of applicant, show that its conduct does not represent a flagrant and persistent disregard of the provisions of the Act.—Eagle Motor Lines, Inc., Extension, 107 M.C.C. 499 (503-4).

Where an applicant's past conduct shows a pattern of continued or serious violations, such applicant has the burden of refuting the import of its past conduct in order to establish its fitness to acquire additional authority. The record in this proceedings establishes (1) that at times applicant has failed to render reasonably continuous and adequate service, (2) that it has not kept its records in accordance with the Commission's accounting regulations, (3) that it is commonly controlled with other motor carriers in apparent violation of the provisions of §5(2) of the Act, (4) that it falsely answered at least one question relating to common control in its application, and (5) that its principal stockholder operates as a broker without authority under §211 of the Act, participates in the receipt of a rate concession in violation of §217(b) and §222(c) of the Act, or participates in improper pooling of revenues within the purview of §5(1) of the Act. Denied Peoples Express Co., Extension—Containers, 108 M.C.C. 174 (175); however, while applicants herein violated regulations by giving false answers pertaining to applicants' interest in other carriers, Commission finds such violations not willful and applicants fit to perform operations for which a need is shown.—L. & M. Express Co., Ext.—North Carolina, 110 M.C.C. 845 (850-1).

Before a grant of common carrier authority can be made, the Commission is required not only to ascertain that the proposed operations are required by the public convenience and necessity but also to find that applicant is fit and able properly to conduct the proposed operation. Applicant has established a long-continued history of noncompliance and disregard for the Commission's regulations. Where an applicant's past conduct demonstrates a pattern of serious or continuous violations, then such applicant has the clear burden of refuting the import of its past conduct in order to establish its fitness to receive additional authority. A carrier's self-serving statements and belated remedial efforts announced at the time of the hearing are not persuasive and can be afforded little weight when viewed against a background of continued noncompliance. Application denied.—W. G. Thalmann Extension—Kentucky, 108 M.C.C. 269 (272-3).

Applicant is not unfit despite unauthorized operations which resulted in an agreed judgment in a Federal District Court and a resultant civil forfeiture by this applicant during the span of the hearings herein. The recurrence of violations by applicant after the close of the hearings cannot be condoned. The alleged changes in the management of this applicant's operations may correct the cause of the infractions but do not mitigate the unlawful conduct. However, the Commission is reluctant to find applicant unfit primarily in response to matters occurring subsequent to the hearings herein, and, in effect, to impose an additional penalty to the fine and 5-year probationary period adjudged against applicant by the Federal District Court, in view of its apparent willingness to reform the situation.—Houston Lines, Inc., Extension—Steel, 108 M.C.C. 467 (475).

As scope of the incidental-to-air exemption of §203(b7a) had not been finally settled at time of hearing on instant application, applicant's past performance of service from and to considered airports in mistaken belief that it was within that exemption should not militate against a finding of fitness.—White Air Freight Service, Inc., Common Carrier Application, 95 M.C.C. 616 (619); but the legitimate doubt among carriers concerning the scope of the partial exemption of

§203(b)(7a) has been largely removed by 95 MCC 71, and applicant's violations, which do not relate to any reasonable interpretation of §203(b)(7a) and which cannot be considered excusable in view of applicant's past violations and its actual or constructive awareness that it was operating beyond the scope of its authority, render applicant unfit, especially since applicant has engaged in other improper practices involving safety regulations and tariff requirements, continuing its improper practices without any significant sign of remedial action up to time of the hearing. Denied.—Fournier's Express, Inc.—Hartford, Conn., 108 M.C.C. 584 (586).

§207(a) of the Act provides a certificate may be issued to any qualified applicant therefor, if among other things, it is found that it is fit, willing, and able to properly perform the service proposed and to conform to the provisions of the Act and the rules and regulations thereunder. A finding of fitness is prerequisite to a grant of authority. The purpose of the fitness provision of the Act is to protect the public from carriers whose conduct demonstrates an unwillingness to operate in accordance with the requirement of regulation. Whenever the record of an applicant's past conduct demonstrates a pattern of serious or continuous violations, then that applicant has the burden of refuting the import of its past conduct in order to establish its fitness to receive additional authority. Nonissuance of a certificate on the basis of unfitness of a carrier is not a punitive measure aimed at past unlawful operations. Rather, it is the result of the Commission's evaluation of applicant's willingness and ability to conduct its future operations in a lawful manner.—Id., pp. 585-6, 590.

The record shows that applicant in the past provided some service after it was advised by the Commission that it did not possess appropriate authority therefor. While such practice reflects unfavorably upon its fitness, in the light of all the circumstances involved herein, applicant's infractions are not sufficient to bar an approval of the application solely to the extent that a need has been shown by a substantial preponderance of the evidence. Authority granted to transport meats, meat products, meat by products, dairy products, and sugar to the involved destination area. However, applicant is admonished to adhere strictly to the limited number of commodities it will be authorized to transport.—Auclair Transp., Inc., Extension—Wilder, Vt., 108 M.C.C. 604 (611-2).

As found by examiner in his initial report, applicant became aware 3 years prior to hearing that its transportation of commodities between San Diego County points it served and the Los Angeles Airport was well beyond the normally allowed exempt collection and delivery area of the §203(b)(7a) exemption. Despite examiner's finding of applicant's unfitness, temporary authority was granted when the review board found that the proposed operations were those of a common rather than a contract carrier. On further hearing the examiner recommended a grant of common carrier authority. On exceptions, applicant seeks to excuse past violations on color of right plea. No remedial action was taken until applicant received temporary authority. Applicant's decision not to seek proper authority for approximately 3 years after it had become aware of probable need for authority, and its continued illegal line-haul operations in avoidance of our regulations even at the time it had filed for permanent authority, do not establish its claim to past good faith operations. Denied.—Weston Trucking Company Contract Carrier Application, 108 M.C.C. 614 (615-8)*.

Under §207 of the Act, weight may be given evidence of past unauthorized operations conducted under color of right. The Commission has recognized in past proceedings (108 MCC 584) the existence of interpretive problems regarding the partial exemption provisions of §203(b)(7a) of the Act. Questions in this area were substantially resolved by the Commission in 95 MCC 71. In a proceeding where the applicant's past conduct of record is shown to exhibit a pattern of serious or continuous violations, applicant has the burden of refuting the import of its past conduct before the Commission can affirmatively find that it is willing and able to conduct its future regulated operation in a lawful manner. Applicant has persisted in its unlawful operations, improper conduct, and overall disregard for the

Commission's opinions and regulations; and its color or right plea is not founded upon a reasonable question of mistaken interpretation. Applicant is not entitled to enhance its past operations with any status of righteousness.—Id., pp. 617-8.

Applicant's application for a "grandfather" certificate of registration under the "grandfather" provisions of §206(a)(7) was denied because of its admitted affiliation with a multi-state carrier engaged in interstate commerce. Applicant misrepresented its status on its §206(a)(7) application with respect to whether or not it was under common control with any other person. In its corresponding §207(a) application for operating authority, applicant has failed to rebut or offer any explanation for such conduct. An applicant who willfully and knowingly misrepresents its operating status before the Commission can hardly be trusted to comply with the obligations that a regulated carrier is expected to observe in its relations with shippers and the general public. Application denied.—Merritt Corporation Common Carrier Application, 108 M.C.C. 865 (869, 871-2)*.

Applicant in its exceptions maintains that it had been found fit in the prior report and recommended order served May 26, 1967, and, thus, "the fitness of applicant has already been fully considered and passed upon and was not and should not have been considered in issue either at the continued hearing on June 13, 1968, or at the present time". The report and recommended order served May 26, 1967, never, by operation of law or otherwise, became the order of the Commission. Therefore, the fitness of applicant remains in issue.—Id., p. 871.

Applicant has conducted its past operations in a manner demonstrating a substantial indifference to or a willful disregard of applicable safety regulations. Applicant has been shown to be guilty of a number of serious violations perpetuated shortly after it received its initial temporary authority and continuing almost up to the time of the hearing. Compliance with the safety requirements is necessary to protect the public and to promote safe operating conditions on the highways. Applicant's only excuse for these violations was ignorance of applicable safety rules and regulations. Applicant's past conduct demonstrates a pattern of serious and continuous violations which make it unlikely that it will be willing and able to conduct future operations in a lawful manner. A carrier's self-serving statements and belated remedial efforts announced at time of hearing are not persuasive of future compliance and can be afforded little weight when viewed against a background of continued noncompliance. Denied.—Ewen Brother, Inc., Common Carrier Application, 108 M.C.C. 878 (885-6).

Each applicant challenged the fitness of the other. Neither applicant appears to have any insurmountable financial problems. Department of Transportation has not intervened in either proceeding on the issue of safety practices. The record will not support the conclusion that either applicant's conduct is indicative of a flagrant and persistent disregard of the law; nor will it support a conclusion that either applicant should be punished by withholding an affirmative finding of fitness. The interest of one applicant's president in a vehicle leasing concern does not, ipso facto, require a finding that that applicant has failed to establish its fitness.—Turner Expediting Service Extension—Montgomery County, Ky., 110 M.C.C. 342 (349-50)*.

Disputes between protestant City of Chicago and applicant concerning the pertinent municipal regulations are matters resting between Chicago and applicant and are not within our province to consider, compare 33 MCC 383. The Commission presumes that applicant will comply with Chicago's lawful requirements and our grant of authority should not be construed as a sanction of any violation of those requirements. Questions of local regulation and possible unlawful obstruction of interstate passenger transportation may be resolved by a court of appropriate jurisdiction. Applicant's failure to enter into a contract as required by Chicago constitutes no basis for denial of the application.—Tri-State Coach Lines, Com. Car. Applic., 110 M.C.C. 601 (610).

Applicant has continued to transport commodities not covered by its contract carrier permit despite being advised by Commission personnel that such transportation was unauthorized. Applicant also has transported contract carrier commodities for companies not authorized by its permit. Such conduct indicates that it is unlikely applicant will be willing and able to comply in future with applicable rules and regulations. The application is denied without prejudice to subsequently filed applications.—McRay Truck Line, Inc., Ext.—Forty-Eight States, 111 M.C.C. 602 (605-7).

Applicant's past operations were conducted in a manner which indicates that it will directly or by subterfuge engage in unauthorized activities in future in disregard of Commission's rules and regulations. Applicant took action to remedy its unlawful practices only when pressured by investigation. Nonissuance herein is not a punitive measure for past conduct but rather a protection of the public from a carrier whose actions demonstrate no willingness or ability to operate in accordance with Commission's requirements.—Ritter Trucking Co., Extension, 111 M.C.C. 771 (775-7).

Application for authority to serve indicated plant site of sole supporting shipper granted despite applicant's past violations of the Act and its certificates by failure to render service. Such violations were brief, caused by mitigating circumstances, and have been adequately remedied so as to indicate applicant's willingness and ability lawfully to perform proposed operations. Nonissuance of certificate based on unfitness is not a punitive measure for past unlawful operations.—Spector Freight System, Inc., Extension—Whitley, 111 M.C.C. 889 (892-3).

Although applicant is guilty of unauthorized transportation, failure to collect charges promptly, and improper billing and record keeping, it has made sincere efforts at correction by institution of improved business procedures. Such efforts outweigh prior unlawful conduct, and applicant is found fit. However, in view of serious nature of violations, grant is limited to 3 years.—Johnny Brown's, Inc., Extension—Winchester, Va., 111 M.C.C. 905 (909); applicant's past unauthorized operations and violations of mixed-load restriction are not such as to justify finding of unfitness, when applicant has made sincere effort to correct past mistakes and has indicated willingness to effect compliance with mixed-load restriction. 3-year term authority granted.—Radke Extension—Various Commodities, 113 M.C.C. 89 (96); applicant's failure to maintain pickup records, transportation of traffic in violation of a self-imposed embargo, and failure to effect pickups on shippers' requests do not warrant finding of unfitness since applicant has shown mitigating circumstances and has promptly and cooperatively terminated such violations. Applicant reprimanded for past violations, and 3-year term authority granted.—Associated Transport, Inc., Ext.—T.V.A. Power Plant, 113 M.C.C. 637 (640-2); applicant's admitted violations are held to be technical and ameliorated by subsequent remedial program, while Bureau of Enforcement's objections to grant of extended authority lack citation of specific regulations violated and evidence to define extent of violations. Applicant found fit, and 3-year term authority granted to afford reappraisal of applicant's effort to comply with regulations.—S.T.L. Transport, Inc., Extension—New York Points, 115 M.C.C. 14 (22-3); on further proceedings, Division 1 finds that it has been stipulated that applicant has terminated its illegal tacking operations which were begun on erroneous advice of counsel, while remaining violations, performed under lease and interchange arrangements, have been terminated, as verified by Bureau of Enforcement. 3-year term authority granted.—Distributors Service Co., Extension—Foods, 118 M.C.C. 322 (329-30)*; applicant's more recent conduct warrants conclusion that a sincere effort is being made to perform only lawful service in keeping with all applicable rules and regulations. Limited term authority granted.—Peoples Express Co. Ext.—Empty Containers, 118 M.C.C. 675 (679-80).

Commission found that the irregularities committed by applicant in obtaining notarized statements of support result from a misunderstanding of the notarization function, are not intended to deceive, and are no reasonable basis for finding applicant unfit. However, parties to all future and pending Commission proceedings are hereby warned that such irregularities in future will reflect adversely on their fitness.—Arrow Line, Inc., Ext.—Saratoga Race Track, 112 M.C.C. 116 (119).

Intervention by the Federal Highway Administration (FHWA) of the Dept. of

Transportation produced many violations by applicant of safety regulations which were held to bring its fitness into question. Subsequent agreement between FHWA and carrier whereby FHWA would not press its exceptions for 9 months was held inconsistent and unreconcilable with FHWA' former action. Commission initiated an investigation of carrier's fitness.—Eagle Motor Lines, Inc., Invest. & Revoca. of Certif., 117 M.C.C. 30 (35).

The fitness of a carrier encompasses its financial ability to perform service it seeks to provide; its willingness to adhere to the rules and regulations established pursuant to the Act; and its ability to perform service in a safe manner for the protection of the public.—Id., p. 35.

While the Federal Highway Administration of the Dept. of Transportation has jurisdiction with respect to motor carrier safety, the Commission is charged by statute to make the ultimate finding as to fitness of a carrier and to assure that the carrier thereafter maintains compliance with the applicable safety and other lawful requirements. The concept of fitness is a continuing one. Having previously found a carrier fit, the Commission is not foreclosed from reopening the proceeding to consider the matter further.—Id., 117 M.C.C. 72 (74-5).

It is a spurious argument that because applicant conducts only a small operation it should not be held to as strict a fitness accountability as larger carriers. Fitness is a concept which does not vary. Applicant found unfit for certificate authority on basis of repeated violations of regulations, which were held to establish a pattern of willful disregard for all rules and regulations from which applicant was unable or unwilling to remove itself.—Ewen Brothers, Inc., Com. Car. Applic., 117 M.C.C. 101 (104).

Division 1 concluded that applicant had not been shown fit to receive a certificate authorizing its proposed operation as an irregular-route motor carrier of general commodities, with certain exceptions, between 14 Pennsylvania counties and Philadelphia, Pa., restricted to transportation of shipments having prior or subsequent movement by air. The division found that applicant had continued to tack authority set forth in two paragraphs of its lead certificate despite a previous Commission notice that such paragraphs could not be tacked. Such conduct demonstrated a pattern of serious and continual violations inconsistent with a finding that applicant is fit to receive a grant of authority. Application denied.—Conahan Extension—Pennsylvania, 117 M.C.C. 488 (504-5).

Section 207 of the Act establishes, as preconditions to the issuance of a certificate of public convenience and necessity, findings (1) that the applicant for a certificate is fit, willing, and able properly to perform a proposed service, *and* (2) that the proposed service is required by the present or future public convenience and necessity. Both findings must be made. One may not be based on the other. The findings concerning fitness should be based on evidence concerning the applicant alone, and not on how strong a case has been presented by the supporting shipper or protestants.—Metler Hauling & Rigging Ext.—Loudoun County, Tenn., 117 M.C.C. 557 (559-60).

Financial fitness: [Vols. 16, 18, 19, 21].—While determination of whether motor carrier applicant is financially fit to perform proposed service is a matter within the Commission's discretion, such a finding must be supported by and based on substantial evidence. In proceeding under review, substantial evidence of record supports the Commission's finding that carrier seeking extension authority to transport general commodities between certain Alabama and Georgia points, which had annual gross receipts of less than $7,000 with a deficit of over $3,000, and which had a good credit rating, was financially fit; sustained.—Georgia Highway Exp., Inc. v. United States, 331 F. Supp. 906 (908-9)*.

Although applicant's assets exceed its liability by only $3,096, all but $1,002 of its liabilities is owed to associated companies. Inasmuch as contemplated interrelation between applicant, Transcontinental Bus System, and affiliated companies is expected to give applicant many economies of operation through use of affiliates' personnel, terminal, shop, and other facilities, it may be found financially fit to conduct the proposed operations.—Continental Dispatch, Inc., Common Carrier Application, 95 M.C.C. 483 (486).

While applicant did not formally introduce in evidence the usual financial data, its balance sheet was submitted under oath with original application and is entitled to consideration in assessing its overall fitness where there is no reasonable doubt as to its financial stability.—D & M Taxi Co., Inc., Common Carrier Application, 96 M.C.C. 439 (447-8).

Financial fitness of applicant is pertinent only in determining whether it can adequately conduct proposed operations. Therefore, although applicant long has operated at a deficit, this alone does not render him unfit. Extension herein sought is for operations in area applicant already serves; and since proposed operations can be performed with applicant's existing manpower and equipment, there will be no added financial burden on applicant if authority sought is granted; indeed extension of applicant's present authority probably will enable it to reduce its present operating deficit to a considerable degree. Granted in part.—Brown's Connecticut Airport Service, Inc., Conversion. 103 M.C.C. 6 (11).

Since applicant's financial position was shown to be weak, and applicant failed to conform to the requirements of the Act and the rules and regulations thereunder, sought authority was denied.—Colorado Air Cargo, Inc., Common Carrier Applic., 110 M.C.C. 442 (446-7).

Commission found applicant financially fit although its operations for one year showed a substantial deficit because such deficit resulted from extraordinary expenditures connected with acquistion of another carrier and new equipment and such expenses are not recurring items. Applicant had no difficulty in obtaining bank financing and currently operates at a profit.—Tennessee Carolina Transp., Inc., Ext.—Memphis, 113 M.C.C. 711 (713).

Although applicant's balance sheet revealed current liabilities exceeding current assets to a slight degree, its operations were profitable during the period in question, and a grant of authority would enable it to better its financial position. Therefore, protestants' allegation that applicant (which already has the required equipment for the proposed operation) is not financially fit properly to perform the considered service was rejected.—Saldutti & Son, Inc., Ext.—Inedible Fish Oils, 118 M.C.C. 58 (66)*.

The financial fitness of an applicant is pertinent only in relation to whether it can adequately conduct the proposed operations. Compare 103 MCC 6. Authority sought herein is for operations in an area which applicant already serves, and applicant indicates that the proposed operations would be provided with its existing manpower and equipment. Additionally, applicant has demonstrated that two banking institutions have agreed to lend it any needed financial assistance. Therefore, although applicant's current liabilities exceed its assets we conclude that applicant is financially fit.—Distributors Service Co., Extension—Foods, 118 M.C.C. 322 (328-9)*.

Following the traffic: [Vols. 11, 12, 14, 16-19, 21].—Adequacy of existing service is only one element in determining whether a carrier may be permitted to follow traffic whose orgin has been relocated and which it served at the former plant site. An equally important consideration is the effect a grant or denial of authority will have on the existing competitive scheme in the area involved. Since applicant and several protestants served supporting shipper at prior origin and shipper is now using additional service which it did not utilize before, although available, approval of the application preserves the existing competitive scheme rather than disrupting it.—G.P. Ryals, Extension, 107 M.C.C. 434 (438-9).

Foreign commerce: [Vols. 10, 11, 14, 16, 18, 19, 21].—Since Massena, N.Y., is a New England type town and a village within that town (a town need not be located in New England to be considered a "New England type town" for purposes of construing operating authority), then both applicants, one a regular-route, general commodity carrier with authority to serve Massena as an off-route point and the other, an irregular-route carrier with authority to transport general commodities to Massena, may also serve Rooseveltown, N.Y., which is located 7 miles from the Village of Massena but within the town and the international boundary point located at Rooseveltown. While this enables the applicants to transport Canadian traffic moving to or from points outside the town of Massena, neither may move traffic to or from Canada, which originates or terminates within Massena. As need was demonstrated for services of two carriers, authority was granted to both to operate between Massena and the port of entry on the international boundary between the U.S. and Canada at Rooseveltown.—W. T. Byrns Motor Exp., Inc., Extension—Rooseveltown, 96 M.C.C. 765 (767-9).

While the Commission is aware that its regulatory jurisdiction does not extend beyond United States borders, it must look to the overall substance of a proposed service from United States origins to port of entry on international boundary on traffic moving to Canadian points, both the interstate and foreign aspects, in determining whether authority sought is required and, if so, to what extent. To deny the application without giving any consideration to the totality of the proposal could leave foreign consignees helpless where, as in instant case, the traffic is destined to points beyond United States border and none but applicant can meet shippers' reasonable transportation requirements. On reconsideration, therefore, consideration is given to proposed single-line service (without change of lading at the border) direct to Canadian jobsites required by supporting shippers and to the inadequacies and facilities within Canada to meet that requirement; granted in part.—Balzas Common Carrier Application, 98 M.C.C. 522 (527)*.

Shipment of urea imported from Trinidad to North Carolina for consignees, who are known in advance and bound by contract to accept fixed monthly quotas, is in foreign commerce; and shipment's subsequent movement from Wilmington, N.C., to other points in N.C. is part of a continuing movement in foreign commerce, since the only uncertain element in the entire movement is the ultimate delivery date for each account and the essential character of commerce is not affected by such temporary storage as may be required. The record is clear that supporting shipper requires the service of carriers authorized to transport these shipments; however, authority granted restricted to the transportation of shipments of urea, in bulk, having a prior or subsequent movement by water.—Petroleum Transit Co., Inc., Extension—Wilmington, N.C., 102 M.C.C. 380 (385-6).

Supporting shipper's plants are located in Canada. Shipper, a manufacturer of trucks, has in the past transported vehicles in private carriage to points on the border for interchange with one of the applicants. Protestants do not hold authority to originate an "initial movement" from a point in Canada to a point in the United States. It is within scope of Commission's power to grant initial movements authority from the Canadian border even though the involved plants are located in Canada. Shipper should not be forced to rely on private carriage to avail itself of the ample "secondary movements" service shown to exist herein. Authority granted to both applicants to move considered traffic, in foreign commerce only, upon condition that each applicant submit a sworn statement that it has received proper authority or that no Canadian authority is necessary.—Dallas & Mavis Forwarding Co., Inc., Ext.—Canadian Ports of Entry, 108 M.C.C. 295 (298-300)*.

It is not any inadequacy among carriers that impedes efficiency in foreign commerce between the U.S. and Mexico, but rather the stringent requirements of Mexican law regarding use of only Mexican-owned equipment on Mexican soil.—Transportes Azteca Extension—Eastern States, 117 M.C.C. 645 (650).

Future need: As established in 67 MCC 252, a shipper may establish a future need by showing that it is actually soliciting business or has some definite plan upon which it can be reasonably found that the commodities sought to be transported will move in the near future.—West Motor Freight, Inc., Extension—Fleetwood Foods, 118 M.C.C. 50 (55)*; here, shipper has been shipping involved commodities into a number of destination States, its sales are increasing at a very rapid rate, and it has established a sales force designed to sell its products throughout the continental U.S. Protestants are unable or unwillingto perform proposed service. Both applications granted substantially as filed.—Belger Cartage Service, Inc., Extension—Vehicles, 113 M.C.C. 540 (543)*.

In order to prove a future need, an applicant must demonstrate with competent evidence that the need for transportation service at issue will develop with reasonable certainty. This is most often accomplished by the submission of evidence indicating the shipper's *specific* plans for future development of its product or market. A declaration by the supporting shipper that it expects to market its products in all principal cities in the U.S. does not constitute adequate or proper evidentiary support for a finding of future need for service. See also 67 MCC 252 (1956).—Frost-ways, Inc., Extension—Livonia, Mich., 117 M.C.C. 209 (215)*.

Hours of service; safety regulations: [Vol. 16].—The examiner's finding that applicant was not fit and able to conduct proposed operations, i.e., transportation of passengers in assembled groups of not more than nine persons to which it leases automobiles for operation by a group member in commuting to and from work, was based on his conclusion that applicant would be unable to comply with applicable safety regulations pertaining to hours of service of drivers; however, transportation time involved of about 2 hours a day, 5 days a week, plus the normal 8 hours at work will neither exceed the allowable 60 hours per week nor the aggregate 10 consecutive hours within a 24-hour period. Certificate authorizing described operations will be conditioned on the Commission's reserving the right to impose in the future such terms, conditions, or limitations as it may find necessary in order to insure that the service authorized is performed in conformity with applicable safety regulations.—Monarch Associates, Inc., Common Carrier Application, 107 M.C.C. 277 (285-6)*.

Household goods: [Vols. 12, 16, 18, 19, 21].—Scope of judicial review of Commission orders, which granted plaintiff authority to transport household goods subject to so-called "Kingpak" restriction, is limited to ascertaining whether there is warrant in the law and facts for the agency action. Under §207(a), the Commission has broad and exclusive discretion in determining whether a certificate of public convenience and necessity shall be granted; and so long as its report, read as a whole, discloses the essential basis for its judgment, it is not required to make formal and detailed findings of fact regarding the evidence. Purpose of Congress was to leave to the Commission authority to decide whether additional motor service would serve public convenience and necessity; that, of course, gives it administrative discretion to draw its conclusion from an infinite variety of circumstances that may occur in specific instances. [326 US 60.] The Commission, not hearing examiner, has responsibility of evaluating public need and, in making its decision, it is free to accept or reject the examiner's recommendation.—Towne Services Household Goods Transp. Co. v. United States, 329 F. Supp. 815 (819-20)*.

The judicial function is exhausted when a rational basis for an agency action is found. It is the Commission's duty and obligation to accept or reject findings and recommendation of its examiner and, in considered instance, it rejected only those portions thereof which would grant plaintiff an unrestricted, rather than a "Kingpak," certificate. Although plaintiff argues that, since other carriers have in recent years been granted unrestricted household goods certificates on the basis of evidence adduced in other proceedings, it is entitled to a similar certificate as a matter of right, such reasoning completely misinterprets the statutory plan for granting certificates and the nature of applicant's burden to show need for his proposed service. Also, the fact that the Commission did not affirm hearing examiner's findings is not important since, under governing statutes, the Commission and not an examiner or employee board must render the final decision. Considered decision is amply supported by substantial evidence of record; therefore, the Commission's action in granting plaintiff a restricted certificate is sustained.—Id., pp. 820-2.

Although protestant argues that it is ready, willing, and able to handle all foreseeable needs of household goods shippers in the State, the fact that its service, rendered through local agents or otherwise, is admittedly competitive with activities of supporting shippers, who are forwarders of used household goods, negates any claimed willingness to provide shippers with the underlying transportation service required. Record is also clear that no carrier, other than applicant, is willing and able to handle the particular traffic movement here considered. If application were denied, shippers would be without adequate transportation between South Carolina points.—Nilson Extension—South Carolina, 95 M.C.C. 326 (329).

Supporting witnesses' testimony as to their use of, and complete confidence in, applicant's existing service does not establish a public need for proposed single-line transportation of household goods between applicant's authorized area in eastern States, on one hand, and points in 13 named western States, on the other; also, a finding that existing service is inadequate to meet transportation needs of the public is not warranted on the record. Applicant has been, and continues to be, an effective competitor within its authorized area and, under an exclusive joint-line arrangement with another household goods carrier, participates in movement of interline traffic from and to considered western States; however, there is no showing that authority sought is necessary to enable applicant to maintain its competitive position, or that its continued participation in the interline traffic is threatened by a possible termination of the joint-line arrangement. Application denied.—Neptune World-Wide Moving, Inc., Extension—Western States, 103 M.C.C. 533 (537, 538-9)*.

Operations of household goods carriers have long been considered different from those of other motor carriers and to deny authority which seeks only to replace a cancelled interline portion of a joint-line service for which substantial public need has been shown because of indicated technical reasons would harm public interest, the participating carriers, and abrogate the Commission's expressed policy as to household goods carriers.—Cartwright Van Lines, Inc., Ext.—Calif., 112 M.C.C. 399 (405).

On reconsideration, Division 1 reversed denial of authority sought herein as contained in report of Sept. 23, 1968 (not printed) inasmuch as said denial was due to the erroneous consideration of the application under the "Kingpak" standard. When considered in light of criteria of public convenience and necessity, testimony of supporting witnesses coupled with failure of protestants actively to pursue their objections demonstrates that sought should be granted.—Empire Fuel & Transfer Co., Common Carrier Applic., 113 M.C.C. 38 (44)*.

Applicant, an agent of an authorized household goods carrier, having established that its proposed service is required in addition to that of existing carriers including that of its principal, authority duplicating the principal's is granted.—Kriegsman Transfer Co. Extension—Household Goods, 113 M.C.C. 554 (559)*.

Applicant has presented sufficient evidence of past good faith operations and indicated support of shippers who have utilized its service, in accord with findings in 103 MCC 318, to warrant grant of authority to transport household goods.—Panda Transport, Inc., Extension—Baltimore, Md., 114 M.C.C. 75 (78-9)*.

Application for nationwide authority to transport household goods granted as it is consistent with findings in 110 MCC 452. Applicant is a large, established carrier which effectively competes for such traffic at present, and conditions in the household goods carrier industry are such that a grant of authority will so redound to the benefit of the public as to offset any slight detrimental effect to existing carriers.—King Van Lines, Inc., Extension—48 States, 114 M.C.C. 866 (869-72).

See also H C & D Moving & Storage Co., Inc. v. United States case, §207(a), n. 24.

Interchange: [Vols. 17-19, 21].—While applicant, seeking authority between points in 50-mile radius of Kokomo, Ind., limited to shipments moving in interline service with other common carriers, which would permit it to interline traffic at Indianapolis rather than some more distant point, claims that use of that interline point would allow it to achieve operating economies by avoiding circuitous operations, it made no real attempt to show what, if any, savings in mileage, time-in-transit, or operating costs would result. Furthermore, shippers' support was wholly based on need for transportation of emergency, weekend, or afterhours shipments which protestants were not always able to pick up promptly. Grant of authority sought would enable applicant to serve a major nearby consolidation and break-bulk point in competition with protesting short-haul carriers presently serving that gateway, and thereby provide a new competitive service for which no need is shown; denied.—Brada Miller Freight System, Inc., Extension—Kokomo, Ind., 96 M.C.C. 473 (475-7).

After a thorough analysis of the record, it is clear Florida shippers are not receiving a reasonable and consistent service for which they have established a need and to which they are entitled. And although protestants argue that they will interline traffic at Charlotte, N.C., destined to Florida points, most protestants have either tariff restrictions or operational procedures which impair movement of volume traffic between these points. One protestant requires both supporting carriers to contact it before they accept truckload or volume traffic destined to Florida points in order to determine its willingness to interline; another has a tariff restriction requiring it to be either originating or delivering carrier; and a third is competitive with both supporting carriers in the same origin territory, and, as they fear single-line solicitation, they do not offer this protestant their traffic. Moreover, the record also discloses protestants' inability to interline traffic between points in Florida. Granted.—Alterman Transport Lines, Inc., Extension—General Commodities, 106 M.C.C. 402 (415-6, 419-20)*.

Public convenience and necessity found to require proposed operation when applicant demonstrated that the sought relocation of its interchange point on traffic moving between Salt Lake City, Utah, and Denver, Colo., from Rico to Montrose, Colo., will result in operating economy and efficiency which will inure to the public's benefit; that proposed service will not be different from that it can now perform at Rico; that a grant of the authority sought will not materially enhance its competitive position; and that protestants will not be materially and adversely affected by such grant of authority. Irregular-route authority between Salt Lake City and Montrose, with service at Montrose restricted to interlining of traffic only, and subject to a restriction against severance from applicant's existing Salt Lake City-Rico authority, granted.—R. A. Gould, Inc., Extension—Montrose, 108 M.C.C. 69 (72-4)*.

Cancellation of an interline arrangement so jeopardizes continuance of a joint-line service for which a need has been shown by substantial public use over many years as to warrant applicant's requested operation. Fact that proposed operation will be joint-line rather than single-line, as in cited 98 MCC 58, is merely incidental as no requirement for single-line service was shown therein.—Cartwright Van Lines, Inc., Ext.—Calif., 112 M.C.C. 399 (404).

After proceeding under various theories of proof including elimination of gateway, alternate route, or extension of a new service route, under which it failed to meet its required burden of proof, applicant, a regular-route motor common carrier operating through interchange points at Detroit and Bay City, Mich., and Toledo, Ohio, on the one hand, and on the other, points in Michigan and other States, was granted authority to establish additional interchange points at Grand Rapids and Lansing, Mich., based upon a showing that its present interchange point at Detroit was heavily congested with traffic, that the proposed operation will result in greater operating economy and efficiency, and that the additional interchange operations will not result in a service competitively different from that which applicant renders at its present interchange points.—Short Freight Lines, Inc., Extension—Grand Rapids, Mich., 113 M.C.C. 316 (321-2)*.

Except as to those points between which one protestant could operate directly, applicants were granted authority where existing joint-line service was found to be inadequate.—Curtis, Inc., Extension—Textiles and Floor Covering, 113 M.C.C. 340 (347).

Deterioration of interline conditions at Nashville, Tenn., due to congestion warrants grant of authority to applicants to transport general commodities between Nashville and Memphis, Tenn. The latter point is less congested and is a more advantageously located gateway for the considered area, thus preserving a valuable transportation service for interlined shipments.—Tennessee Carolina Transp., Inc., Ext.—Memphis, 113 M.C.C. 711 (720-2).

Application, relying upon 98 MCC 58, denied as applicant's attempts to reestablish the interline service, deteriorated by one carrier's bankruptcy, have been minimal and reliance upon traffic generated under applicant's temporary authority is inappropriate in such a case as this. Thus, applicant has not complied with the principles set forth in 98 MCC 58 for grants of authority.—Cartright Van Lines, Inc., Ext.—Calif., 114 M.C.C. 303 (307-9)*.

Commission, citing *Eagle Motor* (N/P/R) decision of Dec. 15, 1969, modified prior grant by restricting applicant's authority against tacking and interlining, since applicant has agreed that protestants would be materially and adversely affected by a grant lacking such restrictions. Partial restrictions rejected as administratively unworkable. Authority in all other respects granted.—Duenow Extension—Fertilizer, 114 M.C.C. 525 (528-9)*.

On reconsideration, Commission modified prior grant of authority to applicant so as to allow a limited joint-line service, including transportation of traffic having a prior or subsequent movement by water or air, as such joint service will enhance the cooperation between carriers so essential to a balanced and effective transportation system.—Watkins Motor Lines, Inc., Ext.—General Commodities, 114 M.C.C. 562 (566)*.

Application for extended common carrier general commodity authority to Jacksonville, Fla., was based on 5 years of difficulties in applicant's interchanging Florida traffic generated on its system. Connecting carriers were reluctant to enter into or maintain joint and through rates, insisted on premium divisions as price for continuing joint rates, and refused to exchange trailers or to pay rental for applicant's trailers. Authority granted.—Overnite Transp. Co. Ext.—Jacksonville, Fla., 115 M.C.C. 718 (725)*.

Protestants' proposals to serve shipper by interlining with other carriers not parties to this proceeding are entitled to little weight inasmuch as there is little evidence of record that the interlining carriers are suitably authorized and available for the movement of the involved traffic.—West Motor Freight, Inc., Extension—Fleetwood Foods, 118 M.C.C. 50 (55)*.

Applicant and its supporting shipper both view the instant application as an effort to substitute direct, single-line service to the involved destination territory for joint-line service assertedly being performed by applicant in conjunction with other motor carriers. Although carriers that have provided a significant quantum of joint-line service may be granted direct-line authority if the interline arrangement is cancelled through no fault of their own, such is not the case here. Applicant named only one carrier with which it has interlined traffic to the involved destination states, and is not confronted with an impending cancellation of joint-line concurrence. Denied.—Onley Refrigerated Transp., Inc., Ext.—Conn., 118 M.C.C. 127 (132)*.

Intrastate certificate: [Vols. 16-19, 21].—Valid intrastate certificates can be relied upon by applicant in proving need for proposed service. However, under color of such certificates non-authorized operations cannot generally be shown. Since a person could control operations of both applicant and a multi-State carrier, applicant cannot be said to be operating within a single State for purpose of former single-State exemption since its operations are not independent of those of commonly controlled carrier; fact this power of control has not actually been exercised does not alter this situation.—Barton Truck Line, Inc., Ext.—General Commodities, 99 M.C.C. 460 (467-9)*; however, since the question of common control was not patent, applicant's prior operations under the former second proviso were conducted under color of right granted by the Commission and were subsequently conducted under a statutory right conferred by the "grandfather" provision of §206(a)(7). Therefore, such operations may properly be considered in determining whether or not proposed service is required by the public.—Barton Truck Lines, Inc., Eligibility—Utah, 106 M.C.C. 234 (237)*.

In applications for interstate authority based on operations conducted under state certificates registered under §206(a)(7) of the Act, a showing of past continued performance of lawful transportation is itself evidence of public need for continuance thereof; on the other hand, any request for authority more extensive than that lawfully authorized to be performed under the certificate of registration requires substantially the same degree of proof of public need for service as would be required in any application under §207. Accordingly, proper weight will be accorded respondent's past good faith operations, although unauthorized, along with other relevant facts in determining whether a public need has been established for the proposed service, and whether such continuing operations justify the issuance of the authorities requested.—Imperial Truck Lines, Inc.—Common Carrier Application, 106 M.C.C. 741 (751-2).

See also Western Gillette, Inc.—Control—Desert case, §5(2), n 110, *Certificate under §207.*

Labor difficulties: [Vols. 19, 21].—Applicant, a contract carrier, was granted temporary authority to serve the supporting shippers when protestant was forced to cease operations in the involved areas due to labor difficulties which resulted in a strike and acts of violence. Protestant has restored operations in the affected areas except as to points in southeastern Pennsylvania including Philadelphia. The supporting shippers' reason for supporting this application is that protestant is not now operating in part of the area to be served and has not provided service for this area for approximately 20 months. The public convenience and necessity dictate that a major American city (Philadelphia) should not be left without motor carrier service simply a carrier ceases operations, whatever the cause may be. Furthermore, it is clear that the cessation has now gone far beyond the stage of a temporary disruption. Sucessive grants of temporary authority are not the best method of assuring service to the public in this case as that procedure is not calculated to provide the continuous presence of motor carrier service shown to be needed here.—Hourly Messengers, Inc., Ext.—Parcels and Packages 108 M.C.C. 402 (404-5)*.

The hypothetical possibility of future strikes or work stoppages is not a sound basis for a grant of authority. Except in the unusual instance, the appropriate course of relief for such occurrences is an application for temporary authority.—Paulaski Highway Express, Inc., Extension—Ky., 117 M.C.C. 552 (554)*.

Lease arrangement: [Vols. 12, 16, 18, 19, 21].—See Point Transfer, Inc., Extension—Pa. and Ohio Origins case, §207(a), n. 25 *Fitness.*

Monopoly: [Vols. 12, 19].—Mere existence of a monopoly is not in itself sufficient justification for establishment of a new operation in absence of inferiority or inadequacy in existing service; however, where fact of monopoly has been established and where questioned carrier has not used its exclusive occupancy or has allowed itself to operate to the disadvantage of the public, the very fact of monopoly may be considered as a circumstance requiring remedial action. On instant record it is clear that protestant's monopoly has been a factor contributing to less than adequate service; testimony of supporting shippers and receivers of freight clearly indicates that they are not receiving the consistent overnight service which they desire and need. And, although considered Northwest Florida territory has not been a source of heavy traffic, proposed competitive service is practical and, perhaps, it will provide the stimulus needed to improve service. Granted.—P. C. White Truck Lines, Inc., Extension—Northwest Florida, 102 M.C.C. 204 (212-15).

One-way service: [Vols. 17-19, 21].—Four applicants seek authority to transport liquid acids and chemicals from points in the United States to the St. Louis commercial zone area. Applicants want inbound authority (return authority) commensurate with their outbound authority in order to provide an efficient and economical two-way service for respective supporting shippers. Shippers then would be able to avail themselves of reduced round-trip tariff provisions published by applicants covering return load movements. The rate question is one of economic savings through a more efficient operation rather than one of mere desire for lower rate levels, and this proceeding was determined as one of NTP. Only one of the several shippers is in a position to generate a feasible outbound-inbound circuit of motor transportation without a diversion of traffic which will seriously affect opposing carriers; the preponderance of susceptible traffic is transported by rail carriers, and, since the other existing carriers do not have authority to perform round-trip movements, any appreciable traffic which might be diverted from them is already subject to diversion. The economies of such coordinated movements will benefit both the carriers and the public alike. Authority granted as to two of the applicants.—Rogers Cartage Co., A

Corporation—Ext., 110 M.C.C. 139 (140, 141, 144, 148)*.

Past operations: [Vols. 10-19, 21].—See also Dixie Exp., Inc., Investigation and Revocation case, §207(a), n. 25 *Existing service;* D. S. Scott Transport Ltd. Extension case, §206(b), n. 22 *Admissibility;* Eastern States Transp., Inc. case, §207(a), n. 25 *Conversion;* H C & D Moving & Storage Co., Inc. v. United States case, §207(a), n. 24; Wilson Trucking Corp.—Purchase—Compton Lines, Inc. case, §5(2), n. 110 *Certificate under §207.*

In competing carriers' suit to enjoin and set aside Commission order granting extension authority to defendant carrier, the question of past violations bears equally on issues of public convenience and necessity as well as fitness; however, illegality of past willful operations does not *ipso facto* block a grant of a certificate. The Commission carefully considered past violations of defendant carrier (applicant) and admonished it to cease such operations; and in an investigation proceeding, 112 MCC 228, it was found that applicant's violations in 1967 were not willful and did not warrant a suspension of authority. Also, there is evidence of record in instant case, other than that based on applicant's operations beyond commodity scope of its certificate, supporting Commission finding of public convenience and necessity which consisted of shippers' testimony of need for proposed service. The Commission made the basic statutory finding of public convenience and necessity; and the finding of need is supported by subsidiary findings which are supported by substantial evidence on the record as a whole. Complaint dismissed.—St. Johnsbury Trucking Co. v. United States, 326 F. Supp. 938 (942-3)*.

Supporting shippers require, essentially, l.t.l. service, and desire continuance of applicant's satisfactory service heretofore rendered under its authority restricted to "truckload lots"; however, carrier's past transportation is not evidence of need for proposed service, although it was performed in good faith under color of right. Even though it might constitute such evidence, it could not outweigh the unquestioned availability of existing carriers offering the same service without complaint form shippers; denied.—Southwest Freight Lines Ext.—Removal of Restriction, 95 M.C.C. 269 (278-9)*; furthermore, since authority is sought as an alternative to a construction of applicant's "truckload lots" certificate so as to permit operations of type depicted by considered representative truckload shipments, the application was filed primarily as a defensive measure. Record does not show need for additional service; denied.—Id., 98 M.C.C. 607 (611-2)*.

Evidence of applicant's past operations from and to considered airports in mistaken belief that they were within scope of the §203(b7a) exemption need not be summarily rejected. While the examiner apparently interpreted 88 MCC 37 as requiring a finding that applicant's past transportation for air freight forwarders had been unlawful and was entitled to no weight, application of the incidental-to-air exemption, at least insofar as operations of air forwarders were concerned, had not been finally settled at time of instant hearing. Moreover, decision in 95 MCC 71 overruled 88 MCC 37 to extent that latter purported to define position of air forwarders using services of underlying motor carriers.—White Air Freight Service, Inc., Common Carrier Application, 95 M.C.C. 616 (618-9).

Since applicant's prior operations under former second proviso of §206(a)(1) were conducted under color of right granted by the Commission, are presently being conducted under statutory right conferred by §206(a)(7), and have not been shown to be willfully or knowingly unlawful, they may properly be considered in determining whether proposed service is required by the public. While evidence of public support is limited, grant of authority is warranted by the showing of applicant's past operations under its registered intrastate authority, and by need shown for service of a carrier able to operate between points in Idaho over highways traversing neighboring States; the configuration of Idaho's boundary lines and geographical peculiarities of its highways system are such that the shortest or most suitable routes between northern and southern points therein often lie over highways through adjacent States. In addition, applicant's prior service as a distribution carrier in Idaho of interstate freight received from connecting rail and motor carriers is itself persuasive evidence of public need for continuance thereof. However, since performance of proposed operations will render applicant ineligible to continue present registration of its intrastate authority or to receive a certificate of registration under §206(a)(7), grant of authority is conditioned on applicant's request in writing for cancellation of its BMC-75 registration and the withdrawal of its BOR-99 "grandfather" application.—Statewide Transport, Inc., Extension—Idaho, 96 M.C.C. 57 (60, 62-5).

Although applicant's past transportation of passengers between Fort Dix and McGuire Air Force Base, N.J., and New York and Philadelphia airports does not establish need for proposed limousine service, it supports a grant of authority for special and charter operations with vehicles of 6-passenger maximum capacity. While supporting evidence is limited to traffic results of what is found to have been unauthorized service, the pertinent operations were performed under a bona fide, albeit erroneous, interpretation of the taxicab exemption of §203(b2) and as such are relevant to determination of application. Moreover, since involved traffic consists almost entirely of transient military personnel, presentation of user testimony would be impractical if not impossible. In the circumstances, applicant's transportation of an impressive number of passengers under color of right is indicative of a need for certificated service to extent indicated. However, as there is no proof of movement of persons from Springfield Township, N.J., application is to that extent denied.—D & M Taxi Co., Inc., Common Carrier Application, 96 M.C.C. 439 (433, 445, 446).

While interstate traffic handled by single-State operator subsequent to negotiations for sale of its rights is entitled to little weight, since augmentation of traffic handled by intrastate carrier to be acquired in §5 proceeding resulted primarily from fact that its interstate operations increased, and was free from the "control, influence, and dominion of the proposed purchaser," such operations may be considered along with other evidence respecting whether continuance thereof by acquiring multiple-state carrier would meet a public need. Furthermore, assuming that acquired carrier's past operations were unlawful, as protestants charged, they were conducted under color of right and therefore are entitled to consideration as evidence which, together with that of supporting shippers, warrants grant of certificate sought as a matter directly related to proposed control and merger transaction.—Helphrey Motor Freight Inc.—Purchase—Manning Freight, 97 M.C.C. 549 (562-3)*.

Vendor's past continued lawful performance of operations in interstate commerce under the exemption of the former second proviso of §206(a)(1), or under §206(a)(7), found sufficient, in and of itself, to establish a public need for vendee's continuance of such operations; certificate of public convenience and necessity issued in proceeding directly related to proposed purchase which is approved.—Lake Shore Delivery, Inc.—Durst Delivery, Inc., 97 M.C.C. 623 (627).

As held in 97 M.C.C. 411, principles previously applicable in §5 proceeding involving former second proviso single-State operations are equally applicable to operations under §206(a)(6) and (7). Accordingly, in single-State carrier's §207 application proceeding, a matter directly related to proposed stock control transaction, applicant's past performance of lawful operations conducted under the single-State exemption is evidence itself of public need for their continuance in interstate commerce; evidence of such past operations, together with shipper testimony clearly justifies grant of authority sought.—Transport Motor Exp.—Control—Capitol Freight Lines, 97 M.C.C. 721 (725).

Applicant's very substantial past unauthorized single-State operations between Big Run, Pa., and points within 25 miles thereof, on the one hand, and Pittsburgh and Philadelphia, on the other, are proper subjects for consideration in determining whether need exists for continuation of his service. Supporting shippers have used, and have come to rely on, applicant's service, and evidence amply demonstrates that he has been providing highly satisfactory service and has attracted a large volume of traffic; however, authority granted is limited to that for which need is shown.—Bowser—Investigation of Operations, 98 M.C.C. 170 (178-9).

Applicant has been serving major aerospace shippers in belief that its "aircraft" authority was sufficient to perform considered operations; this misunderstanding was the result of several informal expressions by Commission's Bureau of Operations and Compliance and the wide-spread trade usage of term "aircraft" to embrace the new rocket and space age commodities. Thus, since evidence establishes that supporting shippers have depended upon applicant to handle substantial volumes of their traffic and that the continuation of extensive service of type provided by applicant is essential to their operations, authority granted.—U.S.A.C. Transport, Inc., Extension—Missiles, 103 M.C.C. 23 (31-2).

Although applicants have not served every potential shipper nor operated between all points in their respective territories, this is no bar to grant of authority, since they have transported traffic of type involved under color of right between representative points in their individual territories and have adduced shipper support for their application. While protestants should be protected with respect to type of traffic they have historically handled, their limited transportation of motor vehicles weighing 15,000 pounds or more is insufficient to offset the need for continuance of past services of applicant in movement of such traffic. Granted in part.—Ashworth Transfer, Inc., Ext.—15,000 lb. Articles, 103 M.C.C. 404 (411).

It is well established that evidence of past operations will support a finding of convenience and necessity and will warrant a grant of authority substantially identical to the previously conducted operations. Futhermore, past operations conducted illegally, but under color of right, have also been found to support a finding of public convenience and necessity. Evidence of past single-State operations in Illinois conducted by applicant (controlled carrier in §5 transaction authorized) under its "grandfather" certificate of registration, including its service at Freeport under color of right, warrants finding that public convenience and necessity requires its operation as a common carrier, except as to service at Joliet and the transportation of certain specified commodities; thus, authority for described irregular-route operations, to replace applicant's certificate of registration, is granted.—Arrow Motor Transit, Inc.—Control, 104 M.C.C. 436 (440-1).

When applicant seeks certificated authority without shipper support to operate between points in Utah and Nevada points in Wendover, Utah, commercial zone, solely upon basis of its past operations under former single-State proviso, such past operations are at issue, and it is incumbent upon applicant to establish its right to operate thereunder.—Barton Truck Line, Inc., Ext.—General Commodities, 99 M.C.C. 460 (469)*; however, on further hearing the Commission determined that since question of applicant's common control with multi-State carrier was not patent and was resolved only after a full determination of the facts, applicant's prior operations under former second proviso were conducted under color or right granted by the Commission and were subsequently conducted under a statutory right conferred by the "grandfather" provisions of §206(a)(7); also, Barton's past occasional service to Nevada points in the Wendover, Utah, commercial zone are not shown to have been willfully performed in violation of the Act and were terminated when Barton was informed of their unlawfulness. Since applicant's past operations have not been shown to be knowingly or willfully unlawful, they may be properly considered in determining whether or not proposed service is required by the public.—Barton Truck Lines, Inc., Eligibility—Utah, 106 M.C.C. 234 (237)*.

Past operations, even when conducted in good faith, are not necessarily determinative of the issue of public need for the continuance thereof; due consideration must be given to the interests of carriers already authorized to provide proposed service. Applicant, although an experienced operator of many years, claims he transported considered commodities in good faith; this is a difficult premise to accept, since considered operations were contrary to numerous and consistent Commission pronouncements for 10 or more years, during which legality of considered services was challenged. Therefore, on this record, it is clear that applicant's claim of good faith is of doubtful validity and little, if any, weight may be accorded to the evidence of applicant's past operations in support of such operations; further, protestants, collectively, have the necessary authority and wherewithal to provide proposed service. The fact that denial of the application will foreclose applicant's participation in traffic it previously enjoyed for a number of years is not controlling. Denied.—Beaney Ext.—Ports of Entry Between U.S. and Canada, 106 M.C.C. 243 (247-9).

Applicant's past operations under color of right are entitled to consideration in deciding the question of public convenience and necessity; however, that such operations have been conducted in the past is not, in and of itself, proof of need for continuance thereof; past operations must be considered with other evidence to determine whether proposed service is required by the public. Though applicant has continuously operated under considered certificate since about 5 years prior to the Commission's decision (in 103 MCC 307) that a portion of the authority should be canceled because it was granted pursuant to proceedings in which proper notice had not been given to interested parties, the record shows that protestants have faithfully provided supporting shippers with satisfactory service for a long period of time and no serious defects in their service are shown. Grant of the authority would adversely and materially affect protestants' operations without concomitant benefit to shippers; moreover, availability of applicant's added service in protestants' authorized area is, at best, a matter of shippers' convenience and not of public necessity; denied.—Carl Subler Trucking, Inc., Modification of Certificate, 107 M.C.C. 539 (540-1, 549-50)*.

Applicant's predecessor had grandfather authority to transport "heavy machinery". The record establishes that applicant's predecessor engaged in rigging, erecting buildings, and the movement of heavy commodities (other than machinery) which because of size or weight require heavy equipment. Applicant contends that grant of grandfather authority to transport "heavy machinery" is the equivalent of heavy hauling pursuant to 2 MCC 710, which identified heavy haulers as carriers of heavy machinery. Record shows abundant shipper support for service proposed as well as substantial proof of applicant's past bona fide operations over many years as a so-called heavy hauler. Therefore, review of all the evidence of past operations and of public convenience and necessity now presented on this record is not founded upon need for the transportation of new commodities; rather, it is based upon a service which utilizes special equipment in the transportation of any heavy commodity. Thus, authority granted to applicant's predecessor was intended to include all the articles normally handled by a heavy hauler. Grandfather certificate modified to authorize such service.—Jetco, Inc.—Investigation and Revocation of Certificate, 108 M.C.C. 498 (503-5)*.

Although applicant was allowed to continue operations under the former second proviso of §206(a)(1), after denial of its §206(a)(7) "grandfather" application, pending determination of corresponding §207(a) application, in view of its admitted affiliation with a multi-State carrier the past operations of applicant under the registration provisions have been unlawful from the beginning. Thus, the prior operations under the former second proviso were not conducted under color of right, and applicant's past operations may not be considered in determining whether or not the proposed service is required by the public.—Merritt Corporation Common Carrier Application, 108 M.C.C. 865 (870)*.

While applicant, a household goods carrier, indicates that it has served both "exempt" freight forwarders and the Department of Defense (DOD) in the past and has submitted abstracts of past operations performed under "pack and crate" contracts and orders for the latter, it has failed to present evidence of shipper support which would indicate a need for the continuance of these past services; and, while the demonstrated conduct of such past operations is accordingly entitled to weight, it has not as yet been deemed sufficient to warrant a grant of authority in the absence of appropriate support by those relying on such a service for the future. In reaching this conclusion, we recognize the possible difficulty in obtaining DOD support. However, appropriate DOD authorities have appeared in support of similar applications. If DOD is the only shipper to be served, a statement of its position is essential to warrant any grant of authority. Application denied without prejudice to the right of applicant to file an appropriate petition seeking the reopening of the proceeding for the purpose of submitting specific and concrete evidence of shipper support, and the precise nature of all the commodities involved.—Keenan Transfer and Storage, Inc., Ext.—Household Goods, 110 M.C.C. 1 (4-5).

It is apparent that the defendant has performed the questioned operations in an open manner, and it is probable that the defendant has conducted past operations under color of right which would be entitled to evidentiary weight in evaluation by the Commission of a request for authority under §207. The defendant's past unauthorized operations under substantial color of right warrant consideration on the question of whether the public convenience and necessity require the continued performance of its past service. Complaint dismissed, conditioned, however, upon the filing by defendant of an application for authority to conduct the local operations questioned herein. Otherwise, defendant is ordered to cease and desist from subject operations.—Red Star Express Lines of Auburn, Inc. v. Maislin, 110 M.C.C. 23 (27).

Applicant's past unlawful operations arose from a misconstruction of its pertinent heavy-hauler authorities. Such misconstruction resulted naturally from the complicated evolution of the definition for heavy-hauling from a service described in terms of commodities handled to one defined by type of service performed. In view of these factors, past operations in unlawful service are insufficient to preclude a finding that applicant is fit. Granted.—Equipment Transport, Inc., Ext.—Heavy Hauling, 111 M.C.C. 74 (83-5).

Applications to transport bulk commodities having prior movement by rail granted, with indicated exceptions, to those applicants participating in involved movements prior to Penn Central's introduction of Flexi-Flo operations. Additionally, applications directly supported by shippers are granted to extent indicated herein. No valid reason is given for limiting grants to only two carriers from each terminal.—Mutrie Motor Transportation, Inc., Ext.—Ex-Rail, 111 M.C.C. 251 (275)*.

On reconsideration, application to transport general commodities, with exceptions, between Seattle, Wash., and points in specified Washington State counties granted as evidence of applicant's past operations is conclusive proof of a need for the proposed service to the extent demonstated by such operations. Where past operations are not territorially coextensive with the application herein, supporting shippers' testimony establishes a public need for the proposed service to the extent specified.—Federal Transfer Co., Inc., Extension—Seattle, Wash., 111 M.C.C. 559 (564)*.

Applicant's past unauthorized operations in proposed charter service do not support a grant of authority, particularly in view of the complete absence of showing of any inadequacy in service of the protestant motor carriers. Denied.—Pathfinder Bus Lines, Inc., Common Carrier Application, 111 M.C.C. 609 (613-4)*.

Applicant's past non-certificated operations were shown to be conducted under color of right and are accorded substantial weight in instant case, as applicant made timely request for temporary authority after judicial determination that such operations were subject to this Commission's regulations. Such operations were never questioned by this Commission; and, as applicant's actions compare favorably with those of another carrier whose operations were previously found bona fide, as cited herein, application is granted.—Morgan Express, Inc., Extension—Amarillo, Tex., 111 M.C.C. 784 (789-90)*.

Evidence of record shows that applicant's past operations in movements for which authority is sought herein, were conducted under an erroneous, but bona fide, interpretation of its existing certificate and were thus conducted under a color of right. Additionally, record shows that such operations, conducted without authority, developed in response to a public demand in part due to inadequacy of existing service. A denial of this application would be injurious to the public interest whereas a grant of authority has not been shown to be injurious to protestants. Application granted.—Byers Transp. Co., Inc., Ext.—Restriction Removal, 113 M.C.C. 50 (56-7).

Application to perform motor common carrier operations, which had been conducted by carrier on an extensive scale for many years unlawfully without appropriate authority but under a color of right in good faith that they were authorized under the terms of its existing certificate, granted primarily on the basis of such past "color of right" operations pursuant to subsidiary findings that the supporting shippers' evidence had established a public need for the continuance of carrier's service, that carrier does not represent a new competitor entering the field, and that a grant of authority allowing carrier to continue its operations will not create a new or aggravated competitive situation to the detriment of other carriers.—Malone Freight Lines, Inc., Investigation of Operations, 113 M.C.C. 442 (463-5)*.

Past unauthorized operations performed under color of right, together with testimony adduced by institutional witnesses, especially in the absence of protestants' ability to provide the proposed service, is sufficient to warrant a grant of authority to transport passengers, in charter operations, limited to the transportation of not more than six passengers in any one vehicle.—Airfield Service Co. Ext.—Charter Operations, 114 M.C.C. 493 (496-8)*.

Petroleum; petroleum products; stringing pipelines: [Vols. 19, 19, 21].—See Willett Extension—Pipeline Machinery case, §207(a), n. 25 *Commodity*.

Prior denial: [Vols. 13, 18, 19, 21].—In applicant's initial proceeding evidence of protestants' proposed merger was considered; in view thereof, applicant's authority, as granted, did not extend to two supporting shippers, since protestants' merged authorities would more than adequately handle the need evidenced. However, considered merger was never consummated, and protestants' individual authorities are inadequate to provide needed service. Therefore, applicant's authority amended on reconsideration.—Frozen Food Exp., Inc., Extension—Indiana, 103 M.C.C. 86 (88-9).

Public interest: [Vols. 11, 17-19, 21].—Although applicant is owned and controlled by one of the supporting shippers, it is a separately incorporated legal entity, and, under the circumstances, no harm is anticipated from an unrestricted grant of authority. Favoritism from common control can result in two ways. First, traffic applicant can obtain from affiliate could afford it a competitive advantage over other carriers inconsistent with public interest; secondly, a commonly controlled carrier might favor its affiliate against the interest of other shippers. The first possibility is clearly inapplicable, inasmuch as the evidence shows no existing motor carriers which could compete with applicant; as concerns the second possibility, transportation needs of applicant's shipper affiliate are small and other shippers, aware of considered relationship, unquestionably support applicant. Evidence establishes need for service and benefits accruing from grant of such authority outweigh any other considerations. Granted.—Super Speed Transport, Inc., Common Carrier Application, 96 M.C.C. 335 (336-7).

Applicant, the Greyhound Corporation, was granted closed door, passenger operating authority between Lincoln and Grand Island, Nebr., in spite of the presence of protestant, a Trailways affiliate, which was satisfactorily rendering a complete service, because with this additional service the benefits to the public will more than offset the harmful effects to Trailways. Unlike Trailways, Greyhound will have no authority to serve intermediate points and passengers using Greyhound's transcontinental bus service will no longer have to transfer or use Greyhound's circuitous route to the north in order to reach Lincoln. Greyhound already operates between Omaha and Grand Island; Lincoln, which is a growing commercial center, in attempting to compete with Omaha, is entitled to a similar quantum of motorbus service as Omaha, that is, the services of two major bus systems.—Greyhound Corp. Extension—Lincoln, Nebr., 96 M.C.C. 630 (633-5).

Extension authority proposed by applicant granted, although ordinarily a grant of new authority will not be issued until it is established that the existing carriers are unable or unwilling to handle the available traffic. A finding that the existing service is inadequate is not a prerequisite nor indispensable to the grant of a certificate of public convenience and necessity; especially when the applicant's proposed operation has developed in response to a specific public need, and it would not be in the public interest to deny applicant continued participation in traffic which it developed under a color of right.—

W. C. McQuaide, Inc., Extension—Air Freight, 108 M.C.C. 24 (27).

Application for permanent charter authority denied as grant of such authority would cause such traffic to be diverted from protestant motor carriers who rely upon their charter operation revenues in effect to subsidize their regular service operations. Diversion of this revenue from protestants would lead to a curtailment of regular service.—Pathfinder Bus Lines, Inc., Common Carrier Applic., 111 M.C.C. 609 (612-3)*.

Public interest generated by advertisement by applicant in the attempt to obtain support in establishment of public convenience and necessity was neither approved nor acceptable. See also, §206(b), n. 15.—Transportes Azteca Extension—Eastern States, 117 M.C.C. 645 (651).

See also American Courier Corp., Extension case, §207(a), n. 25 *Existing carriers*.

Public need: [Vols. 13, 18, 19, 21].—Public need is a fact and not the property of any particular applicant. Therefore, in determining which of two applicants should be granted authority, unless all other things are equal, which carrier offers proof of public need is unimportant.—Willis Shaw Frozen Exp., Inc., Extension—Springdale, Ark., 96 M.C.C. 225 (230); application for authority to serve 3 named cities, exclusive of intermediate points, granted, as benefits accruing to public outweight any adverse effects on protestants, and as applicant has shown itself best qualified to perform proposed operations under the criteria, stated herein, for choosing among 2 or more applicants seeking to perform the same service.—Braswell Motor Freight Lines, Inc., Extension, 112 M.C.C. 558 (568-70)*.

Application for authorization to transport prospective purchasers to and from a planned community under continuing contract with the sponsoring foundation must be denied when considered under §207 since the proposed service is indistinguishable from that which applicant and protestants can provide under their incidental charter authority. Further, the evidence tendered does not warrant a finding that traffic volume will require any additional service, and a grant of authority to the applicant would only result in a new authorization to provide service from a city which one of the protestants is already authorized to serve.—Suburban Transit Corp.—Contract Carrier Application, 106 M.C.C. 763 (770-71).

A need for the proposed service having been established by supporting shippers' testimony, protestant's pending application is not a sufficient basis for denying the application herein. Protestant cannot now provide the service, and shippers should not have to rely on the successful prosecution of a pending application to obtain a transportation service for which a present need has been demonstrated.—Direct Air Freight Corp.—Common Carrier Application, 106 M.C.C. 785 (789).

Commission determined that existing authority no longer describes the complete service required; supporting shippers are experiencing difficulties in obtaining deliveries of l.t.l. shipments of cartons and crated items and have a definite need for the comprehensive commodity and territorial service proposed in the applications, and evidence clearly shows that existing carriers cannot meet the reasonable transportation needs of the shippers. Applications expressed in terms of "intended use" commodity descriptions create interpretive problems, and are denied on that basis. Three applications granted.—North American Van Lines, Inc. Ext.—Overall, 107 M.C.C. 750 (762).

Protestant's ability satisfactorily to perform involved operation is not questioned. Grant of authority herein will have some detrimental effect on protestant when and if it resumes operating in Philadelphia after resolution of its labor problems. However, continuous need of a large class of shippers for specialized motor carrier service is of overriding importance here. While grant might be viewed as remedy more drastic than called for by the circumstances, such action is only satisfactory alternative available. Dangers involved in strike in which protestant is involved render its operations impossible. Commission order directing protestant to cease and desist embargo would be ineffectual because the continuing strike would prevent provision of service. The penalty for failure to obey a cease and desist order, suspension and eventual revocation of certificate, obviously would constitute a more drastic remedy than authorization of a competing service.—Hourly Messengers, Inc., Ext.—Parcels and Packages, 108 M.C.C. 402 (404-5)*.

On reconsideration, authority sought herein granted to extent that evidence of record shows a need for the proposed service and existing service is shown to be inadequate to meet shippers' transportation needs.—West Brothers, Inc., Extension—Baton Rouge, La., 108 M.C.C. 485 (489-91)*; Cobo, Inc., Common Carrier Application, 111 M.C.C. 200 (211-2)*; Carl Subler Trucking, Inc., Extension—Canned Goods, 111 M.C.C. 624 (628)*.

Since proposed operations do not meet the statutory definition of contract carrier operations, proposal was treated as an application for common carrier authority. Supporting shippers have shown a need for single-line, same-day delivery of books, and equipment, materials, and supplies used in the composition, printing, and binding of books. Same-day delivery is necessary to meet competition from other areas. Therefore, shippers need immediate access to equipment on such expedited shipments. Applicant has programmed a collection and delivery service to meet shippers' needs. While protestants have not sought shippers' business. Commission concludes that the present and future public convenience and necessity require operations porposed by applicant.—Frost Trucking Co., Inc., Ext.—Phila., Pa., 110 M.C.C. 203 (210-11)*.

Authority sought herein granted as testimony of consignors and consignees show a need for applicant's proposed direct-line, expedited service and show protestants' service inadequate to meet such needs due to extended time in transit and refusal to handle indicated consignments. Increase in protestant's operating revenues in period during which the applicant operated under temporary authority indicates that permanent authority will not have a materially adverse effect.—Texas-Oklahoma Express, Inc., Ext.—Oklahoma Points, 110 M.C.C. 769 (780-82).

Supporting shippers' testimony shows a need for a prompt, local short-haul service of "size or weight" traffic. Although no specific inadequacy in protestants' service has been established, the Commission concluded that no protestant could handle such traffic efficiently, economically, or adequately due to great distance between protestants' equipment location and proposed area of service. Thus, need has been shown for proposed service sufficient to warrant grant of authority sought herein.—Wehe Common Carrier Application, 110 M.C.C. 798 (809-12).

Application for authority sought herein granted. Shippers' testimony shows need for proposed service which provides time-scheduled deliveries to all points within destination territory. Protestants fail to show they would be adversely affected by a grant of sought authority or that they could provide the required service.—Sammons Trucking Extension—Fort Dodge, Iowa, 111 M.C.C. 92 (96-100).

Authority to transport general commodities having prior or subsequent movement by air between 3 specified airports in Kentucky and named Kentucky counties granted. Shipper's testimony shows need for an expedited service on such traffic, and no protestant offers such a service or specializes in air-truck traffic as does applicant. However, application is denied to extent applicant seeks authority to transport air-truck traffic between 3 named airports as protestant presently holds such authority, and, absent evidence of inadequacy of protestant's service, no public need may be shown for additional service.—Murphy Surf-Air Trucking Co., Inc., Ext.—Kentucky, 111 M.C.C. 570 (572-3)*.

Application for authority as common carrier of general commodities, with exceptions, between indicated cities denied. Applicant's evidence indicates that all operations proposed herein are exempt from Commission regulation as incidental to transportation by aircraft (as codified in 49 CFR 1047.40(b). No clear and specific need for "non-exempt" motor carrier operations has been shown.—Hill Trucking Co., Ext.—Jumbo Jets, 111 M.C.C. 742 (744); Application to operate as common carrier of general commodities, with exceptions, incidental to movement by aircraft granted. Applicant's past operations involving such traffic, although unlawful, were conducted under color of right and, in conjunction with shippers' testimony, show a need for applicant's services. No protestant now can offer service comparable to applicant's and such authority will not economically impair them.—Morgan Express, Inc., Extension—Amarillo, Tex., 111 M.C.C. 784 (790-91)*.

On reconsideration, application for authority as common carrier of specified perishable commodities granted. Commodities involved are highly susceptible to spoilage and deterioration and require dependable refrigerated motor service. Applicant's service under its grant of temporary authority has been especially responsive to such requirements as shown by shipper testimony and volume of this traffic handled. Protestants' service found inadequate .due to lack of suitable equipment, lack of flexibility, and especially protestants' disinterest in l.t.l. shipments.—Inco Express, Inc., Ext.—Five Western States, 111 M.C.C. 877 (884-6)*.

On reconsideration, application to operate as common carrier of iron and steel articles from supporting shipper's plant site to indicated destinations granted with certain restrictions. Shipper's established traffic pattern and projected future tonnage show need for the proposed service. Protestant rail carriers lack flexibility to serve all destinations, and protestant motor carriers are unable to provide such service due to limitations to designated points or lack of authority to handle aggregated commodities not subject to "size and weight" authority as defined in 79 MCC 335.—Vant Transfer, Inc., Common Carrier Application, 112 M.C.C. 36 (42-5).

On reconsideration, application for authority to transport shipping cartons, pulpboard, and paperboard between points in Washington and Oregon granted with certain restrictions. Applicant will provide direct service to meet shipper's need for short-notice, expeditious deliveries, a need which protestants cannot meet due to limitations of territorial authority. Denial would force shipper to use unsatisfactory mixture of private and common carriers. Applicant originally requested contract carrier authority, but to avoud objectionable dual operations it asked for appropriate common carrier authority for same movements as an alternative. Proposed service is very similar to applicant's present operation, and grant avoids fragmentation of its present authority and damage to its present shippers, and allows service to both supporting shippers and present customers on an f.o.b. orgin plant basis.—Vancouver Fast Freight, Inc., Contr. Car. Applic., 112 M.C.C. 53 (57)*.

Evidence of supporting witnesses indicate a need for proposed service that protestant is unable to fulfill as its authority over the involved routes is restricted to special operations in "tour" type service which is not the type of service at issue herein. Application granted.—Arrow Line, Inc., Ext.—Saratoga Race Track, 112 M.C.C. 116 (120).

Application granted, as shipper's testimony has shown a need for the proposed service that protestant is unable to meet, because its authority does not include transportation of parts independently of the basic commodities specified.—Kenosha Auto Transport Corp. Ext.—Seat Cabs, 112 M.C.C. 224 (249)*.

Application granted, as shipper's testimony shows a need for the proposed service which protestants are unable or unwilling to provide. Fact that the purchase of the involved operating rights from protestant by applicant was previously approved by Commission is not relevant herein, as the time period for completion of the transfer has passed without consummation of the transfer.—Lockhart Common Carrier Application, 112 M.C.C. 308 (311)*.

Testimony of supporting shipper demonstrates that it will require increased transportation of sectionalized buildings and mobile homes in the future, based on reasonable forecast of increased business volume, which is an acceptable basis for a grant of authority (see 84 MCC 684). Protestants are not authorized to transport mobile homes, so cannot provide the required complete service as proposed by applicant.—Morgan Drive-Away, Inc., Ext.—Harnett, 112 M.C.C. 392 (395-7)*; commodity descriptions "buildings, complete, knocked down or in sections" and "trailers designed to be drawn by passenger vehicles" were found to be mutually exclusive in 337 ICC 111, and evidence of need for authority to transport the one does not of necessity justify a grant of authority to transport the other.—Transit Homes, Inc., Extension—Buildings (Idaho), 112 M.C.C. 422 (432).

Applicant has made a prima facie showing predicated on a valid forseeable need for transportation of aluminum chloride. The record establishes the existence of prospective users of this commodity in the involved area and shippers will require experienced, reliable transportation to develop a market they are now actively soliciting. Application granted.—Schutt, Inc., Extension—Lockport,N.Y., 112 M.C.C. 471 (473)*.

On reconsideration, authority sought granted, with indicated restrictions, as testimony of supporting shippers shows a need for proposed connecting-line service which protestant is unable to meet due to territorial limitations of its authority. Such grant is a natural extension of an existing service and will provide a more efficient transportation service for shippers.—Hare Extension—Wearing Apparel, 113 M.C.C. 561 (571-2)*.

Testimony of three shipper witnesses establishes existing motor carriers' failure to meet shippers' reasonable transportation needs for a complete service in transporting a variety of tractors and related equipment which meet the criteria of "intended use" test detailed herein. Issuance withheld pending determination of applicant's fitness in another proceeding.—Diamond Transp. System, Inc., Ext.—Tractors, 113 M.C.C. 733 (741-2)*.

Shippers' testimony shows a need for a more complete, efficient, and economical service which applicant's proposed service will meet. Protestants cannot provide such service due to commodity and territorial restrictions of their authorities, circuitous operations, and inability to provide multiple pickup or delivery service.—Berger Transfer & Storage, Inc., Ext.—48 States, 113 M.C.C. 753 (757-8)*.

On the basis of public need, a certificate of convenience and necessity authorizing operation as a common carrier granted to an agricultural cooperative for transportation of general commodities, including explosives, for the Department of Defense.—American Farm Lines Common Carrier Application, 114 M.C.C. 30 (41-2)*.

On reconsideration, unrestricted authority to transport the involved commodities from Philadelphia, Pa., granted as evidence of 7 supporting shippers was representative enough of total existing need to warrant a broader grant of origin authority in place of the previous grant restricted to supporting shippers only.—Weiss Transportation Co. Extension—Delaware, 114 M.C.C. 70 (72)*.

Testimony of Department of Defense and of a number of occasional shippers of mobile homes establishes a need for proposed service and that protestants are not meeting transportation requirements of these occasional shippers. The Department is the largest single shipper of such traffic, and, because of its rotation system for transportation, the protestants will not be materially and adversely affected by such a grant.—Chandler Trailer Convoy, Inc., Ext.—49 States, 114 M.C.C. 436 (444-5).

Although services of existing carriers are not shown inadequate on basis of past failures to provide service, Commission is not thereby precluded from concluding that proposed operations are required and should be authorized to extent specified. Applicant is presently authorized to, and does, provide much of the required service, and an additional grant will serve to enhance the effectiveness and usefulness of an existing service.—Gateway Transp. Co., Inc., Ext.—St. Marys, Ga., 114 M.C.C. 484 (486-7)*.

On reconsideration the Commission determined that a 40,000 pound minimum weight provision in applicant's current tariff, not being related either to its existing authority or to that proposed, constituted a "service embargo" within the meaning of 111 MCC 151, notwithstanding the fact that it was willing to handle its shipper's individual LTL shipments but had never been tendered any. Applicant's receipt of authority was conditioned upon its taking whatever steps might be necessary to bring about compliance with the indicated requirements of 111 MCC 151 with respect to both its present and new tariffs. Applicant was granted a 3 year term certificate and required to file performance reports.—Midwestern Express, Inc., Extension—Paper Products, 114 M.C.C. 834 (838).

Shippers' testimony shows that a substantial amount of traffic moves in considered East-West and North-South movements and that existing carriers are not providing the required reasonably expeditious or consistent service. Protestants have not shown that grant herein would materially and adversely affect them. Application granted with indicated conditons.—East Tex. Motor Frt.

Lines, Inc., Ext.—Miss. & La., 115 M.C.C. 122 (137-9).

On reconsideration, applicant has established a prima facie need for its proposed service in light of 103 MCC 555, as supporting shipper has satisfactorily described the commodity involved and volume of traffic to tendered applicant if successful. Constantly changing nature of destination points prohibits precise proof and therefore authority granted is restricted to protect protestants' irregular-route operations.—Pre-Fab Transit Co. Ext.—Insulation Materials, 115 M.C.C. 692 (695-7)*.

Authority granted to eliminate gaps in applicant's service to shipper in transporting bulk chemicals radially between Kingsport, Tenn., and all points in the contiguous U.S.—Mason & Dixon Tank Lines Ext.—Florida Chemicals, 117 M.C.C. 539 (547)*.

Supporting shippers demonstrate need for expedited, single-line service including use of special equipment and minimal handling to ensure lack of shipment damage. Joint-line services, by their nature, cannot offer minimal handling. Granted.—Watkins Motor Lines, Inc., Ext.—General Commodities, 113 M.C.C. 658 (668-70); supporting shipper, a large processor of fresh meats and packinghouse products, demonstrates need for expeditious single-line transportation of perishable commodities, Applicant now meets shipper's requirements, for split deliveries in most of its consignments, under temporary authority, and to other areas under permanent authority. Granted.—Coats Freightways, Inc., Ext.—Swift Meats, 118 M.C.C. 739 (743-4)*.

Railroad service considered: [Vols. 18, 19, 21].—See also Watkins Motor Lines, Inc., Ext.—North & South Carolina case, § 207(a), n. 25 *Existing carriers.*

Where partial pickup and delivery service is required over a multi-state destination area and, because of the inherent limitations of the rail portion of the overall movement, TOFC service would not provide the full flexibility of an all-motor carrier operation, the rail carrier's contention that TOFC service alone could meet shippers' needs is unfounded, particularly when the evidence established that both the motor carrier applicants and the rail lines would continue to receive a comparable percentage of the traffic. To hold otherwise would falsely equate TOFC service with irregular route, all-motor carrier service.—Kroblin Refrigerated Xpress, Inc., Extension—Dension, Iowa, 96 M.C.C. 233 (240)*.

Existing rail services are not designed to meet supporting shipper's need for expedited, multi-point deliveries, and the record amply establishes that the shipper requires motor carriage as an additional mode of transportation. Authority granted.—Pulley Freight Lines, Inc., Extension—Compounds, 115 M.C.C. 106 (109-10)*.

Rates: [Vols. 11, 12, 15-19, 21].—Shipper's desire to consolidate its traffic and thereby enjoy more favorable rates is inadequate basis for grant of new authority sought.—C & H Transp. Co., Inc., Extention—Compressors, 98 M.C.C. 1 (9).

Public witnesses' support of applicant in order to obtain a locally based, low-cost, charter bus service is no basis for a grant of authority. Reasonableness of rates is generally not an issue in an application proceeding under §207 (see 84 MCC 264). Denied.—Pathfinder Bus Lines, Inc., Common Carrier Application, 111 M.C.C. 609 (613)*.

Authorization sought herein granted in light of decision in 110 MCC 139, to permit shippers to avail themselves of efficient and economical two-way motor operations which eliminate added cost of empty return movements and create savings which ultimately redound to the benefit of the consuming public.—Maxwell Co., Ext.—Chicago to Cinncinnati, 112 M.C.C. 235 (238-9)*.

Freight forwarders, supporting applicant herein, are wholly dependent on common carriers for line-haul transportation and transport services. Facts that protestants' rates are designed to preclude movement of freight forwarder's traffic and that protestants have refused to negotiate for lower rates constitute an embargo on such traffic, which could jeopardize the very existence of freight forwarder industry. Applicant has shown ability to move such traffic under temporary authority, providing forwarder access to a second mode of transportation; application granted.—Armellini Express Lines, Inc., Ext.—F. F. Traffic, 113 M.C.C. 606 (614-5)*.

Applicant's supporting evidence consisted primarily of mere expressions by shippers that they are desirous of the proposed service, and that protestant's rates and charges are, at times, too high. Absent a showing that such rates effectively embargo the traffic, a shipper's desire for lower rates is not a proper basis for a grant of authoriy. If shippers believe that existing rates are too high, appropriate relief, such as the filing of a complaint, is available under the provisions of the Act.—United Parcel Service Ext.—Tenn., Ark. and Miss. Points, 117 M.C.C. 621 (625).

Special equipment: [Vols. 12, 13, 17-19, 21].—Shipper of light, bulky packaging materials has shown need for applicant's specialized motor equipment; demands of its customers for expeditious, efficient and dependable transportation, permitting maintenance of limited inventories, cannot be met by existing rail service, nor can these demands be adequately met by protestants, whose standard-sized motor-equipment renders their service uneconomical. In contrast, applicant, by using specialized equipment which accomodates significantly more cargo and is better suited than standard units to mechanical loading techniques employed by some of shipper's customers, offers transportation which combines the advantages of motor operations with the economies of increased cargo capacity. While shipper is interested in savings attainable through use of specialized equipment, desire of a shipper to benefit from economies resulting from technological innovation differs from preference for services of carrier offering more favorable rates; the results of technological advance must be recognized when advantage to be derived from their usage will inure to shippers, receivers, and the public.—Dieckbrader Express, Inc., Extension—Massilon, Ohio, 103 M.C.C. 540 (542-4).

On reconsideration, findings in the prior report reversed in part to permit applicant to transport urethane and urethane products to all of the destination points listed in the original application, rather than the single destination point authorized in the prior report. Applicant proposes to furnish extra high-cube trailers, which have a 25 percent greater capacity than standard trailer equipment for carriage of the extremely light and bulky commodities involved, and which none of the protestants have offer-to place at shipper's disposal. The application should be granted since the public should not be denied the use of an improved service and its resulting benefits.—Hinchcliff Motor Service, Inc., Extension, 107 M.C.C. 662 (665)*.

Applicant seeks authority to transport liquid gilsonite asphalt sealer in bulk in tank vehicles. Applicant's proposed service includes the spreading of liquid sealer from the same tank vehicles on the surface at the jobsite location shortly after the completion of the line-haul movement. The involved commodity is used as a sealer for asphalt paving. Sales of this commodity include the work of spreading the sealer on the paving. Such jobs require trucks equipped with spreaders and operated by specially trained personnel. Shipper seeks to obtain a single carrier to serve all points in the 11 destination states in order that it may have better control over the distribution of its traffic. It is clear on this record that spreading the sealer on the surface is the most feasible means of accomplishing the delivery of the commodity. Protestants do not have tank trucks equipped with spreaders necessary to spread this commodity on the paving at the various jobsites. Thus, no existing motor carrier is shown to be able to render the complete service, including transportation and spreading, as proposed by applicant. Consequently, the proposed service is required by the public convenience and necessity. Authority granted.—W. S. Hatch Co. Extension—11 States, 108 M.C.C. 853 (856, 857, 861, 862).

Where heavy-hauling constitutes the sole or primary sphere of specialized carriage required, applicant may carry those commodities which, because of their comparatively modest weight or the techniques used in loading or unloading them (including self-loading), are not covered by protestants' heavy-hauler authority. Similarly, commodities falling outside protestants' size and weight authority due to "intended use" test may be carried by applicant.—Warren Transport, Inc., Ext.—Vehicles, 112 M.C.C. 264 (270-73)*.

Special service: [Vols. 12, 18, 19, 21].—The Commission's determination that, although existing carriers provided adequate service to extent that they were able, grant of authority sought was justified by distinctive type of the proposed limousine passenger service between El Paso, Tex., and Los Angeles, Calif., is supported by substantial evidence on the record as a whole. Record shows that proposed service was designed to be faster, overcome language barrier encountered by, and be more advantageous to, Spanish-speaking people, assure arrival of luggage along with the passenger, and be more comfortable than bus travel; also that proposed service might be instrumental in curbing illegal "wildcat" limousine services operating in the area. Accordingly, since the Commission's decision is based upon adequate findings supported by substantial evidence, and is in accordance with applicable law, order granting certificate to intervening defendant is sustained.—National Bus Traffic Association, Inc. v. United States, 284 F. Supp. 270 (271-2)*; application for common carrier authority to transport passengers and their baggage in minibuses (10 passengers), between Chicago and Laredo, Tex., granted, inasmuch as proposed service was held to offer something new and different, directed at a specific segment of the community (Spanish-speaking citizens). See also dissents.—Transportes Hispanos, Inc., Com. Car. Applic., 117 M.C.C. 894 (897)*.

Applicant has established public need for a specialized motor carrier service providing expedited pickup and delivery of air freight beyond air carriers' terminal areas. Since, owing to the nature of air freight, most such shipments are small and are composed of items that are needed promptly, a grant restricted to such traffic should have no adverse effect on opposing general freight carriers and will allow applicant to provide the airlines, the air freight forwarders, and the shipping public with a needed transportation service. Furthermore, the Texas counties named in the applications form a contiguous territory so situated that residents would look to the Houston or Jefferson County airport for air freight service. No need, however, has been shown for service at the Andrau Park airport. Granted accordingly.—White Air Freight Service, Inc., Common Carrier Application, 95 M.C.C. 616 (622-3); the unique characteristics of air cargo transportation and the essential idea of related trucking within and beyond air terminal areas suggests a need for authorization of motor carriers which specialize in air-truck traffic. Both applicants propose a specialized service in the handling of ex-air traffic; because adequate surface transportation is lacking, shippers have been forced to use private carriage for the transportation of inbound and outbound ex-air shipments of freight. Protestants cannot provide this specialized service required by shippers; and, since none of protestants derive a substantial portion of their revenues from the transportation of ex-air traffic, grant of authority to both applicants will have no material adverse effect on any of protestants; granted.—Turner Expediting Service Extention—Montgomery County, Ky., 110 M.C.C. 342 (347, 348, 353)*.

On further consideration the Commission found that proposed irregular route, on-call or non-scheduled operations, providing door-to-door service territorial in scope is distinct from bus service offered by protestants; and where public need for such distinct service is clearly demonstrated, as here, the existence of reasonably adequate bus service should not preclude the granting of service which, while superficially competitive, is not actually so. Granted.—Arrow Line, Inc., Extension—Limousine Service, 103 M.C.C. 195 (198)*.

. Authority granted to unopposed applicant, holder of current heavy hauler authority, to transport non-size-and-weight shipments is limited to bona fide mixed loads, without specific quantity limitations on lading mixture, moving on a single bill of lading from single consignor. Such authority is further restricted against "motor vehicles and motor vehicle cabs and bodies" precluding any traffic of this nature. Authority is made nonseverable by sale, or otherwise, from applicant's size-and-weight authority.—Carroll Trucking Co., Ext.—Three States, 111 M.C.C. 44 (47-50).

On reconsideration, both applicants, Wehe and Reliance, were granted the "size or weight" authority sought herein as the rural, remote nature of the involved area, the highly specialized service required, and the possibility that Reliance (the applicant previously approved) may experience conflicting demands on its equipment demonstrate a need for the services of two carriers.—Wehe Common Carrier Application, 112 M.C.C. 315 (319)*.

In general, authority to transport passengers, in special operations in round trip sightseeing and pleasure tours, has been granted under criteria stated in 1 MCC 190, but numerous cases cited herein show that authority is granted where only general public testimony is adduced when existing carriers are shown unauthorized, unwilling, or unable to provide comparable service, but not granted in cases where no showing is made that public has tried to use available service or that existing service was inadequate.—Brush Hill Transp. Co. Com. Car. Applic., 112 M.C.C. 348 (357-8)*.

Evidence clearly shows that an increasing number of supporting shippers' customers require that the carrier delivering the shipment use its own equipment mechanically to unload the trailer, thus saving the consignee the cost of unloading it manually with attendant cost of having consignee's crane and employees doing the unloading. The advantages are plain and the service is authorized especially since existing carriers generally refuse to acquire the type of equipment which applicant would provide.—Pittsburgh & New England Trucking Co., Extension, 113 M.C.C. 46 (47-8)*.

The Commission has consistently found it appropriate that carriers specializing in serving shippers with only one or two products, marketed through the same dealer network, should be in a position to meet their changing and complete transportation requirements, and that in proper circumstances this constitutes sound reason for authorizing the transportation of sectionalized buildings in markets where a carrier previously held a authority only to transport mobile homes.—Chandler Trailer Convoy, Inc., Ext.—Lexington Trailers, 117 M.C.C. 653 (658)*.

Protestants' unwillingness or inability to provide supporting shipper with the type of service it required, and applicant's possession of equipment necessary to such service, resulted in grant of authority to applicant.—Saldutti & Son, Inc., Ext.—Inedible Fish Oils, 118 M.C.C. 58 (64)*.

On reconsideration, Appellate Division 1 broadened the review board's grant of authority from 3 origin points to also include service from Magnolia, Ark., concluding that the evidence of record shows that applicant proposes a clearly unique transportation service for the supporting shipper involving the use of high-cube vans, an expedited pickup service at any one of the 4 origin points, and delivery directly to any point within the pertinent 11-State destination area. The Division found that none of protestants, individually or collectively, can provide shipper with this flexible statewide distribution service, and that a grant of authority from all 4 of the origin points to the 11 destination States is essential if the supporting shipper is to have the services of a carrier willing and able to provide shipper with the type of service it requires.—Overland Co., Inc., Extension—Gales Ferry, Conn., 118 M.C.C. 725 (728-29)*.

Speculation; trafficking in certificates: [Vols. 15, 16, 18, 21].—Though applicant for authority which will enable it to interline traffic moving between Salt Lake City, Utah, and Denver at Montrose, instead of Rico, Colo., professes an intent to continue its interline operations, the fact that it had entered into a contract to sell its authority between Salt Lake City and Rico, and had brought suit for specific performance of that contract, raises a question as to whether it seeks authority between Salt Lake City and Montrose for the purpose of subsequent sale or whether it intends to operate thereunder. Applicant has been engaged in interlining Denver-Salt Lake City traffic and asserts an intent to continue; and there is no evidence that it is not sincere in its intentions or that instant application is merely a guise for trafficking in certificates such as the Commission has condemned; however, to assure against creating a situation whereby applicant might sell part of its authority while retaining such portion as would permit it to continue substantially identical operations, a nonseverable restriction is imposed on authority granted.—R. A. Gould, Inc., Extension—Montrose, 108 M.C.C. 69 (72-3)*.

Temporary authority: [Vols. 12, 15-19, 21].—See also Frozen Food Exp. Extension—Indiana and Ohio case, §207(a), n. 25 *Fitness.*

Fact that applicant Wehe has performed involved service under temporary authority is not controlling in consideration for grant of the permanent authority. Successful applicant Reliance was found better qualified to perform proposed service and Wehe's application was accordingly denied.—Wehe Common Carrier Application, 110 M.C.. 798 (814); evidence of past operations under temporary authority is of probative value in support of applications for permanent authority where it is used to determine the ability of a carrier to provide the service involved, indicate the volume of traffic, and the effect of the grant on existing carriers; and where there is other supportive evidence, as herein.—Id., 112 M.C.C. 315 (320)*.

Applicant's operations under temporary authority, as supported by shippers' testimony, are probative evidence with respect to a need for service from and to points in a portion of the sought territory especially where no protestant is authorized to provide such service. The evidence is vague with respect to the remaining portions of the application; authority sought is granted in part.—Feed Transports, Inc., Extension—Three States, 113 M.C.C. 763 (766-7)*.

Applicant has been providing single-line service in the transportation of general commodities, with exceptions, between Portland, Oreg., and Seattle, Wash., under temporary authority. The volume of traffic transported supports witnesses' testimony that it is providing satisfactory service. Although operations under temporary authority raise no presumption of a need for corresponding permanent authority and are alone insufficient to justify a grant of authority, evidence of past operations under temporary authority is, nonetheless, of probative value to support an application for permanent authority. Granted.—Trans West Exp., Inc., Ext.—Seattle-Portland, 118 M.C.C. 1 (10, 11).

Through service: [Vols. 12, 18, 19, 21].—See also Jerry Lipps, Inc. v. Interstate Commerce Commission case, §207(a), n. 25 *Existing service*.

A clear need for single-line, overnight service between Nashville, Tenn., and points in northern Mississippi is established when existing service requires a minimum of 3 interchanges and the best possible service now available takes a minimum of 3 days for 150 miles. This has placed Nashville shippers at a disadvantage with Birmingham, Ala., and Memphis, Tenn., shippers, who enjoy single-line service, and has caused them to use, in a limited way, private carriage for prompt and dependable service. Granted.—Dean Truck Line, Inc., Extension—Nashville, Tenn., 96 M.C.C. 184 (189-190).

To the supporting shippers, slaughter houses and meat packers, presently moving their meat products by interline service, expeditious single-line tranportation is essential because fresh meats, even under refrigeration, are subject to shinkage and moisture loss which can result in considerable loss of money when shipments are delayed; also, the proposed services would reduce strain on their limited storage facilities by providing more frequent pickups. Granted.—Kroblin Refrigerated Xpress, Inc., Extension—Dension, Iowa, 96 M.C.C. 233 (236-7)*.

The record shows that the supporting shipper has experienced difficulties in utilizing the joint-line service of protestants to points within the destination territories because of shipper's need for expeditious, safe, and reliable service on movements of furniture to points within the described destination territories. Protestants contend that shippers are not entitled as a matter of right to single-line service where reasonably adequate joint-line service is available. While it is true that existing carriers are normally entitled to handle whatever traffic they can before additional services are authorized, this does not mean that a shipper must be deprived of the opportunity to utilize what appears to be a practical, efficient and comprehensive method of distributing its products simply because an existing service may be faced with added competition. Authority granted except as to authority duplicative of the direct single-line service of two of the protestants.—Trans-Cold Express, Inc., Extension—Furniture, 108 M.C.C. 129 (138, 139, 141).

Applicants' proposed single-line heavy-hauler service, over irregular routes between points in Pacific Coast States and those in named Rocky Mountain States, is shown to be needed by shippers of heavy commodities who have found it difficult to obtain satisfactory service because, due to either incomplete territorial and commodity authority or lack of sufficient equipment, protestants cannot meet their transportation needs. Despite the imposing volume of traffic available between California, on one hand, and the other States involved, which volume is likely to increase, there exists at best a limited quantum of single-line service; moreover, fragmentary nature of existing single-line operations does not meet shippers' need for multi-stop pickup and delivery service. Therefore, while a grant of any new authority to conduct strictly local operations between the Rocky Mountain States involved, with two minor exceptions, is not justified, the record warrants certification of all four applicants to provide service between points in California, on one hand, and, on the other, points in remainder of the territory involved in their respective proposals. In addition, the record supports the proposed service of one applicant between Pacific Northwest and points in Arizona, and proposed services of two other applicants between Pacific Northwest and the Rock Mountain States. Granted in part.—Dealers Transit, Inc., Extension—Eight Western States, 110 M.C.C. 317 (322-5, 335-41)*.

Testimony of shippers establishes that movement of small shipments between the indicated points is characterized by long delays in transit, damaged shipments, and many difficulties in tracing shipments due to multiplicity of carriers used. Applicant's proposed service granted as its single-line, through service would alleviate such problems occasioned by use of two-, three-, or four-line services at present.—Thurston Motor Lines, Inc., Extension—Tennessee, 113 M.C.C. 801 (810-11)*.

As was pointed out in 62 MCC 513, the National Transportation Policy does not tolerate the thought that all shippers and all points are entitled to single-line service.—Herrin Transp. Co. Extension—Atlanta, Ga., 114 M.C.C. 571 (608)*.

Public witnesses' testimony shows a need for proposed direct single-line transportation of passengers and baggage between Norwich, Conn., and New York, N.Y., to eliminate present circuity and changing of vehicles. Witnesses' failure to try protestant's joint-line service cannot be faulted as no passenger likes to change vehicles or wait for connecting carriers. Approved.—Greyhound Lines, Inc., Ext.—Norwich, Conn., 115 M.C.C. 617 (618-9)*.

Supporting shipper's desire for availability of single-line service from which it hopes to enjoy economies and transit time savings does not warrant a grant of authority in the absence of a showing of inadequacy in available joint-line services. Moreover, a grant to applicant would adversely affect protestants. Denied.—Poole Truck Line, Inc., Extension— Pensacola, 117 M.C.C. 1 (6-7)*; shipper's support of application was predicated on mere desire for single-line service, and shipper failed to supply specific evidence of need for such service. Denied.—Midwestern Express, Inc., Extension—Paper, 117 M.C.C. 809 (814)*; the same showing of inadequcy of available joint-line service is required when the supporting shipper has access to services of general-commodity motor carriers operating over regular routes and the preference is for an irregular-route carrier.—Midwestern Express, Inc., Extension—Bossier City, La., 117 M.C.C. 886 (890)*; shipper is not entitled to single-line service as matter of right, and since existing joint-line service is not shown inadequate, no need exists for grant of additonal authority sought herein.—Gra-Bell Truck Line, Inc., Ext.—Paint, 118 M.C.C. 334 (338)*.

Truckaway, driveaway, secondary movement: [Vols. 18, 19, 21].—Applicant seeking broad territorial authority to transport used automobiles by driveaway has not established that proposed operations would meet any existing public need. Although it is difficult to obtain witnesses in a driveaway type proceeding, the evidence here in relating to what service may be needed is extremely vague, and where it is specific is so limited that it would be impossible to determine on either record what would be a reasonable and responsive territorial authorization. Denied.—Autocar Shipping Co. Common Carrier Application, 96 M.C.C. 357 (365).

Guided by rationale of 96 MCC 264, need has been shown for applicant's proposed transportation of automobiles in driveaway service to and from Washington and Alaska points; and under present circumstances applicant's past unlawful operations are not a bar to grant of authority. Services of protesting commercial automobile haulers are often too costly for small concerns and individuals, and such service, where available, often is not responsive to obvious public demand for type of service proposed by applicant. Also record discloses that granting proposed service would not have a material adverse effect upon protestants' operations, especially in light of their limited participation in considered traffic. However, because of unique safety problems involved, certificate restricted to reserve jurisdiction to impose any future conditions which may be deemed necessary. Granted accordingly.—AADA Systems, Inc., Common Carrier Application, 102 M.C.C. 23 (26-7).

On the record applicant has established need for its continued transportation of used passenger automobiles between points in the United States, including Alaska and excluding Hawaii. Public support of 27 individual and corporate witnesses is impressive, in light of the infrequent or one-time users of this type of service; and considering the inherently sporadic nature of the involved operations, applicant has been providing an essentially nationwide service. Furthermore, under instant circumstances applicant's past operations were conducted under color of right and are entitled to consideration, and, since applicant has been providing this type of service for a number of years, its continuance cannot be said to create a new or aggravated competitive situation. However, because of the unique safety problems involved, certificate restricted to reserve jurisdiction to impose in the future any further considerations which may be deemed necessary to insure safety of operations.—AAA Con Drivers Exchange Common Carrier Application, 102 M.C.C. 393 (400-2).

Secondary authority granted applicants to transport from U.S. distribution centers automobiles manufactured at Brampton, Ontario. Applicants already hold authority to transport from these centers automobiles manufactured at Kenosha, Wisconsin. Comingling of this traffic is for shipper an economically sound arrangement and, although the availability of existing services is an important factor to be considered in determining whether or not new operations should be authorized, when such availability is weighed against the respective interests of supporting shipper and applicants, equitable considerations are on side of applicants. Denial of the applications would seriously affect applicants' existing operations and would deprive shipper of services upon which it had come to depend. On the other hand, a grant of authority could have little or no impact upon protestants' operations. They have not participated in shipper's traffic in the past and, therefore, there can be no loss of revenues from or diversion to applicants of any traffic in which protestants are not participating.—Kenosha Auto Transport Corp. Ext.—Secondary Movements, 105 M.C.C. 754 (760).

Applicant granted authority to transport in secondary movements and in truckaway service, trailers (mobile homes) designed to be drawn by passenger automobiles, from certain points in Georgia to certain points in Florida. Supporting shippers contended that existing carriers were not interested in their traffic, and that existing carriers' lack of ready accessibility to source of traffic would prove economically prohibitive.—Marrone Common Carrier Application, 117 M.C.C. 680 (681, 683)*.

Volume of traffic: [Vols. 13, 18, 19, 21].—Volume of traffic involved herein now available for movement found to require the proposed service, with indicated restrictions, of 11 applicants as well as that of protestant. Although expansion of commercial zone of involved area would alleviate the difficulties of shippers, the delay resulting from such a proceeding should be avoided. The record does not support protestant's contention that grants of authority would prevent existing carrier from meeting its public obligations or impair the quality of overall service.—Consolidated Freightways Corp. of Del. Ext.—Phoenix, 108 M.C.C. 379 (383-5).

Commission concluded that the volume of traffic considered herein was insufficient to warrant two grants of authority. Accordingly, the application of Reliance was approved as its numerical superiority of special equipment required and the location of its terminals indicate that it is better qualified to perform the proposed service.—Wehe Common Carrier Application, 110 M.C.C. 798 (813).

Supporting shipper's testimony as to potential volume of movements of liquid chemicals, in bulk, shows a need for service of at least 1 more carrier. Protestant carriers are unable to satisfy this need because of either territorial or commodity limitations of authority or inadequate supply of specialized containers required by nature of considered traffic. All applicants were found qualified to perform proposed service but lack of specific evidence as to future volume of traffic required limitation of authority to one carrier. Applicant Kaw Transport now performs proposed service under temporary authority, was first applicant for authority, and is primary choice of supporting shippers. Application of Kaw Transport granted and all other applications denied.—Klipsch Hauling Co., Extension—St. Joseph, Mo., 111 M.C.C. 295 (307-8)*.

Application granted as evidence indicates there is a substantial volume of the considered traffic moving in an extremely large, sparsely populated area and protestants are unable adequately to service this area due to lack of sufficient equipment.—Baker Extension—Alaska, 112 M.C.C. 251 (254-5)*.

Supporting shipper's testimony as to substantial volume of considered traffic establishes need for proposed service except to the extent that such traffic, having prior movement by water, is not conclusively shown to move in interstate commerce or the existing service of protestant is not shown inadequate.—Commercial Carrier Corp. Extension—Salt, 112 M.C.C. 415 (419-20)*.

Commission granted authority, in ten applications embraced herein, only to extent that present and future need for service is shown by supporting shippers' evidence that rapid and continuing increase in the production and sales of involved commodities warrants additional service that existing service is inadequate to meet and where at most only one carrier is presently authorized to meet shippers' needs. Also, such grants are necessary to authorize reasonable service area where operations beneficial to public may be conducted.—Transit Homes, Inc., Extension—Buildings (Idaho), 112 M.C.C. 422 (430-1).

Evidence of the exact volume of traffic to be handled by applicant under the authority sought is not essential to establishing a prima facie case or to receiving a grant of authority.—Transloric Trucking Corp. Common Carrier Application, 113 M.C.C. 82 (87)*.

26. Operation over irregular routes.—[Vols. 10-19, 21].—See also AAA Trucking Corp., Inc. v. Burgmeyer Bros., Inc. case, §212(a), n. 1; Gregory Heavy Haulers, Inc., Extension case, §206(b), n. 15; Red Line Transfer & Storage, Inc. case, §207(a), n. 30; Western Truck Lines v. J. H. Rose Truck Line, Inc. case, §204(c), n. 126.

Irregular route authority granted applicants when evidence revealed that motor and rail protestants, as well as freight forwarder protestants, could not practically provide multiple pickup and delivery service needed by supporting shippers. In addition, certain of the supporting shippers have need for the faster transit time proposed by applicant, which would be used by them in meeting peak demands and when materials used in their products are in short supply; and, although applicant is unable to provide such 3- to 5-day service 100 percent of the time, it is able to place emphasis upon individual shipments and provide this faster service when specifically requested by shipper.—Watkins Motor Lines, Inc., Ext.—North & South Carolina, 103 M.C.C. 227 (247-9).

In addition to authority to transport frozen foods, frozen berries, frozen vegetables, and potato products, frozen and not frozen, more than half of the protestants hold authority to transport general commodities; and, although these protestants may transport proposed mixed shipments of frozen foods and commodities, they are confined to operations over regular routes with service only at points on those routes. Thus, while protestants provide satisfactory service on long hauls involving one pickup and delivery, the trend is away from truckload shipments of one food from one origin to one destination. Consignees are ordering smaller lots of different foods more frequently, resulting in increase in l.t.l. shipments, which, due to the diversity of foods produced at different points and in order to fill out a truckload, require pickup at multiple origin points. Also, maintenance of smaller inventories requires more prompt pickup and delivery. Therefore, delivery from one truckload of mixed l.t.l. shipments to different consignees at multiple destination points is the end result of the general trends towards the maintenance of smaller inventories and the rate of the increasing number of frozen food products. Accordingly one applicant granted authority to transport over irregular routes frozen foods and potato products, not frozen, when moving in the same vehicle with frozen foods; the other applicant is granted authority to transport over irregular routes frozen foods, potato products not frozen, and canned goods, subject to finding this applicant fit in another proceeding [see 107 MCC 506].—United Buckingham Frt. Lines, Extension—Frozen Foods, 106 M.C.C. 539 (547-50, 552-6).

Application for common authority to transport valuable commodities, as specified, over irregular routes between points in Rhode Island and Massachusetts using armored vehicles is granted with noted modifications as supporting shippers' testimony demonstrates a need for applicant's on-call service, and availability of such service would free shippers from an inferior bargaining position in respect to protestant Brink's Inc., a contract carrier now holding the only authority for such movements.—International Detective Serv., Inc., Com. Car. Applic., 111 M.C.C. 828 (831-2).

Operation over irregular routes authorized where existing service is primarily regular route and traffic will move to jobsites at remote points not on or near protestants regular routes.—Ashton Trucking Co. Extension—Pulverized Limestone, 113 M.C.C. 142 (145)*.

28. Change in route; alternate route.—[Vols. 10-19, 21].—See also Regulations Governing Hazardous Materials, §208(a), n. 30.

Applications for authority to operate through an alternate port of entry, based on theory that increased efficiency would result, have been treated by Commission as analogous to alternate route or gateway elimination proposals. Shipper support is not deemed essential if the tests established in such cases are met: (1) whether applicant is actually engaged in transporting a substantial volume of traffic between points involved, and, in so operating, is effectively competing with existing carriers; and (2) whether grant of authority would enable applicant to institute a new service or a service so different from that presently provided as to improve materially the applicant's competitive position to the detriment of existing carriers.—The Overland Express, Limited, Extension—Alternate Route, 96 M.C.C. 24 (26-7).

Authority granted to operate through Port Huron as an alternate port of entry in connection with Canadian applicant's present service between Detroit, Mich., and Ontario, Canada, restricted to traffic to or from points in Canada and against shipments originating or destined to Sarina, Ontario. Substanial amount of tonnage transported through Port Huron and Detroit ports of entry pursuant to its existing authority clearly supports conclusion that applicant effectively competes with existing carriers for such traffic and authorization of proposed service will not permit any marked improvement in the service applicant now performs where mileage between such points would be about the same regardless of which port of entry were used. Restriction is imposed to maintain competitive balance with respect to local traffic moving between Sarnia and Detroit.—Id., p. 27.

In cases where applicant is presently conducting part of its operations over an alternate route, as here, where applicant is presently hauling traffic from Birmingham, Ala., to points in Mississippi by moving some of the distance over an alternate route and some of the distance over a service route, and it applies for authority for another alternate-route segment that would shorten this combined route and presents evidence showing the nature of the service it is performing over the combined route, it must be shown that service over the combined route could have been performed with equal effectiveness competitively over its all-service route. By use of its existing alternate-route segment, the combined route now used is 15 miles shorter than the all-service route, but, since the overall time-in-transit would not be appreciably different, it is held that applicant's transportation activities could have been conducted over its all-service route with equal competitive effectiveness as over the combined alternate-service route.—West Bros., Inc., Extension—U.S. Highway 11, 96 M.C.C. 490 (496).

In determining whether a grant of alternate-route authority would result in a change in the competitive situation to the disadvantage of existing carriers, a comparison of the proposed operations over the proposed routes with applicant's present operations over its all-service route reveals that applicant would reduce its mileage on movements between Birmingham and representative points by 33, 43, 44, 38, 32 and 62 percent. Where such large savings will result from operations over the proposed alternate route, the evidence must be positive and convincing that use of the proposed route will not result in any material change in applicant's service. As the applicant would experience a minimum savings of transit time from 3 to 4 hours by use of the proposal and would be in a position to offer overnight service on traffic not now receiving it, thereby increasing the attractiveness of its overall service, and enabling applicant to compete substantially more effectively with the involved carriers now operating over the proposed routes, application will be denied.—Id., p. 497.

The fact that the proposed route is essentially an alternate route to applicant's existing service routes is insufficient, standing by itself, to establish public convenience and necessity.—Greyhound Corp. Extension—Lincoln, Nebr., 96 M.C.C. 630 (633).

Change in route, in general: [Vols. 18, 19, 21].—Record in unopposed irregular- to regular-route conversion application, filed under provisions of the Commission's special procedural rules governing such applications, 49 CFR 2a, amply established that at each of the considered intermediate and off-route points applicant's pertinent irregular-route service has evolved into a regular-route operation, within the criteria of 47 MCC 23, and that applicant is fit, financially and otherwise, to perform such service. Also, while evidence of applicant's past operations pertains only to inbound movements to considered points, to impose a one-way restriction on the regular-route authority granted would render applicant unable to provide those services required of a regular-route carrier. Granted, conditioned on receipt of applicant's written request for imposition of described restriction on certain of its outstanding authority.—Midwest Motor Exp., Inc., Extension—Intermediate Points, 96 MCC 402 (404, 406-7).

It is the Commission's statutory responsibility, before granting authority which would allow relocation of an interline point, to find that public convenience and necessity require proposed service; thus, applicant must show that it would achieve improved efficiency which would redound ultimately not only to its own but to the public's benefit. The record being devoid of any evidence of actual savings in time, mileage, or operating costs which applicant expects to achieve, grant of authority which would enable it to use nearby major consolidation and break-bulk point as an alternative interline point, and thus provide an entirely new service in competition with existing carriers serving that gateway for traffic it cannot now handle, is not warranted.—Brada Miller Freight System, Inc., Extension—Kokomo, Ind., 96 M.C.C. 473 (475-6).

Since portion of applicant's irregular-route authority has evolved into a regular-route operation and since applicant is fit, conversion of said authority to conform with present operations is granted, subject, however, to applicant's written request that its present irregular-route certificate be amended so as not to include any points serviceable under this new regular-route authority, which is nonseverable, by sale or otherwise, from present certificate.—Cole's Exp. Route Conversion Application, 99 M.C.C. 783 (784, 786).

Inasmuch as the implied authorization under the "intermediate-point service" provision of the Superhighway Rules to serve points on the superhighway and connecting highways is specific in nature, service is permitted at all portions of the commercial zones of such "on highway" points, including those portions of the commercial zones of such points which extend beyond 1 airline-mile of the superhighway and connecting highways. The authorization to serve points within 1 airline-mile of the superhighway and connecting highways represents, in part, an acknowledgment that superhighways are often constructed around rather than through major traffic centers, and that in many instances an "on superhighway" authorization would fail to confer effective operating rights.—Property Motor Carrier Superhighway Rules, 117 M.C.C. 119 (150).

The requirement under the "25-mile" rule of the Superhighway Rules that the superhighway route (including the highways connecting such superhighway route with the carrier's authorized underlying regualr service route) between the point of departure from and the point of return to the carrier's authorized underlying service route by "wholly within 25 airline-miles of the authorized regular service route" means that every point on the superhighway route must be within 25 airline-miles of the authorized service route, and at the same time every point on the authorized service route must be within 25 airline-miles of the superhighway route. The "intermediate-point service" provision under the "25-mile" rule of the Superhighway Rules is not to be construed to permit a carrier to serve points within a 50 mile radius of the superhighway (25 miles on each side), either separately, or in conjunction with the other provisions of the "25-mile" rule. The "25-mile" rule is limited by the very terms of the "intermediate-point service" provision to points which are on and within 1 airline-mile of the superhighway (and "connecting " highway).—Id., pp. 150-1.

Deviation rule: [Vols. 18, 19, 21].—See also §208(b), n. 1, 5.

Applicant granted authority over service route; at the same time its application was denied to operate over an unfinished superhighway along side of the service route, on the basis that when such superhighway is finally completed, section (c)(8)(i) of the Commission's Deviation Rules Revised, 1957, 49 CFR 211, would allow applicant, upon filing for appropriate authority under the rule, to operate over the superhighway without the need of obtaining actual authority as requested.—Greyhound Corp. Extension—Lincoln, Nebr., 96 M.C.C. 630 (636-7).

Applicant, a carrier of passengers and their baggage, by application (letter-notice) notified the Commission of its intention to use an alternate route under the Commission's Deviation Rules Revised, 1957, (49 CFR 311.1). Before operations may be lawfully conducted under section (c)(8)(i) of the Deviation Rules, applicant must indicate that (1) the superhighway extends in the same general direction as the authorized service route, and (2) that its use will not materially change the existing competitive situation between such carrier and any other. Applicant's proposal is not in harmony with the general purpose and intent of the Deviation Rules because it would substitute one superhighway for another; such proposal is not within the relief contemplated in the superhighway provisions of the Deviation Rules. Also applicant's proposed deviation route is so much shorter and faster from the standpoint of time and distance that the reduced transit time would be to the competitive disadvantage of the existing passenger carriers as reduced transit time is a decisive factor in the extremely competitive bus industry. Denied.—Arrow Line, Inc., Extension—Deviation Route, 108 M.C.C. 92 (94).

Petition (letter) from an official of the Tennessee Public Service Commission was treated as a declaratory order requesting Commission to render an opinion as to whether Tennessee deviation rules authorize Tennessee certificate of registration holders to utilize superhighways in interstate or foreign commerce as well as intrastate commerce. Tennessee deviation rules allow regular-route motor carriers to operate over interstate highways as alternate routes after giving 20 days' prior notice to the Tennessee commission; the rules do not contemplate reissuance of outstanding authorities, and motor carriers lawfully utilizing deviation routes pursuant to the prior proceedings are not required to file any further notice with the state commission. Certificates of registration obtained pursuant to §§206(a)(6) and 206(a)(7) of the Act authorize service in interstate or foreign commerce to the same extent as corresponding intrastate authority issued by the state commission. The purpose of the deviation rules is to permit regular-route motor carriers to operate over superhighways without the necessity of individual applications. Consequently, no notice to the Commission is necessary to allow deviation operations in interstate commerce.—Tennessee Deviation Rules, 110 M.C.C. 199 (200-02).

Elimination of gateway: [Vols. 18, 19, 21].—In a proceeding involving the elimination of a gateway the applicant must establish, among other things, that such elimination will not enable it to institute a competitively different service to the detriment of existing carriers. Since the examiner concluded that the elimination of the North Brunswick, N.J., gateway would result in such a new and different service, he recommended as a substitute one at Pomona, N.J. However, a gateway at Pomona would allow applicant consistently to render same-day delivery service, instead of its previously provided next-day service, and, although applicant maintains that same-day service is not desired by the shipping public and that it has no intention of providing regular same-day service, the fact that the grant recommended would enable it to provide same-day service on a regular basis is sufficient to defeat the application.—Hermann Forwarding Co. Extension—Pomona, N.J., 99 M.C.C. 476 (478, 480).

Although application merely seeks authorization of a new route, a grant thereof would result in elimination of applicant's Monroe gateway on traffic moving between its eastern terminals, on one hand, and, on the other, Nashville, Knoxville, and off-route East Tennessee points. However, grant of application would leave applicant's Monroe gateway requirement intact and applicable to traffic moving to or from the rest of its authorized East Tennessee irregular-route service area, thereby resulting in only partial elimination of Monroe gateway, contrary to Commission policy. Furthermore, since applicant's present operations between considered points are not competitive with those of protestants, grant of authority sought would result in the probable exterior enhancement of applicant's service between these points to the detriment of protestants and institution of a new service. Denied.—Overnite Transp. Co. Elimination of Galeway, 103 M.C.C. 135 (146-7, 149).

In considering household goods carrier's application for elimination of four of its gateway restrictions and for extension of its authority, the Commission stated that an "elimination-of-gateway application" must be considered in the context of applicant's entire operation. And in eliminating more gateways than requested and in rewriting and reissuing applicant's authority in a much simpler form, the Commission stated that simplification of outstanding operating authority is a virtue in itself, if not contrary to the public interest and the interests of existing carriers. By the same token, addition of any complications and inflexibilities to operating authority is undesirable is absence of showing that they are required by the public interest. However, all applicant's gateway restrictions were not eliminated, because complete elimination would be too radical a modification and would enable it to compete in new traffic markets.—Atlas Van-Lines, Inc., Extension—Elimination of Gateway, 105 M.C.C. 156 (163-5).

On findings (1) that proposed savings would be minor, (2) that there would be no extraordinary lessening of transit time and (3) that removal of considered gateway would not materially improve applicant's competitive position to the detriment of established carriers, applicant's Charlotte, S.C., gateway eliminated; however, Clover, S.C., was not eliminated as a gateway for applicant's more northerly routes, because elimination of this gateway would permit applicant to institute a new service, significantly different both in quality and quantity, which would materially improve applicant's competitive position. Furthermore, the Commission noted that while it should not be precluded from granting or modifying authority to describe more efficient and coherent route structures where a carrier has met the basic "gateway elimination" criteria, it must first ascertain whether considered operations are devisible and independent of one another before the separate route structures may be described and considered as separate proposals; otherwise, the entire application might fail because of the partial elimination restriction.—Thurston Motor Lines, Inc.—Charlotte Gateway, 105 M.C.C. 586 (594-8).

Applicant, seeking to operate between two points presently served only by traversing a third, may prove requisite convenience and necessity in two ways: (1) by showing need not adequately met by existing carriers, or (2) by showing that elimination will result in more economical operations. Applicant failed to demonstrate need for proposed service between points in California, on one hand, and, on the other, points in southern Idaho and southern Oregon, because, apart from general expressions of need, the record lacks specificity. However, applicant did demonstrate as between points in Washington, on one hand, and, on the other, points in California, Montana, Utah, Wyoming, Colorado, and Oregon (1) that it is transporting substanial traffic from and to these points through considered gateways as an effective and efficient competitor with existing carriers and (2) that the elimination of considered gateways would not enable it to institute a new service or a service so different as to materially improve its competitive position to the detriment of existing carriers. Granted in part.—Cartwright, Inc., Ext.—Elimination of Circuity, 106 M.C.C. 106 (110-11, 115).

Applications seeking elimination of gateways are granted or denied in the context of applicant's complete operations; a partial elimination of a gateway is not sanctioned upon a mere showing of operating convenience. Applicant must show that it has provided a substantially complete territorial service through considered gateways between all its authorized origins and destinations. Evidence presented by applicant fails to demonstrate operations between substantially all origins and destinations authorized to be served; it is not enough for applicant to show that it has handled a substantial volume of traffic if it has provided service only at selected points. Evidence of record is designed to support only a partial elimination of considered gateways; such fragmentation of authority is contrary to sound regulatory policy and prohibited. Denied.—Dallas & Mavis Forwarding Co., Inc., Extension, 106 M.C.C. 154 (158-60).

Since applicant's three part application is designed to eliminate certain Alabama gateways and since it elected to proceed without shipper support, it must establish (1) that it is transporting a substantial volume of traffic through considered gateways as an effective and efficient competitor with existing carriers, (2) that elimination of gateway requirements would not enable it to institute a new service or a service so different from that presently provided as to improve applicant's competitive position to detriment of existing carriers, and (3) that it has been providing service at substantially all points in its authorized territory. As to part I of its application, applicant has failed to show that it is providing service at substantially all points in the territory it is authorized to serve via its Alabama gateways; as to part II, four shipments are not enough on which to base grant of authority, even on theory that transportation of textile machinery is sporadic; and as to part III, applicant has failed to show that it is an effective competitor on this traffic either as to origin points or commodities authorized. Denied.—Floyd & Beasley Transfer Co., Inc., Extension, 106 M.C.C. 250 (251-4).

Carrier's application for regular route authority to operate between Albany, N.Y., and Springfield, Mass., treated as an alternate route application, was denied by the review board because applicant had no authorized route with respect to which proposed route could be considered alternate; on reconsideration, however, the application is considered as one for elimination of Hartford, Conn., gateway since, by a combination of its slow and circuitous regular and irregular routes, applicant could operate between Albany and Springfield, using Hartford as a gateway. Although applicant has been operating between named termini, in actual fact such operations, even using the Hartford gateway, were not performed over its authorized regular and irregular routes; rather, using its irregular-route radial authority as the sole basis therefore, applicant used a more expeditious but clearly illegal crosshaul. Thus, these operations which constitute the basis for the requested gateway elimination are clearly unauthorized; applicant has failed to meet its burden of demonstrating that it is operating in good faith through the gateway; denied. Applicant admonished to adhere to strict compliance with the terms of its outstanding authority.—Dorn's Transp., Inc., Ext.—Springfield, Mass. 110 M.C.C. 92 (93-95)*.

Applicant is authorized to transport household goods in nonradial operations, between points in most of states east of Mississippi River, including Louisiana, and in radial operations between points in Arkansas, on the one hand, and, on the other, points in Louisiana and Texas. By joining its nonradial and radial authority at a point in Louisiana, it has been transporting household goods between points in east, on the one hand, and, on the other, points in Texas assertedly for purpose of rendering a more efficient service to shippers by eliminating necessity of operating through Arkansas gateway. Applicant disclaims reliance on "elimination of gateway" criteria but rather premises its application, which is supported by three shippers, on proposition that elimination of gateway is necessary in order to render a more expeditious service to shippers. Commission has consistently found that a carrier authorized to conduct radial operations may not operate between two radial points by operating through the base point. In view of the fact that applicant has produced no evidence to show that the service of existing carriers is unsatisfactory or indequate, it has failed to establish that present or future public convenience or necessity require proposed operation; denied.—Engle Bros., Inc., Ext.—Arkansas Gateway, 110 M.C.C. 263 (264-5).

Commission denied applicant's claim that these proceedings are gateway eliminations. Applicant seeks to operate in territories substantially broader than those now authorized and to transport commodities it is not now authorized to carry. Thus, basic criteria for elimination of gateways—actual competitive transportation of traffic between all points—cannot be met.—Ashworth Transfer, Inc., Ext.—Explosives, 111 M.C.C. 860 (868-9).

To allow motor carriers to ignore the routing and gateway limitations in their operating authorities and thus to provide totally new motor services for which no public need had been established would be largely to negate the certificate and permit requirements of the Act. However, if a proposed substitute service bears a reasonable relationship to the authorized service for which it is substituted, and if the proposed substitution would not affect the carrier's competitive situation, it is permissible.—World Storage & Transfer, Inc. v. Alaska Transfer, Inc., 115 M.C.C. 288 (291-2).

Proposed substitution of one named gateway for another rejected as applicant has failed to show that such a substitution would result in operating economies or efficiencies from avoidance of circuitous operations and would not materially and adversely affect the competitive situation of existing carriers.—Jayne's Motor Frt., Inc., Ext.—Southhampton Township, N.J., 115 M.C.C. 700 (705-6)*; applicant failed to meet the standard gateway elimination requirements (see 83 MCC 451) and to show itself to be an effective competitor at to substantially all commodities involved.—Kroblin Refrigerated Xpress, Ext.—Sterling, Ohio, 118 M.C.C. 869 (875)*.

30. Extension of operations.—[Vols. 10-19, 21].—Part I, §1(18), n. 29, 129.

See also Masselink Bros. Trucking Ser., Inc., Ext.—Restrictions case, §207(a), n. 35; Roy L. Jones, Inc., Ext.—Earth Drilling Equipment case, §207(a), n. 25 *Commodity;* Salem Transp. Co., Inc. case, §212(a), n. 30; Terminal Transport Co., Inc., Ext.—Birmingham case, §207(a), n. 25 *Existing service.*

Applicant, a motor common carrier of perishable commodities, files for authority to transport all sorts of food products, i.e., meats, oils, fruits, vegetables, and bakery products, from Texas to points in 6 western states. The concept on which applicant bases its case is that there is a need for a peddler type service meeting all the requirements of all the supporting shippers. There is, however, no justification for grouping the shippers nor of treating their needs as though they were a single shipper. More properly the application should be considered as several extension proposals consolidated in a single proceeding. In such circumstances, the proposed movements will be looked at individually, the shippers' needs weighed and the protesting carriers' services evaluated and authority granted or denied for each movement on its own merits.—Zero Refrigerated Lines Extension—Six States, 96 M.C.C. 482 (483).

Applicant's offer to afford in-transit storage privileges at Portland, Oregon, is only an element to be considered in finding that a public need exists for the proposed service; standing alone it is not of controlling importance (see 100 MCC 18). Furthermore, although protestants are willing to accord intransit storage privileges in connection with traffic moving through Portland, neither applicant nor supporting shipper have attempted to participate in transiting arrangements under existing authorized service. Denied.—Exley Exp., Inc., Extension—Storage in Transit, 100 M.C.C. 284 (287).

Although shown to be required by supporting shipper, proposed operation by common carrier applicant as contract carrier would permit applicant to serve West Virginia Pulp and Paper Company as both a common and contract carrier; therefore, §210 requires that approval of such operations be withheld, because the resulting dual operations would give rise to opportunities for discrimination. However, because of considered circumstances proceeding held open for 90 days during which applicant can present to Commission some plan of action which would enable it to perform contract-carrier service required while eliminating any objectionable dual operations.—Schock Transfer Co., Inc., Extension—Kansas City, 100 M.C.C. 718 (720, 722).

Since it is well established that a carrier may transport parts or accessories of a commodity for which it holds specific authority as part of the same undertaking (in same vehicle or in separate vehicle if transported in same manner and at same time as primary commodity of which they are ultimately to become an integral part) without specific authorization, no new authority is required to transport parts or accessories of commodities which may be transported under applicant's modified certificate. Denied.—Ray Carter, Inc., Extension—Heavy Commodities, 102 M.C.C. 217 (221-2).

As no real inadequacy has been shown in existing service between Memphis, Tenn., and Monroe, La., authority granted is restricted against tacking to protect existing carriers' interest; and although applicant seeks authority to serve points in southeastern Arkansas to or from which supporting shippers desire service over irregular routes, it is apparent that nature of proposed service and needs of supporting shippers are basically attuned to regularly scheduled less-than-truckload operations between fixed termini, serving numerous intermediate and off-route points. Applicant itself has applied for conversion to regular routes of part of its irregular-route authority in this area; and, since most of considered points in this sparsely populated territory are within 40 miles of designated regular routes, grant of only regular-route authority to serve points in described area is more appropriate.—Red Line Transfer & Storage, Inc., Extension—West Monroe, La., 102 M.C.C. 486 (488-9).

Demand for proposed service (except to Milford) is not extensive and mere convenience, standing alone, is not sufficient to support grant of authority. Also, since it is apparent that applicant's overall method of operation, involving as it does the transportation of passengers over essentially a single route, according to a predetermined plan between fixed termini, and in observance of a published schedule, is in the nature of a regular-route operation, regular-route authority granted. However, since applicant has agreed to apply for a revocation of its lead certificate in event titled application is approved, and since all points in titled application are presently authorized in lead certificate or applied for in embraced applications, this grant is conditioned on cancellation of applicant's lead certificate.—Brown's Connecticut Airport Service, Inc., Conversion, 103 M.C.C. 6 (13).

Evidence of past operations conducted under color of right by most applicants warrants grant of authority to transport articles weighing 15,000 pounds or more, whether self-propelled or not, including those within authority to transport heavy machinery and/or contractor's machinery, equipment, materials, and supplies; however, one applicant's failure to demonstrate that it had participated in this traffic is fatal to its application.—Ashworth Transfer, Inc., Ext.—15,000 lb. Articles, 103 M.C.C. 404 (411, 433).

That an applicant for extended authority specifically solicits and handles substantial amounts of national account business does not defeat its cause, particularly since it was shown to advertise, solicit, and handle a considerable tonnage of c.o.d. business and intended to continue to do so if the authority were granted as sought.—Fernstrom Storage & Van Co. Ext.—Nationwide, 110 M.C.C. 452 (457)*.

Public convenience and necessity not shown to require operation by applicant as common carrier of described explosive commodities over irregular routes as applicant and sole supporting shipper, Department of Defense, fail to support a prima facie showing of need for service through absence of evidence as to volume of traffic and specific inadequacies of existing service.—

Ashworth Transfer, Inc., Ext.—Explosives, 111 M.C.C. 860 (863-6).

Applicants now authorized to transport mobile homes granted additional authority to transport "double-wides" (sectionalized buildings) to enable them to provide complete service to shippers they presently serve. This Commission, under "field of service" doctrine as stated in 107 MCC 445, will grant extensions of authority to carriers whose existing authorities prevent them from handling new commodities for industries they already serve.—Transit Homes, Inc., Extension—Buildings (Idaho), 112 M.C.C. 422 (432).

Applicant's petition for extended authority granted to three states and the District of Columbia, but refused to two states on basis of protestant's evidence of adequate available service.—Oliver Trucking Co., Inc., Ext.—Delaware, 115 M.C.C. 554 (557).

Public convenience and necessity found to require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of trucks (3/4 ton or less) and passenger automobiles, in secondary movements, in truckaway service, between points in New Mexico and points in Colorado, restricted against tacking duplicating authority.—Transport Trucking Co. of Texas Ext.—New Mexico, 117 M.C.C. 517 (521)*.

Applicant's desire to extend its authority was based primarily on a wish to retain in his family the operating rights of the contract carrier owned by his son and daughter-in-law; existing service held adequate. Application denied.—Buanno Transp. Co., Inc., Ext.—Gloversville, N.Y., 117 M.C.C. 700 (704)*.

Commodities: [Vols. 17, 19, 21].—See also W. S. Hatch Co., Extension—11 States, §207(a), n. 25 *Commodity*.

Since no inadequacy is shown in services now available for transportation of explosives, applicant has failed to show need for grant of such authority. Both protestants are authorized to transport explosives, which is a specialized service not ordinarily rendered by carriers of general commodities, and despite the fact that Department of Defense was represented at the hearing by counsel experienced in transportation matters, it demonstrated no specific need for commingling general commodities and explosives, it presented no specific evidence as to quantity of explosives that might require transportation between involved points, and it did not specify the frequency of possible movements.—M.R.& R. Trucking Co., Extension—Birmingham, 105 M.C.C. 69 (82-3)*.

The phrase "business records" is a broad commodity description denoting those papers and instruments ordinarily used by all firms engaged in a commercial or mercantile enterprise. Banks and banking institutions are a particular type of commercial activity or business. While protestants hold authority as contract carriers to transport business records restricted to those used in the business of banks and banking institutions and common carrier authority to transport business records restricted against such service for any bank or banking institution, such phraseology was necessary to avoid the possibility of unlawful practices prohibited by §210 of the Act. It does not follow that applicant must choose to serve only banks and banking institutions, or other businesses except banks and banking institutions. Where applicant seeks to handle the same commodities for all types of businesses there is no bar to granting such authority provided a public need is shown that cannot or will not be met by existing carriers.—Ted W. Betley, Extension, 107 M.C.C. 55 (61-62).

Applicant should be granted authority to transport a new type of portable structure known as "double wides" from points in Michigan to points in the destination territory where it now is certificated to handle single unit mobile homes. The development of this product represents an addition or extension of the industry which constitutes a shipper product that has evolved into a commodity beyond the scope of applicant's specialized initial authority and for which applicant has satisfactorily met its burden of establishing a future need for service.—Transit Homes, Inc., Extension, 107 M.C.C. 445 (449-50).

Lift trucks loaded and unloaded under their own power cannot be transported under applicant's "heavy hauling" authority nor can they be handled by protestants under their various intended use authorities since the intended use of any particular lift truck is not known at the time of shipment and because sufficient numbers of such lift trucks are not so intended for a particular use as to create a presumption favoring such use. Also, since the lift trucks are loaded and unloaded under their own power and no special equipment is necessary to perform these functions, they may not be transported as "heavy machinery".—Eagle Motor Lines, Inc.—Extension, 107 M.C.C. 629 (633-34).

Two applications for similar authority to transport paper and paper products were virtually unopposed, and the evidence presented amply warranted the grant of such authority; however, applicants failed to meet the requisite burden of proof with regard to the inability of existing carriers to handle the involved traffic in an adequate and satisfactory manner, or that protestant's service within the territorial scope of its authority is inadequate. Denied, in part.—Mitchell Bros. Truck Lines Ext.—Lewiston, Idaho, 118 M.C.C. 171 (175-6)*.

35. Operations by and with railroads.—[Vols. 10-15, 17-19, 21].—Within the underlying policy of §5(2)(b), railroads, and their affiliates, frequently have been authorized to conduct substituted motor-for-rail service when record shows that: (1) a public need exists or a more economical and efficient service will result; (2) the service authorized is, unless special circumstances are shown, restricted to insure that service is auxiliary to and supplemental of rail service; and (3) a grant of authority will not appreciably alter the existing competitive situation and seriously endanger operations of existing motor carriers. To be a substituted service and one that is auxiliary and supplemental to rail service, the motor transportation must be functionally related to the rail service.—Great Northern Ry. Co. Extension—Ex-Rail Cement, 96 M.C.C. 699 (703).

If proposed motor carrier operations of railroads, or their affiliates, were limited to points within 25 miles of the rail lines (as opposed to railheads), applicants' motor vehicles could move from or to any destination point as long as that point was within 25 miles of the rail lines; new off-rail points could be served in moderately long hauls over irregular routes that are not parallel or related to rail points; and the service performed would not be tantamount to local delivery within railroads' terminal area as defined in their tariffs. Proposed service would be to territory beyond applicants' reasonably defined territorial area and/or would constitute a new service; thus, service shown to be needed is to predominately off-rail points and cannot be considered as an auxiliary or supplemental service that is functionally related to rail service. Therefore, applicants must prove need for unrestricted operating authority by showing "special circumstances".—Id., pp. 703-5.

Such "special circumstances," i.e., (1) that a grant of authority will not result in undue restraint of competition and (2) that public interest requires the proposed operations which are not furnished by independent motor carriers, are not established by evidence of cement industry's new distribution technique, composed of volume movement by rail with short-haul distribution by motor vehicles to off-rail destinations, when independent motor carriers are willing and able to serve the needs of supporting shippers either under existing authority or that acquired in contemporaneous application proceedings. While the economies of long-distance rail transportation insure rail participation in the overall movement, the railroads, through their affiliated motor carriers, appear intent upon establishing one-mode control of proposed ex-rail service to the exclusion of intermodal coordinated rail-motor transportation with independent motor carriers, contrary to public interest and the National Transportation Policy. Application denied.—Id., pp. 705-6.

Except where justified by special circumstances, common-carrier operation proposed by motor subsidiary of railroad must be functionally subordinated to rail service; that is, it must be truly auxiliary to or supplemental of rail operations conducted by parent railroad. Since no "special circumstances" have been shown justifying a grant of such unrestricted authority, application is denied insofar as such authority is sought.—Missouri Pac. Truck Lines Ext.—Removal of Keypoint, 100 M.C.C. 677 (682).

Applicant seeks to remove from its present authority any restriction limiting its participation in trailer-on-flatcar (TOFC) traffic, and its motion to dismiss seeks, in effect, a

Commission ruling that its existing authority (restricted to points on the rail line of the Chesapeake and Ohio Railway Company, the C & O, and restricted to traffic having a prior or immediately subsequent movement by rail) allows it to participate in all TOFC operations. A review of most common TOFC plans reveals that applicant's present authority permits it to transport loaded trailers moving in C & O's plan II TOFC service, a railroad controlled operation where shipments move at all-rail rates and where railroad provides complete transportation service. Applicant cannot operate under other plans since it is neither authorized to perform line-haul motor service for which rail service could be substituted, nor may it operate under its existing authority in any way other than as an agent of the C & O; and, since applicant has relied solely upon its own operations to establish that it should be authorized to participate in all TOFC traffic and has produced no public witnesses, it has failed to show need for additional authority.—Masselink Bros. Trucking Ser. Inc., Ext.—Restrictions, 103 M.C.C. 507 (508-11).

Where unrestricted authority is sought for substituted motor-for-rail service, establishment of public convenience and necessity must be accomplished in same manner as in any motor common carrier proceeding. Additionally, applicant must show that special circumstances prevail which negate any disadvantage to the public resulting from grant of unrestricted authority to a railroad affiliate. Commission finds grant of unrestricted authority sought herein to be in public interest because of the existence of special circumstances. Proposed service will alleviate the long-standing problem of lack of adequate transportation of small shipments at small communities. Application is supported by numerous shippers, and revenues from resulting traffic will contribute to profitability of applicant's service to all supporting shippers. Protestant motor carriers are in good financial condition and have not shown that proposed service will so injure them as to threaten overall quality of their service or their obligation to the public. Protestant trucking association has not demonstrated adverse effects on independent motor carriers and such effects cannot be implied absent affirmative evidence.—Santa Fe Trail Transp. Co. Ext.—Colo. & Kans. Points, 111 M.C.C. 224 (230-2).

Commission, citing 63 MCC 91, approves authority sought herein by applicant, a rail motor common carrier affiliate, without restrictions limiting its service to operations supplementary to rail service as "special circumstances" are found to exist because of failure of independent motor carriers to provide needed full common carrier service to their authorized points, except where and when it has suited their convenience. Such a grant will not result in undue restraint of competition.—Santa Fe Trail Transp. Co. Ext.—Dallas & Forth Worth, 114 M.C.C. 321 (345)*.

Although 355 US 141 made it clear that the Commission enjoys a measure of discretion in determining on specific facts and circumstances that the public interest requires a grant of unrestricted authority to a rail-owned carrier, the Commission has exercised that discretion in conservative fashion when granting functionally unrestricted operating authority to rail motor carrier affiliates since 1957 when that cases was decided. Since then there have been few large grants of unrestricted motor carrier authority to rail affiliates, and where large grants have been made they usually have not involved substantial opposition by existing motor common carriers offering competitive services at small intermediate points.—Southern Pac. Transp. Ext.—Elimination of Restrictions, 117 M.C.C. 224 (327).

Applicant sought unrestricted operations which were geographically more extensive than those granted since 1957, and the application was opposed to a substantial extent by motor carriers which actually were providing services at most of the small intermediate points involved in the application. However, the quality of the existing service was held lacking. It is not the purpose of the Act to protect independent motor carriers at all costs where a grant of authority to a rail subsidiary is unlikely to result in undue restraint of competition and where the public interest requires services which the motor carriers are not providing. Granted, subject to restrictions.—Id., pp. 331-2. See also §5(2), n. 2 *Dual operation.*

Substituted freight service: [Vols. 17, 19, 21].—In granting authority to provide a substituted motor-for-rail service it must appear that the new operation "is one in which the motor carrier would be acting in a subordinate capacity, aiding the railroad in its rail operations rather than competing with independent motor carriers"; and, moreover, substituted service must actually be substituted for something; it must replace "an existing rail service in which the traffic to be handled by truck has previously moved by rail". There is no showing that there is now being performed a rail service for which the proposed motor service would be substituted; therefore, it is clear that applicant's service would not be subordinate to the railroad's operations but would be no different from the services provided by protestant motor carriers. Denied.—Missouri Pac. Truck Lines Ext.—Removal of Key Point, 99 M.C.C. 754 (759-60).

Since applicant has established that removal of key point restriction would be in its interest and that of its parent rail company without materially infringing upon the established service of protestants, the application should not be denied on the basis of the Commission's prior denial of applicant's request in 94 M.C.C. 146 where the decision was predicated largely on failure to present evidence upon which relief could be granted; nor is denial warranted by findings in 99 M.C.C. 754 where, unlike the instant application, protestants established that their substantial participation in the traffic under consideration would be subject to diversion if the application were granted.—Missouri Pacific Truck Lines, Inc., Extension, 107 M.C.C. 441 (443-44).

Applicant is a commonly controlled affiliate of another railroad having multi-state subsidiary motor carrier authority; on acquisition of applicant by the other railroad, applicant's right to engage in single-state subsidiary motor service under the exemption proviso of §206(a)(1) ceased by operation of law. Applicant now seeks to convert its temporary authority to engage in substitute motor-for-rail in single-state operation into permanent authority to conduct this some service and in addition commercial zone authority that would extend into adjacent states. Applicant made no attempt to restrict its proposal to motor carrier service auxiliary to or supplemental of its rail service; therefore, applicant must show that special circumstances exists i.e., applicant must show a public need for the service and that the service of the existing carriers is inadequate; having failed to show that existing carriers are unwilling or unable to meet the transportation needs of the public, the application must be denied.—Chicago & Eastern Illinois Railroad Company Common Carrier Application, 108 M.C.C. 53 (54, 61-2, 66).

On reconsideration, applicant railroad has shown a prima facie need for proposed service by evidence of supporting shippers. Sole protestant showed nothing about the nature and quantity of its equipment and filed no reply to applicant's petitition for reconsideration. Such showing fails to rebut applicant's prima facie case, and authority, as specifically restricted, is granted.—Erie Lackawanna Ry. Co. Ext.—Substituted Service, 110 M.C.C. 823 (827).

36. Operations by and with water carriers.—Complainants sought intervention of Commission based on alleged violation of §203(c). Defendant had substituted water for motor transportation when it was no longer possible to utilize ferry service. Complaint dismissed.—Wold Storage & Transfer, Inc. v. Alaska Transfer, Inc., 115 M.C.C. 288 (292).

Regulations of the Commission

34 FR 18392, Nov. 18, 1969, Part 1041: Interpretation—Certificates and Permits, Part 1041 amended by addition of §1041.23 Operating authority to serve a particular airport, effective Nov. 26, 1969.

35 FR 17264, Nov. 10, 1970, Part 1060: new Part 1060 Special Relief for Motor Carriers Affected by a Temporary Highway Closing, §1060.1 Special relief for motor carriers affected by temporary closing of West Virginia Highway 2, added, effective upon publication in the Federal Register.

36 FR 21596, Nov. 11, 1971, Part 1062: Speical Regulations for For-Hire Motor Carriers Engaged in the Transportation for Recycling or Reuse of "Waste" Products in Furtherance of Recognized Pollution Control Programs, new Part 1062 setting forth special procedures, added, effective Dec. 15, 1971.

37 FR 14307, July 19, 1972, Part 1041: Interpretation; Certificates and Permits, §1041.11(a) Service to, from, and between points in Hawaii, added effective Aug. 21, 1972.

37 FR 16944, Aug. 23, 1972, Part 1041: Interpretation; Certificates and Permits, §1041.11 Service to, from, and between points in each Alaska and Hawaii, codification and heading in order (37 FR 14307) corrected.

39 FR 7794, Feb. 28, 1974, Part 1065: Gateways and Tacking-Irregular Route Motor Common Carriers of Property. New part 1065 added to 49 CFR regarding petitions for elimination of gateways, effective April 5, 1974.

39 FR 8327, Mar. 5, 1974, Part 1060: Special Temporary Relief for Motor Carriers Affected by a Highway Closing. Notice that regulations published at 35 FR 17264 (Nov. 10, 1970) are no longer in force.

39 FR 9830, Mar. 14, 1974, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce. Promulgates rules concerning consumer problems involving carrier information to be given to shipper and cost estimates, effective April 25, 1974.

39 FR 17444, May 16, 1974, Part 1065; Gateways and Tacking-Irregular Route Motor Common Carriers of Property. Extension of date for filing of gateway eliminations and letter-notices to June 4, 1974, effective upon publication.

Section 207. (b) *[§307 (b) U.S.C.]* Certificate not to confer proprietary or property rights in highways.—[Unchanged. See vol. 10,p.8020.]

Section 208. *[§308 (a) U.S.C.]* Terms and conditions of certificate—(a) Specification of routes and termini; extension of routes; restriction on additions to equipment.—[Unchanged. See vol. 10,p.8021.]

Notes of Decisions

Volume 10—p. 8021; Volume 11—p. 9450; Volume 12—p. 10401; Volume 13—p. 11077; Volume 14—p. 11598; Volume 15—p. 12204; Volume 16—p. 12853; Volume 17—p. 13553; Volume 18—p. 14462; Volume 19—p. 15720; Volume 21—p. 17403.

2. Construction and interpretation.—[Vols. 12-19, 21].—Geographical terms, conditions, and limitations can be imposed on certificates by the Commission under §208(a) of the Act. However, they must be reasonable and be required by public convenience and necessity or be necessary to implement any requirements established under §204(a)(1) and (6); moreover, they cannot encroach upon carrier's right, safeguarded by statute, to enlarge its equipment and facilities within scope of its authority. Thus, the initial problem in framing motor carrier operating rights is how best to describe the reasonable transportation requirements evidenced by the record, and, at the same time, protect existing carriers from unwarranted incursions into their authorized fields of service. In this light, the Commission is not, and cannot be, bound by restrictions agreed to by the parties where they achieve results inconsistent with public interest and inimical to practicable and effective regulation; protestants who withdraw from a proceeding relying on such proposed amendments do so at their own peril. —Fox-Smythe Transp. Co. Extension—Oklahoma, 106 M.C.C. 1(6-9).

Power conferred by §208(a) to attach terms, conditions, and limitations to certificates is a broad one; the standards are only that they be reasonable and be either required by public convenience and necessity or necessary to implement requirements of the Motor Carrier Act. They cannot, however, nullify another provision of the Act, nor encroach upon a carrier's right, specifically safeguarded by statute, to enlarge its equipment and facilities within the scope of its authority. Moreover, there is no statutory provision which dictates a hearing under §208(a) in order to impose on outstanding certificates such terms, conditions, or limitations as the public convenience and necessity may require. In present rulemaking proceeding, oral hearings are not required either by mandate of law or in order to afford procedural or substantive due process; nor has it been demonstrated that any useful purpose would be served by assigning the proceeding for oral hearing.—Removal of Truckload Lot Restrictions, 106 M.C.C. 455 (474-5, 478-80)*.

It follows, then, that a proper public convenience and necessity finding may be made upon an appropriate record pursuant to §208(a) without a carrier's first filing a §207 application. Congress, in enacting the statute, was aware that a lasting job might not be done initially and left the door open to correct any resulting deficiency; also, as stated in 387 US 397, Congress has placed trust in the Commission to reviw constantly its past actions in order to seek out and correct any which—through changing conditions—have become out of gear with public convenience and necessity. Thus, the Commission has power under §208(a) to make a general finding—on a national scale—of public convenience and necessity; the statute does not confine such a finding to a multiplicity of individual cases dealing with each separate certificate. A contrary conclusion would ignore practicalities of the situation, unduly complicate, and defeat the very purpose of, regulation, and impossibly burden both the Commission and the industry.—Id., pp. 476-7, 480-81.

Therefore, contrary to arguments that a conflict between public convenience and necessity and operating rights previously granted may be resolved only on an individual case-by-case basis, the only sound and feasible method of of determinig whether "truckload lot" restrictions in outstanding certificates is incompatible with the public convenience and necessity is to consider all of them on a national basis. In addition, rulemaking is a process aimed at situations rather then particular persons, and one in which possible individual detriments are subordinated to achievement of the greater good; and rulemaking, rather than adjudicative, procedures are the best ones for a determination as to whether or not public convenience and necessity requires removal of the truckload restriction from all existing certificates.—Id., pp. 477, 479-81.

Following numerous decisions (see 106 MCC 1), Commission on reconsideration concludes that proposed restrictions are administratively undesirable and difficult to enforce and therefore refuses to impose them. A shipper's expressed requirement for "complete" service to several destination points should not become a "gimmick" whereby a "preferred" applicant may obtain authority merely by the naming of some destination points which cannot be served adequately by existing carriers. It is important to ask whether Commission should sanction grants of unrestricted authority when such grants result in actual service less than that expected, and in effect result in a certificate being issued on basis of false premise. On the other hand, a shipper who supports an application should be able to rely on the actual development and continuance of the type of service promised by applicant. It is not unreasonable to require applicant, who has successfully obtained authority on basis of proposed shipper-tailored pickup-and-delivery service, to report to Commission in annual "Performance Report" its success in meeting shipper's requirements.—Bilyeu Refrigerated Transp. Corp. Ext., 106 M.C.C. 692 (694);—shipper, who has successfully obtained authority on basis of its proposal to tailor service to the needs of the small shipment shipper, required to report to Commission in annual "Performance Report" its success in meeting shippers' requirements.—Transamerican Freight Lines, Inc., Extension—Columbia, Ga., 115 M.C.C. 416 (428).

The Commission specifically reserves the right to impose in the future such terms, conditions and limitations as it may deem necessary and which public convenience and necessity may from time to time require, since it is not known what, if any, action might be indicated by the data to be furnished in appplicant's "Performance Report" which it is required to file annually for three years to show its success in meeting shipper's needs.—West Brothers Inc., Extension, 106 M.C.C. 792 (799-800).

In this rulemaking proceeding, Commission prohibited motor common carriers from establishing self-imposed service restrictions which result in a carrier providing service less than its full operating authority or which exceeds such authority.—Restrictions on Service by Motor Common Carriers, 111 M.C.C. 151 (164-7).

Commission's power to attach terms, conditions, and limitations to certificates conferred by §208(a) is exceptionally broad and provides Commission with jurisdiction to promulgate regulations as regards smoking on interstate buses.—Smoking on Interstate Buses, 114 M.C.C. 256 (260-64).

From the inception of Federal motor carrier regulation the Commission has used three separate, distinct, and mutually exclusive terminologies to authorize irregular-route trucking operations [106 MCC 1, 26, 27]. These are the simple and self-explanatory "from and to" description, and the radial and nonradial "between" descriptions. A radial description depicts operations between a base point and other points in a described area; employs the language "between ***, on the one hand, and, on the other, ***"; and is limited to the transportation of traffic from and to the base point points. Incontrast, a nonradial grant which is described in terms of service "between *** and ***" authorizes operations between all points within the described area.—Hilt Truck Line, Inc.—Investigation of Operations, 117 M.C.C. 9 (23-4).

25. Restriction of addition of equipment, facilities, forbidden.—[Vols. 10-14, 16]—See Removal of Truckload Lot Restrictions, n. 2 above.

30.-Routes, streets, points to be served.—[Vols. 13-19, 21].—See also Cole's Exp. Route Conversion Application and Midwest Motor Exp., Inc., at §207(a), n. 28 Change.

A certificate prescribes origin and destination points which the carrier may serve, and also restricts it to routes specified therein; it does not authorize common carriers to roam wherever they choose. It seems basic to the policy underlying enactment of the Motor Carrier Act that before common carriers can take advantage of their published tariff rates, they must follow authorized routes, since allowing them to transport goods over whatever route they choose would invite the kind of chaos the act was intended to forestall. Certificate authorizing plaintiff to operate (1) between certain New Jersey counties and parts of New York, including Peekskill, and (2) between those same counties and parts of Connecticut, including Bridgeport, does not permit direct operation between the two named points; therefore, since plaintiff was not operating legally when it carried defendant's shipments directly from Peekskill to Bridgeport, it cannot assert a claim for undercharges based on its published tariff rate.—Mars Express, Inc. v. David Masnik, Inc., 401 F. 2d 891 (894).

In action to set aside Commission order on further consideration, following remand in 251 F. Supp. 526, which required plaintiff to cease certain operations found to exceed its territorial authority, the court holds that, as a matter of law, plaintiff's certificate authorizing it to operate "between points in Connecticut, Pennsylvania, New Jersey, and New York within 100 miles of Columbus Circle, New York, N.Y., **" permits it to provide service in the first three States listed without regard to the 100-mile limitation therein, which applies only to operations in New York State. Whether under the rule of grammer designated as "Doctrine of the Last Antecedent," or as a matter of simple common sense, absence of a comma after first reference to "New York" indicates that, as a matter of grammatical construction, the 100-mile provision applies only to New York. Commission order under review, set aside and enjoined.—T. I. McCormack Trucking Co., Inc. v. United States, 289 F. Supp. 39 (40-41)*.

Commission finding that defendant carrier's certificate for regular-route limousine service between Philadelphia airport and Atlantic City, N.J., did not preclude the pickup and discharge of passengers at locations other than its established terminal within Atlantic City, was made within its statutory powers and, also, in accord with its regulations governing regular-route passenger carriers' transportation of special or chartered parties. And there was no abuse of administrative discretion in the Commission's finding that all of Atlantic City was on defendant's route for two reasons: (1) since certificate did not specify a route, or terminal, to be used within that city, carrier could travel throughout the minucipality; (2) the "terminal area exception" of §202(c) permits motor carriers to perform transfer, collection, and delivery service within their terminal areas and the Commission has held that passenger carriers' terminal areas are the corporate limits of points they serve. Accordingly, plaintiff's suit to enjoin and set aside the Commission's order is dismissed.—Salem Transp. Co. v. United States, 314 F. Supp. 693 (694-6)*.

In suit to set aside the Commission's order that plaintiff cease and desist from providing service at Chesapeake, Va., under the regular-route certificate (issued in its route conversion proceeding) authorizing it to serve "all points in . . . North Carolina" as off-route points, the record adequately supports the commissions ruling that authority so limited to a definite territory does not allow any service at any point beyond the limit prescribed, even if such point is within commercial zone of a town in the authorized area. Moreover, plaintiff concedes that prior to conversion from irregular- to regular-route status, it could not serve Chesapeake; and it is clear that a carrier does not broaden its authorized area by converting from irregular to regular route operations. Therefore, by virtue of converting its certificate, plaintiff did not expand its authorized service territory to include Chesapeake, although that point is within commercial zone of Moycock, N.C., which it may serve as an off-route point. Commission cease-and-desist order, upheld; action dismissed, with prejudice, at cost of plaintiff.—R-C Motor Lines, Inc. v. United States, 350 F. Supp. 1169 (1170-1, 1173-4)*.

Since permit issued to applicant's predecessor authorized service to and from "railheads", and record does not show an established meaning for that term peculiar to the trade or industry, it is proper to consult definitions in accepted dictionaries. Of the definitions of "railhead" in Webster's dictionary, none suggest that its meaning is limited to exact rail siding or other rail facility actually used; rather, the preferred definition speaks of it as "a point." Moveover, the analogous term "station on the railway," used in many interstate authorities, has been interpreted as authorizing service to and from points within commercial zones served by rail stations. Authority from the Commission to serve railheads is authority to serve any point on a "railroad" at which freight is loaded or unloaded, is not limited to service at or within physical limits of rail facilities or freight terminals, and authorizes service within commercial zones of municipalities in which such rail facilities are located. Applicant's 100-mile radius of railheads must be measured from the municipal limits or, there being no municipality, from the rail facility itself.—Contractors Cargo Co.—Extension, 96 M.C.C. 306 (312-3)*.

In granting mainland-based carriers statewide authority to transport household goods in Hawaii, the required waterborne movement over which the Commission has no jurisdiction precludes issuance of a radial grant framed "between points in Hawaii, on the one hand, and, on the other, points in the continental United States," since such grant would include in part transportation by water. Also, a grant of unrestricted authority "between points in Hawaii" might well be interpreted to include inter-Island transportation, as well the type of operations for which authority is sought, thus bringing the Commission into a possible jurisdictional conflict with other Federal regulatory agencies. In the circumstances, therefore, mainland applicants should be granted authority to transport household goods between points in Hawaii, restricted to the handling of traffic originating at or destined to out-of-State points.—Burham Van Service, Inc., Extension, 103 M.C.C. 372 (392-3)*.

In order to insure people in Florida an adequate transportation service, applicant granted general commodity authority to operate over regular routes between Charlotte, N.C., and Pensacola, Tallahassee, Jacksonville, Orlando, Tampa, and Miami, Fla., and, in effect, between all points in Florida (authority granted between specified Florida cities and all other points in Florida were authorized as off-route points); in addition all points in Mecklenberg County, N.C., and Florala, Ala., authorized as off-route points in connection with the above regular routes. This unusual grant of authority was the result of existing carriers' (1) reluctance to interline truckload traffic at Charlotte, (2) their inability to interline traffic between points in Florida and (3) the excessive and erratic transit time for L.T.L. shipments between Charoltte and points in Florida.—Alterman Transport Lines, Inc., Extension, 106 M.C.C. 402 (415-422)*.

Petitioner's certificates to transport various motor vehicles from Warren Township, Mich., should be modified to reflect the present nominal and political situation; but its proposed modification which would authorize service from Warren, Mich., is unacceptable. Inasmuch as Warren Township has been incorporated into a municipality known as Warren, Mich., it is no longer a political entity and it is now totally comprised of the city of Warren which, as a municipality, has a commercial zone that would include such important automotive centers as Detroit. Due to fact that Warren Township no longer exists, modification of the certificates is appropriate; however, like present description of the origin, the new description should be territorial in nature. Therefore, the words "that part of Macomb County, Mich., south of 14 Mile Road and west of Gratiot Avenue (except Fraser, East Detroit, and Roseville, Mich.)," are substituted in each certificate in lieu of words "Warren Township, Macomb County, Mich.," to properly describe the service authorized.—Dallas & Mavis Forwarding Co., Inc., Modification, 110 M.C.C. 253 (254-6).

Protestant's contention that the decision in 398 F. 2d 36 precludes an affirmative disposition of this application is without merit. In that case, the applicant had authority to serve Chicago but was precluded from serving O'Hare Airport because in order to serve the airport, applicant would have had to traverse a public highway, not described in its certificate, which is outside Chicago. In the instant case, O'Hare Airport is itself the terminus and to preclude service to O'Hare under the rationale in the cited court case would be to contravene a specific Commission grant of authority to serve O'Hare.—Tri-State Coach Lines, Com. Car. Applic., 110 M.C.C. 601 (608).

Commission denied petition to allow for-hire motor carriers of hazardous materials to transport such commodities using nearest direct route approved by stat and local authorities. Evidence does not assure us that a claimed increase in the safety factor would result or would offset adverse economic consequences and administrative difficulties inherent in proposed regulations. Carriers may avoid circuitous operations by availing themselves of new deviation rules (110 MCC 514) or by filing applications seeking gateway eliminations, alternate routes, or relocation of interchange points.—Regulations Governing Hazardous Materials, 111 M.C.C. 575 (589-93).

Administrative Ruling 84, which indicates that a regular-route carrier of property, with authority to serve all intermediate points on a designated route is allowed to serve all points situated wholly within 1 mile of the highway composing such route, is as workable and enjoys as much acceptance today as it was and did in 1960. Respondent's motion to institute a rulemaking proceeding to inquire into policies embodied in the ruling denied.—Adams Trucking, Inc.—Revocation of Certificate, 118 M.C.C. 567 (570-571).

31.—Combination of routes.—[Vols. 12-19, 21].—Round trip charter authority "beginning and ending" in a certain county of a state cannot be said to authorize service to other points within the state and such authority may not be tacked to regular authority under which there is incidental charter rights since the existence of a point of service common to two authorities is the key to the right to tack. Protestant lacks this common point because he is precluded from serving the state under the terms of his specific charter authority except to the extent that the state may be traversed in transporting charter groups to and from the authorized "beginning and ending" territory, and traversal is not synonomous with service.—Harry Lee Eyre, Jr.—Extension, 106 M.C.C. 851 (857-59).

In remanding the investigation proceeding to the Commission, the District Court, in 286 F. Supp. 213, had determined that certain motor common carrier operating rights held by carrier in two separate paragraphs of its certificate were patently ambiguous with respect to whether they constituted two separate grants of authority, in which case such rights could lawfully be combined with each other, or a single grant of authority, in which case such rights could not be combined; and that, therefore, the Commission, on remand, must examine the administrative history of such rights to resolve this issue. On remand, Commission found that the history disclosed that the subject operating rights constituted a single grant of radial authority; and accordingly, such rights may not be tacked or combined with each other. —Malone Freight Lines, Inc., Investigation of Operations, 113 M.C.C. 442 (446-461)*.

35. Duplicate operating rights.—[Vols. 11-16, 18, 19].—Since applicants cannot perform operations in foreign commerce, to the extent that such operations take place in the United States, under their state certificates registered under §206 (a) (7), issuance of certificates of public convenience and necessity would not lead to the creation of duplicating operating rights.—Imperial Truck Lines, Inc.—Common Carrier Application, 106 M.C.C. 741 (755).

Section 208. (b) [*§308(b) U.S.C.*] **Deviation from route.**—[Unchanged. See vol. 10,p. 8023.]

Notes of Decisions

Volume 10—p. 8023; Volume 11—p. 9452; Volume 14—p. 11600; Volume 15—p. 12207; Volume 16—p. 12857; Volume 19—p. 15732; Volume 21—p. 17416.

1. Construction and interpretation.—[Vols. 10, 11, 14-16, 19, 21].—The Commission found that the standard approach to deviation rules, which focuses upon the ratio (specified herein as not less than 90 percent) between the distance over the proposed route between the points of departure from and return to the regular service route and the distance between such points over the regular service route, was appropriate to superhighways as deviation routes. This approach has been found under the nonsuperhighway alternate route provision (49 CFR 1042.1 (c) (8) (ii)) of the deviation rules to be a most effective safeguard against the occurrence of unwarranted changes in the competitive situation between the applicant carrier and any other. Under the rule, as here modified, a carrier meeting the burden of proof would be able to utilize the superhighway route as to all of its passengers without regard to their respective points of origin and destination under its authority.—Motor Service on Interstate Highways—Passengers, 110 M.C.C. 514 (525-526).

In keeping with this approach, however, applicants under this rule were hereby placed on notice that undue service restrictions in the use of such routes, proposed merely to eliminate opposition, will not be countenanced and will be rejected.—Id., p.526.

Carriers' understandable desires for definite certificates setting forth all of their operating rights must yield to the practicalities of the total situation. As a result, and so that the Commission can continue to be in a sound position to handle reasonably and with dispatch the extremely heavy motor carrier operating authority caseload, it was found that the present rule requiring the dismissal of applications for certificated authority embracing operations capable of being performed under the deviation rules, as modified herein, should be continued.—Id., p. 526.

Section 1 of passenger carrier superhighway rules modified to reflect that the superhighway routes (including highways connecting such superhighways with the carrier's authorized regular service route or routes) to which the rules apply are those which extend between the point of departure from and the point of return to the carrier's regular service route or routes. Section 3 of these rules also modified to reflect that the highways connecting the superhighway route with the carrier's regular service route or routes are to be considered along with the superhighway in determining such factors as the mileage over the proposed route and the extent of parallelism of the proposed route to the underlying service route or routes.—Id., p. 527.

That the .applicable guideline ratio between the distance over the superhighway route between the point of departure from and the point of return to the regular service route and the distance between the same points over the regular service route is 85 percent under the property carrier superhighway rules as opposed to the less liberal 90 percent ratio adopted under the passenger carrier superhighway rules is, in part, a reflection of the premise that there is generally less intense competition existing between carriers of property than between passenger carriers, which factor amply warrants the slightly more liberal standard adopted under the property carrier rules.—Id., p.539.

Carrier's use of superhighways found to require operation over "connecting" highways to such an extent as to comprise a significant portion of the total distance traversed between the point of departure from and point of return to the carrier's authorized underlying service route. Cease and desist order issued.—Philipp Transit Lines, Inc. v. Main Line Hauling Co., 117 M.C.C. 466 (466).

Since respondent's operations between St. Louis and Washington (Mo.) and that between St. Louis and Linn (Mo.) involve the utilization of nonsuperhighway "connecting" highways which constitute a significant portion of the total over-the-road distance traversed between the point of departure from and the point of return to the underlying authorized regular service route, neither operation may be performed under the Superhighway Rules [49 CFR 1042.3]. The Superhighway Rules contemplate the utilization of nonsuperhighway "connecting" or "access" highways extending between the authorized regular service routes and the superhighways merely as incidental to the operation over the superhighways themselves. These regulations do not envision that operation over nonsuperhighway "connecting" or "access" highways shall constitute a significant portion of the total over-the-road distance traversed over the superhighway-nonsuperhighway "connecting" highway route between the point of departure from and the point of return to the underlying authorized regular service route.—Burggrabe Truck Lines, Inc. v. Beaufort Transfer, 117 M.C.C. 567 (576, 577).

As a general rule of thumb and subject to reasonable variations depending upon a particular situation, where operation over nonsuperhighway "connecting" highway or highways constitutes an over-the-road distance of more than 20 percent of the total superhighway-nonsuperhighway "connecting" highway operation between the point of departure from and the point of return to the underlying authorized regular service route, the nonsuperhighway "connecting" highway operation should be deemed to constitute a significant portion of the said total superhighway-nonsuperhighway "connecting" highway operation, and this total operation, therefore, should be considered as not falling within the permissible scope of the Superhighway Rules [117 MCC 119, 149].—Id., p. 577.

Respondent's operation between St. Louis (Mo.) and Hermann (Mo.) does fall within the permissible ambit of the Superhighway Rules, since operation over the nonsuperhighway "connecting" highway is incidental to the operation over the superhighway inasmuch as the "connecting" highway constitutes only approximately 18.7 percent of the total superhighway-nonsuperhighway "connecting" highway distance traversed between St. Louis and Hermann. Moreover, the "connecting" highway route is not less than 85 percent of the distance over the underlying authorized service route between these points. Thus the "connecting" highway route comports with the guidelines of, and may be utilized under, the "25-mile" [§1042.3(a)(1)] and "intermediate-point service" [§1042.3(b)] provisions as well as the "85-percent" [§1042.3(a) (2)] provision of the Superhighway Rules.—Id., p.577.

Petitioner, lacking the authority to serve "all intermediate points (without regard to nominal exceptions)" on its underlying certificated service route, was found not to qualify for operation under the "intermediate point service" provision of the Superhighway Rules. Petitioner's contention that his authority to serve 11 of 29 intermediate points between Louisville, Ky. on the one hand, and 23 of 41 points between Louisville, Ky. and Sharon, Ind. on the other hand, is tantamount to "all intermediate-point service", based on population, was held unjustified by the Commission. "Nominal exceptions", therefore, refers to intermediate points as such rather than to population figures.—Lafayette, Ind., Superhighway Operations, 117 M.C.C. 660 (662, 667).

Since one-third of petitioner's operation between Indianapolis, Ind. and Sharon, Ind. involves the utilization of connecting nonsuperhighways, constituting a significant portion of the total over-the-road distance traversed between the points of departure from and return to the authorized regular service route, such operation is not within the scope of and may not be performed under any provisions of the Superhighway Rules.—Id. p. (666).

Since defendants' operations involved utilization of nonsuperhighway "connecting" highways which constitute a significant portion (52 per cent) of the total over-the-road distance traversed between the point of departure from and the point of return to the underlying authorized regular service route, the operations are not within the scope of or may not be performed under the Superhighway Rules. Defendants were therefore in violation of §§203(c) and 206(a) (1) of the Act; cease and desist order entered.—Great Lakes Exp. Co. v. National Transit, 117 M.C.C. 735 (744-45).

5. Regulations governing.—[Vols. 19, 21].—The requirement under the "25-mile" rule of the Superhighway Rules that the superhighway route (including the highways connecting such superhighway route with the carrier's authorized underlying regular service route) between the point of departure from and the point of return to the carrier's authorized underlying service be "wholly within 25 airline-miles of the authorized regular service route" means that every point on the superhighway route must be within 25 airline-miles of the authorized service route, and, at the same time, every point on the authorized service route must be within 25 airline-miles of the superhighway route.—Property Motor Carrier Superhighway Rules, 117 M.C.C. 119 (150).

The "intermediate-point service" provision under the "25-mile" rule of the Superhighway Rules is not to be construed to permit a carrier to serve points within a 50 mile radius of the superhighway (25 miles on each side), either separately, or in conjunction with the other provisions of the "25-mile" rule. The "25-mile" rule is limited by the very terms of the "intermediate-point service" provision to points which are on and within 1 airline-mile of the superhighway (and "connecting" highway).—Id., pp. 150-51.

Inasmuch as the implied authorization under the "intermediate-point service" provision of the Superhighway Rules to serve points on the superhighway and connecting highways is specific in nature, service is permitted at all portions of the commercial zones of such "on highway" points, including those portions of the commercial zones of such points which extend beyond 1 airline-mile of the superhighway and connecting highways. The authorization to serve points within 1 airline-mile of the superhighway and connecting highways represents, in part, an acknowledgment that superhighways are often constructed around rather than through major traffic centers, and that in many instances an "on superhighway" authorization would fail to confer effective operating rights.—Id., p. 150.

7. Destructive competition.—It is the complaining carriers' burden, under the "destructive competition" provision of the Superhighway Rules (49 CFR 1042.3), to establish affirmatively that their services have been, or are reasonably certain to be, materially adversely affected by operations of competing carriers conducted pursuant to such rules. Such a showing is not made where, as in the instant proceeding, the complainants merely make general allegations of destructive competition unsupported by specific probative evidence.—Burggrabe Truck Lines, Inc. v. Beaufort Transfer, 117 M.C.C. 567 (578).

Regulations of the Commission

34 FR 18459, Nov. 20, 1969, Part 1042: Superhighway and Deviation Rules. Entire Part 1042 (Deviation Rules) revised, and title thereof changed, effective Dec. 15, 1969.

35 FR 17264, Nov. 10, 1970, Part 1060: new Part 1060 Special Relief for Motor Carriers Affected by a Temporary Highway Closing, §1060.1 Special relief for motor carriers affected by temporary closing of West Virginia Highway 2, added, effective upon publication in the Federal Register.

Section 208. (c) [*§308(c) U.S.C.*] Transportation of special or chartered parties.—[Unchanged. See vol. 21, p. 17418.]

Notes of Decisions

Volume 10—p.8024; Volume 11—p. 9452; Volume 12—p. 10404; Volume 13—p. 11080; Volume 14—p. 11601; Volume 15—p. 12207; Volume 16—p. 12857; Volume 17—p. 13556; Volume 18—p. 14465; Volume 19—p. 15733; Volume 21—p. 17418.

1. Construction and interpretation.—[Vols. 10-19, 21].—Although passenger carrier's application for extension of its authority was not accompanied by the full $200 filing fee required when it reached the Commission on Dec. 19, 1966, and the remainder of the fee was transmitted after Jan. 1, 1967, it was within the Commission's power to regard the application as filed before Jan. 1, 1967, within the meaning of 1966 amendment of §208(c) which limits the automatic grant of charter rights to applications filed "on or before January 1, 1967."—Blue Bird Coach Lines, Inc. v. United States, 328 F. Supp. 1331 (1333)*.

In view of the rationale of 76 MCC 215, applicants' regular route authority to serve New York City does not authorize it to provide charter service under §208(c) to and from points on Long Island in Suffolk and Nassau Counties. Therefore, applicants' motion to dismiss their pending applications for such additional authority is based on the erroneous presumption that such charter rights are incidental to their present authority and is denied.—Greyhound Corp. Extension, 98 M.C.C. 712 (726)*.

No incidental charter rights accrue under provisions of §208(c) of the Act to carriers restricted to performance of special operations; therefore, Salem may not perform charter operations between McGuire Air Force Base in Wrightstown, N.J., and John F. Kennedy International Airport, in New York, N.Y., under its present authority, which, while authorizing transportation between these points, is limited to special operations in non-scheduled door-to-door service of not more than eight passengers. Thus, Salem's transportation of airplane crews under charges assessed and based on the use of a vehicle as a unit, without regard to the number of passengers transported, constitutes unauthorized charter operations.—Salem Transp. Co. Inc., 100 M.C.C. 373 (374, 381).

Although protestant can perform charter operations incidental to its regular route operations, it may not tack this authority to a specific round trip charter authority limited to operations beginning and ending in a specified county not within the territory served by its regular routes because tacking by definition requires a common point of service between the two authorities.—Harry Lee Eyre, Jr.—Extension, 106 M.C.C. 851 (858-59).

Commission issued a new certificate authorizing operation for which applicant has shown need. Such issuance is made to prevent any doubt concerning applicant's incidental charter rights and to insure that applicant will provide continuous and adequate limousine service under its existing certificates. Authority granted upon condition that it cannot be severed by sale or otherwise from applicant's existing corresponding authority.—Connecticut Limousine Service, Inc., Modification, 110 M.C.C. 830 (838).

The establishment and protection of regular-route motorbus industry is of primary importance to national transportation. This must be kept foremost in mind in proceedings involving special operations as special operator could, under guise of tour service, poach in field of regular-route transportation. "Tour service" may be differentiated from other forms of special operations by accessorial services which tour operators perform, as indicated herein. Commission rejected proposed limitations on "tour" service since to require now that specific accessorial features be included in each tour would intrude on operator's business prerogatives; would prevent creativity and flexibility necessary to attract patrons; and would tend to promote unsound business practices thus raising the cost of tour service to the public.—Passenger Transportation in Special Operations, 112 M.C.C. 160 (172-73).

Section 208(c) of the Act found not to require suspension of underlying regular route authority as a prerequisite for suspension of incidental charter authority.—Federal Highway Admin. v. Safeway Trails, Inc., 113 M.C.C. 815 (828-30).

Commission prescribed regulations limiting smoking on interstate buses engaged in regular route, special operations to a maximum of 20 of the total seating capacity of such buses as smoking was found to be a substantial nuisance and a possible health hazard.—Smoking on Interstate Buses, 114 M.C.C. 256 (264-7).

3. Definitions.—[Vols. 11-19, 21].—Notwithstanding apparently contrary conclusions in 47 MCC 737, the provision of a vehicle for the exclusive use of the group which hires it, and charging a flat rate per vehicle vis-a-vis a per-passenger rate, are not sufficient to make the operation a "charter". To determine whether a particular group is sufficiently cohesive to be lawfully transported by a carrier holding charter authority the community of interest standard is applied See 100 MCC 453.—Airfield Service Co. Ext.—Charter Operations, 117 M.C.C. 165 (169-170)*.

Applicant's proposal constitutes a special operation because, although its operations will usually be over the same route, no schedules will be published and the other attributes of a regular route service are not present.—Transportes Hispanos, Inc., Com. Car. Applic., 117 M.C.C. 894 (897)*.

Charter operation: In view of "charter party" definition in regulations governing transportation of special or charter parties under §208(c), a true chartered party must have a community of interest, i.e., a common purpose other than a desire for transportation. Record in Commission case, involving alleged unlawful operations by broker who arranged for, and carriers who provided, transportation of passengers on a per capita fare basis, shows that no community of interest existed among passengers on considered trips from Milwaukee, Wis., to Sportsman's Park near Chicago; broker advertised the trips as available to individuals, with no mention of group activity or offer of significant nontransportation features; and that individual tickets were in fact sold. Also, assuming that bona fide charter parties were formed for the trips, there is substantial evidence, unrebutted by plaintiffs (defendants in Commission case), that such charter operations violated the regulations because the frequency thereof made them regular scheduled or non-scheduled services. Commission ruling that providing such service without authority was unlawful, sustained.—Travel & Tour Service, Inc. v. United States, 302 F. Supp. 188 (191-3)*.

As applicant's charges for transportation in nonexempt taxicab service between New Jersey military bases and New York City and Philadelphia are based on use of entire vehicle at a fixed rate per mile, and would entitle the individual or group traveling to exclusive use of the vehicle furnished, the operation is charter service where the traveling party is formed independently of the carrier.—D & M Taxi Co., Inc., 96 M.C.C. 439 (447).

Charter service, as distinguished from special operations, is characterized by existence of a collective contract or charter for the exclusive use of the vehicle by a complete, cohesive, homogeneous group organized by someone other than the carrier. Authority requested by applicant to conduct chartered passenger operations, wherein it would provide service basically for existing groups but would sell individual tickets, either to fill the chartered bus and thus render the operation profitable, or to provide a convenient method of collecting money for a particular trip, would create an anomalous, hybrid type of service that would be confusing to the public and difficult to police, and which would utterly destroy the distinction between special and charter operations. For the sake of public, private, and administrative interests such a proposal must be rejected.—Arrow Stage Lines, Inc., Investigation and Revocation, 96 M.C.C. 572 (578, 579).

The test of a valid bona fide charter group is that it be pre-formed and have a common purpose and a community of interest for at least the duration of the trip and the nontransportation group activities related thereto and facilitated thereby; hence a group of prospective purchasers transported to a cooperative-ownership community are members of a charter group since they are motivated by the participation of the group in a tour of the town with an eye to possible residence rather than just a desire for transportation. Since the community is a social and recreational world of its own shared by residents of like mind, the decision to purchase may well rest on the individual members' estimation of the group as prospective neighbors; thus it is not in the same class as a casual shopping tour, where the group tends to dissolve except during the actual transportation, and the identity of members of the group has substantially less importance after the destination is reached.—Suburban Transit Corp.—Contract Carrier Application, 106 M.C.C. 763 (768-69).

Special operation: See also Archambault case, no. 10, below.

In suit to set aside Commission order granting defendant carrier authority to conduct irregular-route special operations in round-trip transportation of passengers (not more than nine in one car) commuting to and from work, plaintiffs' reasoning that the Commission has no authority to classify regular commuter transportation as "special operations," would unduly restrict the Commission's classification under the statute. As the courts and the Commission have held, the phase "special or charter operations" used in the statute is a "catchall" category; also, it does not necessarily follow, because an operation may appropriately be designated as "special," that it may not also possess many characteristics of an "ordinary regular-route operation" The Commission's broad statutory discretion to decide that a particular service is a special operation need only be exercised rationally; in case under review, it met that standard by validly differentiating defendant carrier's service from that offered by plaintiffs. Grant of "special operations" authority sustained.—Hudson Transit Lines, Inc. v. United States, 314 F. Supp. 197 (201-2)*.

In applicant's nonexempt taxicab service between New Jersey military bases and New York City and Philadelphia airports, groups which it transports are normally organized by its own personnel and it is obvious that their primary if not sole purpose is to obtain transportation. As carrier's activities in formation of traveling parties violate established charter concepts, its service to that extent falls in category of special operations.—D & M Taxi Co., Inc., 96 M.C.C. 439 (446).

Special operations include the various kinds of operation which are neither charter service nor the usual operations of ordinary regular-route common carriers of passengers, and involve the sale of tickets by the carrier to each individual passenger. The most common of authorized special operations is that in provision of round-trip sightseeing or pleasure tours. Such operations differ from normal regular-route passenger operations in being designed especially to meet the needs of individual sightseers or tourists, and not to serve persons requiring expeditious service between particular points.—Arrow Stage Lines, Inc., Investigation and Revocation, 96 M.C.C. 572 (578-9).

Proposed operations involving a flexible, non-scheduled door-to-door operation, in vehicles of limited capacity, operated on an on-call, reservation basis, over irregular routes found on further consideration by the Commission to be those of a "special operation."—Arrow Line, Inc., Extension—Limousine Service, 103 M.C.C. 195 (196)*.

Commission granted authority sought herein as proposed limousine service between Fort Lee, N.J. and New York, N.Y. is shown to be a nonscheduled, specialized, door-to-door operation rendered at rates that are substantially higher than those of protestants. Proposed service will not adversely affect protestants' operations because supporting public witnesses are not regular bus riders, are willing to pay higher rates, and show a need for the proposed service.—Horizon Limousine Service, Inc., Com. Car. Applic., 111 M.C.C. 1 (5-7)*.

Commission herein affirmed its definition of special operations as previously set forth in 62 MCC 731 and 100 MCC 432 as a "catchall" classification covering a service not designated as ordinary regular route or charter operation and which is not bare expeditious point-to-point service.—Passenger Transportation in Special Operations, 112 M.C.C. 160 (173).

Pursuant to 62 MCC 802, the requirement that an all-expense or package "tour" include "something substantial" in addition to bare expeditious transportation between two points is not satisfied by the inclusion of box lunches, refreshments, free parking, and admission to the entertainment objective of the tour.—Chieppo Petition for Modification of Certificate, 117 M.C.C. 358 (371, 378)*.

4. Evidence.—[Vols. 14, 17-19, 21].—The phrase "convenience and necessity" implies more than mere adequacy or availability of agencies by which a traveler can be conveyed from one point to another, without regard to special and distinguishing characteristics of the service afforded, and to find that such characteristics are without probative value in applications would have a stifling effect upon carrier initiative and would greatly reduce incentive for development of new and improved types of service. However, it must be emphasized that the mere introduction by an applicant of deluxe equipment and service features not provided by existing passenger carriers is not sufficient to establish a basis for new authority apart from a showing that such features are proposed to meet a public demand or need which existing carriers have shown themselves unwilling or unable to meet.—American Buslines, Inc., Extension, 99 M.C.C. 506 (512).

While a portion of proposed operations concern the exempt transportation of school-children, nonexempt operations are also proposed for which appropriate authority is necessary. And since the evidence fails to establish that present or future public convenience and necessity require proposed charter operations, authorization of new service, competitive with existing service, is not warranted. Denied.—Pat & Gordon, 102 M.C.C. 553 (559).

Revenues from incidental charter operations are an important part of a carrier's total revenues and are entitled to the same consideration as certificate rights in the preservation of carrier's ability to serve the public. Protestant is not required to prove its regular route operations radiating out of a particular point are profitable. Application denied.—Everett Charter System, Inc., Com. Car. Applic., 111 M.C.C. 214 (216)*.

Applicant, in support of its contention that the proposed service is required by the public convenience and necessity, relied almost exclusively on past operations assertedly performed under the mistaken belief that they were exempt. No user testimony was adduced, and the supporting witnesses—five airlines and an airport facilities operator—merely refer requests for service to applicant. Application denied.—Airfield Service Co. Ext.—Charter Operations, 117 M.C.C. 165 (169)*.

10. Special or charter party operations.—[Vols. 10-12, 14-19, 21].—Since bus line seeking to set aside Commission order, which required plaintiffs (defendants in Commission case) to cease and desist from operations found unlawful, holds no specific authority to operate between Milwaukee, Wis., and Sportsman's Park near Chicago, its common-carrier passenger operation between those points is prohibited by the Act unless charter-party transportation, permitted by §208(c), is involved. The Commission ruled that considered transportation of passengers on an individual per capita fare basis, without proper authority, violated the statute and the regulations governing special or charter parties because no agent for a collected group of patrons (whose only community of interest was attending a racing meet) arranged for the trips, the transportation was arranged for before a group was formed and it was afforded so frequently as to constitute regular scheduled or nonscheduled service. Crucial Commission findings on the issue of lawfulness of such operations are supported by substantial evidence and the record shows no error of law; complaint dismissed.—Travel & Tour Service, Inc. v. United States, 302 F. Supp. 188 (191-2, 193)*.

Charter or special operations established under the incidental authority of §208(c) are entitled to the same degree of protection against new competitive service, such as would result from purchase and reactivation by vendee of a vendor's dormant certificated charter rights, as is afforded operations established under rights conferred by a certificate, and it is immaterial that carriers are not obligated to provide charter service under the provisions of §208(c).—Eagle Charter Bus Service, Inc.—Purchase—Eagle Bus Lines, 93 M.C.C. 705 (709).

Contention of applicant, holding authority to operate in charter service, that any of considered past unlawful operations arose from the "narrow thread" distinguishing charter operations from special operations, cannot justify the past unlawful activities and practices described. While the original "grandfather" certificate of applicant's predecessor authorized special or charter service, it was amended by the Commission to its present form more than 10 years before it was transferred to applicant. The certificate is clear on its face and applicant has not sought correction or modification thereof; thus, its claim that there was some basis for its past activities is inconsistent with its argument concerning the veil of legality surrounding those activities. To authorize additional authority sought would, in effect, condone past acts and encourage unlawful operations on a broader scale. Record is conclusive that applicant is not fit to receive authority sought; denied.—S & S Bus Service, Inc., 95 M.C.C. 796 (799, 800, 802-3)*.

As passengers transported by applicant in nonexempt taxicab service, under license issued by Department of Defense, between Fort Dix and McGuire Air Force Base, N.J., and New York City, Philadelphia, and airports in or adjacent thereto consist almost entirely of transient military personnel, applicant should be afforded the widest latitude in fulfilling its agreements with the military establishment. Therefore, authority is granted for both special and charter operations over irregular route.—D & M Taxi Co., Inc., 96 M.C.C. 439 (442, 447).

As protestants collectively are authorized to provide regular-route service at, and incidental charter service from, the major population centers of 9 of 15 Iowa or Nebraska counties where from applicant seeks charter authority, and no unwillingness or inability on their part to meet the reasonable charter transportation requirements of the traveling public in those areas is shown, no new charter service that would infringe upon protestants' operating rights should be authorized. And while the remaining 6 counties apparently have no charter service available, none appears to be needed, as the territory encompassing those counties is sparsely populated and no representative of a cohesive, homogeneous group from that area supported the application. Accordingly the authority sought for charter service must be denied.—Arrow Stage Lines, Inc., Investigation and Revocation, 96 M.C.C. 572 (579-80).

Nor is there any justification for a grant of special-operations authority from the 15-county area to points in the United States and ports of entry on the Canadian boundary. Supporting testimony is either highly speculative and vague or indicates merely a desire for charter service with the attendant convenience of the carrier itself collecting the money from each individual and soliciting additional customers to fill the bus. The type of special operations proposed, involving a broad territorial grant without limitation to specific events or provision of substantial accessorial services in addition to the transportation offered, would unduly encroach on services normally provided by regular-route passenger carriers and therefore would be contrary to public interest and the national transportation policy.—Id., p. 580.

However, numerous supporting witnesses desire special round-trip tour services to the New York World's Fair similar to those previously provided by applicant to the World's Fair at Seattle. As those witnesses do not comprise a complete and cohesive group, but most of them reside in Norfolk, Nebr., or communities in reasonable proximity thereto, and protestants are not authorized to perform special round-trip tour operations from that area, nor does it appear that such service will be made available through their affiliated brokers, authority is granted applicant to conduct special round-trip tour operations solely from Norfolk to the New York World's Fair for such period in 1965 as the Fair is open to the public.—Id., p. 580.

Since proposed motor "tour" service is conducted pursuant to common arrangements with a regulated multi-State water carrier, which assembles the "tour" group and charges one fare for lunch, round-trip boat transportation, and applicant's bus transportation on Long Island, N.Y., it is a "special operation". And, although applicant has participated in providing such through transportation as a connecting carrier without appropriate authority, these tours have generated much public support, and a service such as applicant provided in the past is required if these tours are to be offered in the future. Therefore, since none of the protesting motor carriers can provide considered service and since applicant's past operations appear to have been conducted pursuant to an honest misunderstanding of the law, appropriate authority granted.—Archambault, 99 M.C.C. 535 (538-40).

In view of protestant's authorized operations and insufficient evidence of record, applicant has failed to show that a public need exists for proposed extension of its special operations authority and/or for elimination of the seasonal restriction in its existing authority. No witnesses indicate a desire to travel to considered area at any time when applicant could not accommodate them under its present seasonably restricted authority and testimony as to other areas (specifically Florida, New Orleans and the west coast) is "vague" or of a "wishful variety." The report also expresses concern over applicant's dual status as a broker and common carrier, which apparently has created a situation where applicant as a broker has failed to exercise proper discretion and independent action in awarding or allocating traffic and where preferential treatment to neglect of other common carriers has resulted. Denied.—The Gray Line, Inc., Extension, 102 M.C.C. 519 (525-6).

Proposed operations include such features as lodging, meals, tips, baggage handling, and admission to points of interest in addition to the transportation service performed; therefore, application contemplates something more than bare expeditious, point-to-point transportation and is consistent with Commission's view of what constitutes sightseeing and pleasure tour operations, citing 62 MCC 731. "Special operations" authority granted, but jurisdiction retained so that limitations may be imposed if necessary in light of decision in Ex Parte No. MC-29 (Sub-No. 1).—Eastern Massachusetts S. Ry. Co. Ext.—Tours, 103 M.C.C. 126 (129).

Applicant's proposed transportation of assembled, and preformed, groups of passengers between certain California points and location of six supporting casinos in Reno-Lake Tahoe, Nev., area, over regular and irregular routes and under flexible schedules designed to accommodate the casinos' various activities, found to be in the nature of a common carrier service similar to that provided in special or charter operations, rather than contract carriage, when proposed service would be held out to an indeterminate number of casino patrons solicited from the general public for each trip. Proposal corresponds to the type of service most appropriately covered by a grant of special operations authority, to the extent that individuals assembled into groups would be transported. However, under special operations authority alone, bona fide charter groups—also envisioned by the proposal—could not be transported; therefore, to provide for that segment of California patrons of supporting casinos, applicant is granted authority to provide special and charter party service.—Gray Line Scenic Tours, Inc., 103 M.C.C. 807 (816-8)*.

Authority granted applicant to transport, in charter operations, airline crews between specified airports and New York, N.Y., and Philadelphia, Pa. The evidence establishes that flight crews will use applicant's proposed on-call service, involving transportation in 11-passenger vehicles, between considered areas and that the supporting air carriers and crew members desire single-vehicle transportation of each crew in order to avoid separation of crew members and possible jeopardy of confidential papers and equipment, and while authority to transport a particular class of passengers is uncommon, exceptions exist, especially in the case of special and charter operations where a limited need for service has been established and the limitation can be enforced.—Salem Transp. Co. Inc., Ext.—Charter Operations, 106 M.C.C. 225 (231-2)*.

The fact that applicant operates daily with regularly scheduled departure hours does not forstall designating as "special operations" its transportation, over irregular routes, of groups of passengers in proposed commuter service by automobile.—Monarch Associates, Inc., 107 M.C.C. 277 (286)*.

Four applicants sought similar authority to transport passengers and their baggage, in special operations, beginning and ending at points in Westchester County, N.Y. and extending to points in the United States. The evidence of record indicates that the potential tour patronage from Westchester County would support the operations of only one applicant. When the number of applicants exceeds the number of carriers for which there is a need for service, we are required to evaluate the applicants and to choose which of them should be granted operating authority. Priority in time of filing similar applications, although of pertinent consideration at times, does not justify the granting of the first filed application where as here, there exists other factors weighing against this result. Manhattan (one of the four applicants) proposes to pickup and discharge passengers at those points which are most convenient for the majority of patrons of a particular tour. There is no indication that any of the other applicants are able to offer such an extensive tour service. Manhattan's proposed service will adequately provide the needed service and will alleviate the present inconvenience experienced by some tour patrons who must arrange their own transportation to and from other tour origin and termination points.—Manhattan Transit Co. Ext.—Special Operations Westchester County, N.Y., 108 M.C.C. 763 (764, 770, 771).

Applicant's proposal to transport passengers having a prior or subsequent movement by air between O'Hare International Airport at Chicago, Ill., and Wisconsin points was denied because applicant's supporting evidence consists primarily of speculation and conjecture necessitating the conclusion that applicant has failed to bear its evidentiary burden. Despite the absence of opposition, an applicant must satisfy such a burden. See 100 MCC 50.—Tri-State Coach Lines, Com. Car. Applic., 110 M.C.C. 601 (608-9).

Where applicant and affiliated broker may already perform substantially the same service under combination broker-charter authority, application for special operations authority granted upon proof that (a) applicant is participating in substantial lawful operations within the territory sought to be served, (b) that some benefit will accrue to applicant in the form of more economical or efficient operation, but (c) that any such benefit will not be so great as to amount to the institution of a new service, not previously available, and competitive with existing services. Further, any such grant of special operations authority will be conditioned upon receipt of request for cancellation of that portion of the affiliate's broker license which duplicates authority granted here. The latter condition is imposed in conformity with established Commission policy not to grant authority to allow a carrier to perform operations that may already be performed under existing laws or regulations.—Greyhound Lines, Inc., Ext.—Special Operations, 115 M.C.C. 82 (89, 90).

15. Applicability of rules.—[Vols. 11, 12, 18, 19, 21].—See also Mohawk Coach Lines, Inc., Interpretation, at §208(c), n. 16; and Salem Transp. Co. v. United States, at §208(a), n. 30.

Charter rights that are incidental to common carrier authority and which have been conferred by operation of law without additional proof of need are not severable from underlying regular routes, and thus are distinguishable from specific charter authority issued upon proof either of need or of past "grandfather" operations. The benefits of §208(c) do not accrue unless the carrier is actually performing interstate regular route operations as authorized by its certificate.—Estacada-Molala Stages, Inc.—Revocation of Certif., 118 M.C.C. 115 (123).

16. Origins.—[Vols. 11-16, 18, 19, 21].—Petitioner is authorized to perform incidental charter operations from only a few points in Westchester County, despite rule 111(2) [established in 29 MCC 25, amended 48 MCC 521] that a common carrier may "originate * * * (charter parties) within the territory served by its regular route." This rule is not susceptible of application with mathematical precision; factors considered include the terrain, density of population, proximity to other highways, operations of competing carriers and their ability to perform such service. Since the intent is to authorize operations incidental to or supplementary of regular-route service, there must be a mutuality between the two; mutuality is lacking, however, where persons in the area sought to be served in charter operations are unlikely to rely upon or use the regular-route service of the carrier in travelling to or from that area. Thus, except for along a small portion of petitioner's route, traversing the extreme northwest corner of Westchester County, petitioner does not have authority to provide considered service.—Mohawk Coach Lines, Inc., Interpretation, 103 M.C.C. 758(760-2).

The Commission has never established specific limits for the phrase "within the territory," as used in its regulations governing the origin territory of special or charter operations; exact limits must be considered individually. And under circumstances of record defendant may originate charter service from points within 18 miles of its Evansville, Ind., to Henderson, Ky., regular route, since the area along this route is not densely populated and since area residents depend on its charter service. Furthermore, since Camp Breckinridge is within considered territory and since there is an economic relationship between the camp and Henderson, it is proper for defendant to originate charter service from Camp Breckinridge. Complainant's contention that, since the camp (a service point on its regular route) is solely within its origin territory, it cannot be within defendant's origin territory, is erroneous; the mere fact a point is on one carrier's regular route does not preclude a finding that such point is not within origin territory of another carrier's charter-party operations.—Greyhound Lines, Inc. v. Evansville & O. V. Ry. Co., Inc., 105 M.C.C. 376 (378-9).

Regulations of the Commission

39 FR 11191, Mar. 26, 1974, Part 1061: Limitation of Smoking on Interstate Passenger Carrier Vehicles. Effective date of order of Nov. 8, 1971, as to Smoking on Interstate Buses, fixed as April 22, 1974.

39 FR 14596, April 25, 1974, Part 1061: Limitation of Smoking on Interstate Passenger Carrier Vehicles. Petition for reopening of this proceeding denied.

Section 208. (d) [*§308(d) U.S.C.*] Transportation of baggage, newspapers, express, or mail.—[Unchanged. See vol. 10,p. 8028.]

Historical Note, vol. 17—p. 13557.

Notes of Decisions

Volume 10—p. 8028; Volume 11—p. 9459; Volume 12—p. 10406; Volume 13—p. 11080; Volume 14—p. 11602; Volume 15—p. 12208; Volume 17—p. 13557; Volume 18—p. 14469; Volume 19—p. 15737; Volume 21—p. 17426.

1. Construction and interpretation.—[Vols. 10-15, 17-19, 21].—Commission herein prescribed tentative regulations requiring interstate bus operators to provide clear and adequate public notice as to their free allowance on the valuation of baggage and all procedures and charges required for valuation of baggage in excess of their free allowance. Carriers are also required to provide adequate opportunity and facilities for passengers to ensure proper valuation of their baggage.—Limitation of Free Baggage Allowance—Greyhound, 114 M.C.C. 56 (63-5).

Commission adopted regulations requiring motorbus operators to post conspicuous public notice as to baggage liability procedures at specified points and to permit the declaration of baggage value in excess of the free allowance limitations, during specified time periods, at baggage counters and the side of the bus. Commission also instituted an investigation into the adequacy of the existing free baggage allowance limitation.—Limitation of Free Baggage Allowance—Greyhound, 115 M.C.C. 566 (572-77)*.

10. Property, mail etc., transported with passengers.—[Vols. 10-12, 14, 18, 19].—The primary duty of a motor carrier of passengers is to its passengers,and any transportation of property must be subordinated to their interests. Passengers carriers' authority to transport express is limited by their certificates to transportation in same vehicles with passengers, which impliedly limits their transportation of express to shipments which can be carried without disturbing the comfort and convenience of passengers or interfering with the essential qualities of common-carrier passenger service. Transportation of property by a passenger motor carrier is a special service, distinctly different from that provided by an ordinary motor carrier of property, for which commensurate compensation is required.—Continental Dispatch, Inc., 95 M.C.C. 483 (491-2).

Section 209. [*§309(a) U.S.C.*] Contract carriers by motor vehicle.—(a) (1)—(3) Permit essential to operate; carriers in bona fide operation on July 1, 1935; laws relating to national parks and monuments unaffected; traffic moving to and from Territories and possessions; "grandfather" provisions.—[Unchanged. See vol. 10, p. 8031, vol. 15, p. 12208.]

Amendments, see footnotes, vol. 10, p. 8031, vol. 15, p. 12209.

Notes of Decisions

Volume 10—p. 8032; Volume 11—p. 9459; Volume 12—p. 10406; Volume 13—p. 11081; Volume 14—p. 11602; Volume 15—p. 12210; Volume 16—p. 12859; Volume 17—p. 13558; Volume 18—p. 14469; Volume 19—p. 15738; Volume 21—p. 17427.

1. Construction and interpretation.—[Vols. 10-12, 14-19].—Permit issued to a motor carrier constitutes formal determination of public need for motor transportation, regardless of the availability of other modes and authorizes holder to engage in for-hire transportation by motor vehicle, not by rail or other modes, on the public highway. Motor carriers must perform their authorized services by motor vehicle unless shipment by other modes is permitted by some specific statutory exception.—Atchison, T. & S. F. Ry. Co. v. United States, 244 F. Supp. 955 (955)*.

That a contract carrier utilized the services of a broker, dealer, and agent not authorized by its permit does not constitute unlawful operation, so long as the carrier entered into a contract only with the shipper named in its permit, did so to serve a purpose of the contracting shipper, and the contracting shipper guaranteed payment of freight charges.—P.C.M. Trucking, Inc., Extension—Allentown, Pa., 117 M.C.C. 201 (206)*.

Control of shipments is determined by payment of freight charges and routing of traffic, among other less significant factors, but if both of these criteria are met, then it can reasonably be found that such a shipper controls the shipment in question. A person who does not control the routing of a shipment is not such a shipper, even though it may pay the transportation charges either directly or ultimately, and a contract carrier under contract with such a person could not transport such a shipment. Therefore, evidence that a shipper does not control the routing of a shipment is usually sufficient to rebut the presumption emanating from its payment of the transportation freight charges.—Administrative Ruling No. 76, 117 M.C.C. 433 (441-2).

If a consignee controls the selection of carriers and the routing of the shipment, it controls the shipment whether such transportation is prepaid or collect. However, the mere request by a contracting shipper that a noncontracting shipper, who controls the selection of motor carriers, accommodate it by utilizing the services of a specific motor carrier does not convert control of the transportation to the contracting shipper. The determination that this is so does not modify existing business or carrier practices in any significant manner. Rather, that determination merely serves to clarify a situation which appears to have caused considerable confusion among contracting shippers and carriers. The Minnehan rule [that payment by a consignor does not automatically qualify him as the actual shipper of the traffic] effectively terminated the negative aspects of the payment-control situation. This presumption is still valid but can be rebutted by evidence relating to selection of the carrier and the routing of the shipment.—Id., p.442.

5. Contract carrier, in general; definitions.—[Vols. 10, 15, 16, 18, 19, 21].—A prerequisite of contract carriage is existence of contract between carrier and shipper; such contract must be bilateral and impose specific obligations upon carrier and shipper. In addition, considered contract may be with any person who contracts with carrier and pays transportation charges or is responsible for payment of transportation charges. Consequently, it is clear that there can be no valid contract between applicant and its parent, Produce Terminal Cold Storage Company, for transportation of estimated 85-90 percent of the outbound shipments owned by customers who both pay transportation charge and select carrier.—Produce Terminal Trucking Co. Contract Carrier Applic., 100 M.C.C. 695 (698-99).

The remaining 10 to 15 percent of affected outbound shipments are also owned by customers who have power to select carrier and ultimately pay transportation charge. Evidence does not indicate that Storage Company is obligated by agreement with its customers to designate carrier on these shipments, but merely that it does name the carrier if requested, or if the customer fails to do so. It is doubtful, therefore, whether Storage Company could contract with applicant for transportation of this traffic.—Id., p. 699.

However, assuming that Storage Company is a "shipper" within Commission's requirements as to shipments on which it names carrier, a permit still should not be issued. Ordinarily fact applicant is a wholly-owned subsidiary of shipper does not affect contract carrier relationship; but, as in 52 MCC 772, where opportunity for favoritism, discrimination, and unfair competitive practices is present, a grant of authority should be precluded. Accordingly, proposed service is inconsistent with public interest and national transportation policy. Denied.—Id., pp. 699-701.

Grant of general-commodity authority to contract carriers will not lead to a blurring of the distinction between common and contract carriage, and open the way for applicants to acquire additional shippers and subsequently convert to common carriage. Proof required of a contract carrier differs from that required of common carriers in that its ability to meet the §209(b) criteria must be demonstrated; moreover, §209(b) authorizes the imposition of conditions as to service and, since the 1957 amendment, the Commission has consistently limited the service to be performed to the shipper or shippers to be served, and the number of contracts is accordingly limited. Instant record indicates that applicants in consolidated proceedings are, in effect, "house carriers" for the supporting shipper; furthermore, since the Commission would closely examine applicants' future attempts to serve additional shippers, a common-carrier type of service could not be offered under the permits sought. Proposed contract carriage of general commodities, with exceptions, for the shipper named, subject to certain restrictions, found to be consistent with public interest and the national policy; granted.—Gypsum Haulage, Inc., Extension, 108 M.C.C. 314 (322-3, 326-8).

Proposed service found to be contract carriage as applicant assigns a specific driver and vehicle, to be used by a designated contracting shipper on a specific day, each week. Such assignment constitutes dedication of equipment to the exclusive use of a shipper for the shipper's distinct needs.—Luper Transportation Co.—Petition for Amendment, 111 M.C.C. 39 (42)*.

12. Competition.—[Vols. 10-19, 21].—Since opportunity for favoritism, discrimination, and unfair competitive practices is present, grant of authority precluded because under present circumstances proposed service is inconsistent with public interest and national transportation policy. However, this result should not be construed as any reversal or modification of principle enunciated in numerous Commission decisions that a close relationship or financial affiliation between a contract carrier applicant and its supporting shipper is not, in and of itself, contrary to public interest.—Produce Terminal Trucking Co., 100 M.C.C. 695 (700-1).

Applicant's proposed direct, single-line service not found to materially adversely affect protestants' operations as protestants are authorized to serve only one destination point and evidence does not show that protestants have transported a substantial amount of the considered traffic and supporting shipper is at a competitive disadvantage due to the necessity of using joint-line transportation. Application approved.—D & G Trucking Co., Inc., Contract Carrier Application, 113 M.C.C. 883 (885-88)*.

15. Violation of Act as affecting fitness.—[Vols. 10-12, 16-19, 21].—See also Frigid Food Express, Inc., Ext.—Floor Covering, §209(a)(1), n. 27.

When a contract carrier suddenly and abruptly ceases to operate in contract carriage and within one year transforms its operations into those of a common carrier, the unauthorized conversion, not being one of gradual evolution, cannot be said to have been accomplished without the carrier having given consideration to its unlawfulness under §203. This ignorance of, or deliberate flouting of, the regulatory requirements of conversion renders applicant unfit to receive a grant of operating authority.—Contractors Cargo Co.—Extension of Operations, 96 M.C.C. 306 (316-7)*.

Although supporting shipper was convicted for violations of §203(c) of the Act through participation in unlawful leasing arrangements, record shows shipper sought legal counsel for such unlawful actions, cooperated with Commission personnel to resolve the problem of such unlawfulness, and did cease such arrangements. In view of these factors, shipper's past unlawful arrangements should not be imputed to applicant. Applicant found otherwise fit and permit approved.—Petro Transport, Inc., Contract Carrier Application, 111 M.C.C. 68 (72-3).

19. Restriction of operation.—[Formerly n. 18; see Vols. 10-19, 21].—See also J & J Trucking Co., Inc., at n. 25 below.

Although record in proceeding in which applicant's predecessor was granted authority to provide service to and from "railheads" strongly suggests that the applicant therein contemplated only transportation of shipments having prior or subsequent rail movement, the report therein does not state that such limitation was intended. In the absence of a specific restriction to that effect, shipments transported under "railhead" authority need not move in prior or subsequent rail hauls.—Contractors Cargo Co.—Extension, 96 M.C.C. 306 (312-3)*.

Restrictions contained in the application for contract carrier authority to transport packaged petroleum products from Kansas City, Kans., to east Texas and Louisianna requiring that east Texas shipments be moved in consolidated truckloads and prohibiting transportation on the same vehicle of any of the commodity moving to points in west Texas, would limit applicant's ability to provide a complete service to shipper, would be difficult to enforce, administratively undesirable and will not be imposed.—Western Lines, Inc., Extension, 96 M.C.C. 657 (667).

Applicant's record of safety compliance is not a satisfactory one, but there are indications that it is taking appropriate steps to correct the situation. Nevertheless it is time to pursue a stricter approach to problem of safe transportation of migrant workers in order to terminate the tendency in this area of passenger transportation to "cut corners" on standards of equipment and driver compliance. Therefore, authority granted herein limited to a 2-year duration; such action is comparable to that taken to improve carrier compliance with regulations governing transportation of dangerous explosives.—Bracero Transp. Co., Inc., Extension, 100 M.C.C. 359 (366-7).

Grant of authority herein is limited to indicated New Jersey counties as evidence of record does not show any shipment moving to points in New York and shipper requires no service on inbound movements. A grant in terms of miles should be avoided (see 78 MCC 157). The grant of authority herein exceeds the scope of the application and therefore publication of such grant in the Federal Register is notice that any interested person may petition to intervene.—United States Trucking Corp., Ext.—Sugar, 111 M.C.C. 26 (35-36).

Contract carrier authority granted to transport general commodities (except in bulk), in containers and on trailers, and empty trailers and containers, restricted to prior or subsequent movement by water.—Service Transfer, Inc., Contract Carrier Application, 115 M.C.C. 29 (35).

Petitioner Mercury, a motor common carrier, contends that it was induced to withdraw its opposition to permit-holder Lawton's authority at the original hearing when Lawton and its supporting shipper restricted proposed operations against service at St. Augustine, Fla. Petitioner subsequently discovered that shipper's plant is not located at St. Augustine but near that point. However, evidence of record shows that specific location of the plant was apparently known by shipper's witness, surmised by applicant, and, especially, in view of its prior service for shipper, should have been known by protestant, inasmuch as party must be presumed to know the consequences of its actions (herein the actions of protestant's drivers acting as agents for protestant). There has been no showing of deliberate misrepresentation and petition for modification of Lawton's certificate is denied.—Lawton, Inc., Extension—Foodstuffs, 118 M.C.C. 882 (886-90)*.

24. Proceeding remanded.—[Vols. 19, 21].—See also Mercury Motor Exp., Inc. v. United States, §17(6), n. 10.

Though the scope of judicial review is limited, Commission decision denying plaintiff's application for a permit must be reversed when, with one exception, evidence of record does not support its conclusion that applicant failed to show that proposed operation would be consistent with the public interest and the national transportation policy. No substantial evidence supports the Commission's finding that plaintiff (applicant) failed to satisfy requirements of any of the five criteria which §209(b) directs it to consider in determining whether issuance of a permit would be consistent with public interest, except as to findings on fourth criterion (effect of denying application, and while there is evidence to support the findings on the fourth criterion, those findings are neither complete nor correct. Considered in light of principal reasons given therefor, the record fails to disclose substantial evidence to support the Commission's findings, except for the fourth criterion; decision reversed and cause remanded for further proceedings consistent with the courts opinion.—Continental Contract Carrier Corp. v. United States, 311 F. Supp. 390 (393-7, 398)*.

Following remand by the District Court, the Commission on further consideration discussed applicant's proposed operations in light of the §209(b) criteria after finding them to be within the "exclusive use" definition of contract carriage. Record establishes that supporting shipper requires the 4-day delivery service applicant proposes, since its motor bus manufacturing plant at Pembina, N. Dak., is limited to storing component parts for 5 buses, although designed to produce one bus each day for a 5-day week. Moreover, applicant, who presently holds no authority from the Commission, seeks to serve only this shipper to whose particular needs proposed operations are suited. And, if application is denied, shipper intends to enter into proprietary carriage operations and completely discontinue use of protestants' services. Thus, weighing and balancing the evidence, applicant has established need for proposed service. Granted.—Mid-West Truck Lines, Ltd., Contract Carrier Application, 105 M.C.C. 822 (823-5)*.

25. Necessity, demand, for service; in general.—[Vols. 10-19, 21].—See also Mid-West Truck Lines, Ltd., Contract Carrier Application case, at n. 24 above.

In action to set aside decision and order of Commission Review Board No. 3 denying plaintiff's application for contract carrier authority, the decision that issuance of the permit sought would not be consistent with the public interest and the national transportation policy was based upon adequate findings supported by substantial evidence and was in accordance with applicable law. Considerations of public interest and the national policy are many and varied and are within the special expertise of the Commission and the review board; and, while the examiner's findings and opinion might have been more explicitely stated, or might have been clarified when adopted by the board, the meaning thereof is abundantly clear when viewed as a whole, Since considered decision and the refusal to grant a further hearing was a rational exercise of administrative discretion, and no error is apparent therein, the complaint is dismissed.—Transportation Unlimited of California, Inc. v. United States, 300 F. Supp. 474 (475)*.

Record does not support the Commission's denial of authority to plaintiff to operate as a contract carrier for intervening shipper on the ground that it (applicant) failed to show that proposed operation would be consistent with the public interest and national transportation policy, in that it did not satisfy any of the five criteria which §209(b) directs the Commission to consider in determining whether a permit should be issued. With respect to the first criterion (number of shippers), the Commission should not have taken into account previously granted and pending applications relating to other shippers in considering the consistency with public interest of the particular operation for a single shipper; that other applications are pending is not relevant. If considered application should be granted, plaintiff would be serving four shippers and, while no absolute maximum has been fixed, the Commission has held that maximum number of shippers permitted is between six and eight; moreover, in 92 MCC 1, permit was granted to a carrier that served four shippers. Thus, no substantial evidence of record upholds the Commission on this point.—Continental Carrier Corp. v. United States, 311 F. Supp. 390 (393-4)*.

Nor does the record support Commission holding (on the second criterion) that plaintiff failed to establish a prima facie case and, also, did not prove it could provide better service than could protestants. Procedure on burdens of proof as to the nature of proposed service was outlined in 368 US 81 and, in light thereof, examination of plaintiff's evidence relative to distinct need and protestants' rebuttal thereof is convincing that plaintiff met its required burdens of proof. Evidence showed that shipper requires flexible, single-line, multiple pickup and delivery service with numerous stops-in-transit to serve its customers; that it could substantially reduce warehouse costs if it had such service; that plaintiff would station equipment at shipper's production plants and, also, display shipper's advertising on vehicles dedicated to its use; and that drivers used are familiar with shipper's customers and their inventories and provide specialized loading and unloading services for them. While any one of those factors standing alone might not be sufficient, taken together they show that plaintiff met its initial burden of proving distinct need; and defendant carriers' (protestants) rebuttal evidence was not sufficient to refute plaintiff's showing.—Id., pp. 394-7.

With respect to the third criterion, no substantial evidence supports the Commission's finding that protestants collectively were handling a large part of the shipper's traffic which would be subject to diversion if the application were granted. Although, throughout the proceedings opposing common carriers indicated a desire to handle all of shipper's traffic, it does not appear that they ever enjoyed that business and, on the record, the court finds no indication that there would be any diversion at all. Moreover, shipper states that if the application is denied, it will use proprietary or private carriage rather than common carriers and, while intervening carriers challenge that argument, record indicates it has made some studies relating to private carriage and, also, that prior to use of plaintiff's services under temporary authority it used a shippers' association, the costs of which would be comparable to those of private carriage.—Id., p. 397.

As to the effect which denial would have on applicant and/or shipper, the Commission did not deal with non rate-related adverse effects claimed by shipper in its express finding that no showing was made that applicant could provide service at a lower cost to shipper than could protesting common carriers; with respect to the rate-related effects, however, there was evidence of shipper's effort to obtain common-carrier commodity rates. Thus, though findings on the fourth criterion cannot be said to be complete or correct, in light of the limited scope of judicial review, there is sufficient evidence to support the Commission on that point. But the record does not support Commission findings on the fifth criterion, i.e., applicant failed to show that protestants would be unable to meet shipper's potential distribution requirements. Also, the Commission misallocated the burden of proof on that point as a matter of law; requiring applicant to show that shipper's requirements would change and, also, that common carriers could not meet those changes, puts too great a burden on applicant. Reversed and remanded for further proceedings consistent with the court's opinion.—Id., pp. 397-8.

In suit to enjoin and set aside Commission order granting defendant carrier, that had served an explosives shipper from three origins for 32 years, a permit to serve same shipper from three other origins to points in 41 of its 43 authorized States, the evidence concerning number of shippers to be served, nature of proposed service, effect that grant of the permit would have on protesting carriers and that denial would have on applicant and/or its shipper, and changing character of shipper's requirements, supported the Commission conclusion that the application should be approved. On review, the record shows that the Commission followed the five criteria which §209(b) requires it to consider; and that there is substantial evidence to support its finding as to each separate criterion and its ultimate conclusion on the application. Therefore, the Commission's decision that issuance of the permit in question would be consistent with the public interest and the national transportation policy is supported by substantial evidence; complaint dismissed.—C. I. Whitten Transfer Co. v. United States, 328 F. Supp. 1120 (1123-6)*.

Evaluating the evidence in light of the statutory criteria in §209(b), issuance of permit sought would be consistent with public interest. While protestant has provided service, under its authority to transport buildings, materials, etc., to supporting shipper of wood flooring, any resulting adverse effect on protestant is outweighed by the advantage to shipper of having a complete service commoditywise available to meet its needs at all times; additionally, record shows that protestant's service is not entirely adequate; granted, subject to condition specified.—Owens, 95 M.C.C. 586 (590-1)*.

There are no facts of record to controvert shipper's asserted need for expeditious service in the transportation of involved commodities to points in the destination territory; applicant plans the dedication of specified equipment to the exclusive use of shipper, and can render a service more responsive to the shipper's needs than those offered by protestants. In fact, shipper has found protestants' service unsatisfactory at times because of delays in the furnishing of equipment. Granted.—Bertsch, 96 M.C.C. 108 (109-110)*.

Applicant's operation would consist of multiple pickup of plumbing fixtures and air conditioners at four Eastern points and transportation of them to points in Arizona, Nevada and California under contract with a supplier of plumbing contractors. In some instances the fixtures would be stored in the shipper's western warehouses, but in other instances, as directed by shippers' customers, jobsite delivery on a house-to-house basis would have to be made during the extended construction of large housing developments. Such jobsite service is presently being handled by private carriage. Shipper's business is such that it is essential that delivering carriers be familiar with the various items for loading purposes and for house-to-house deliveries. In these circumstances, applicant has demonstrated that its proposed service is tailored to meet shipper's distinct needs.—Continental Contract Carrier Extension, 96 M.C.C. 321 (323-24, 327).

About 75 percent of considered traffic presently transported for the shipper from the East to western destinations moves by rail, and in spite of problems of time in transit, inability to perform jobsite delivery and damage claims, there would not be substantial diversion from this mode if the application were approved. Nor can motor common carrier protestants meet supporting shipper's requirements because they lack, for most part, proper equipment, and they do not have the experienced personnel necessary. Some protestants depend on interline carriers to reach shipper's destinations, but no interchange carriers were present to indicate they would make such deliveries, and no protestant would dedicate equipment to shipper's exclusive use. No diversion would exist as protestants have not been handling the considered traffic, but denial of application would mean shipper would have to continue to rely on private carriage.—Id., p. 328.

The nature of the transportation proposed is a flexible, on-call motor service, keyed to the shipper's distribution requirements in a five-State territory. In order to effect satisfactory delivery, these movements will require a number of dropoffs in transit over a broad area and a knowledge of the products being transported. Applicant proposes to keep close contact with the shipper's operations providing an integrated house carrier type service. In the circumstances, applicant has demonstrated that proposed service is tailored to meet shipper's complete distribution requirements throughout destination States; whereas, protestants have not succeeded in establishing that they are better able to meet this need. In fact, protestants' operations are so limited in territorial scope as to render their services, individually or jointly, unresponsive to shipper's transportation requirements.—Minnesota Trucking, Inc., 96 M.C.C. 330 (333).

Moreover, a denial of the application would deprive shipper of a service particularly well suited to meet its transportation needs and would lead to the continued utilization of a proprietary trucking operation which it desires to curtail. Although denial of the application would have no apparent adverse effect upon applicant which is not now an interstate carrier, the evidence does not indicate that a grant would divert any significant volume of traffic from protestants. It appears that protestants, however, have not participated in considered shipments to any great extent, and if application is denied, shipper intends to continue its private carriage operations. Granted.—Id., p. 333-4.

Though supporting shipper asserts a need for lower rates and cost of transportation must be considered in determining whether a proposed operations meets the "distinct need" test of contract carriage, applicant did not establish that the proposed service will be rendered at rates lower than those of opposing common carriers or, if so rendered, that such service is required if the involved shippers are to remain competitive with other shippers of the same commodity. No testimony established if the low rates being charged under applicant's existing temporary service would remain in effect after proposed service were authorized nor did applicant submit into evidence rates that will be charged or cost of performing proposed operation or any comparisons of rates charged by other carriers. Without evidence of this sort, it is impossible to determine if the proposed operations would be economically feasible, if a rate advantage is offered or, assuming one is, if such advantage establishes a "distinct need' for the proposed service.—Liberty Transfer., Co., Inc., Extension, 96 M.C.C. 530 (533)*.

Distinct need for contract motor carrier is shown by supporting shipper who needs carrier that will station equipment at its plant, that will employ drivers familiar with its particular products to "almost represent" it to its customers, and that will provide a single-line service to all points within the sales area of the plant.—Tractor Transport, Inc., Extension, 98 M.C.C. 335 (338).

Since protestant Graff's "paper mill materials and supplies" authority only permits transportation of those things consumed in, or necessary to, the maintenance or operation of a paper mill, including commodities used as ingredients or parts of the finished product, Graff can not provide shipper with needed flexible transportation of corrugated paper boxes. In deciding whether proposed service is needed and whether granting it is consistent with the public interest, frequently it is necessary to determine if another carrier is authorized to provide proposed service, and, while no actual order may run against this carrier, this does not diminish effect of such interpretation.—Ullery, 99 M.C.C. 86 (89-92).

Although there is a similarity in service to be provided to the supporting shipper by the common carrier applicants and C & E, as far as the carriers themselves are concerned, the degree to which each "holds out" its service is not at all similar, nor is the fact that the service could be performed by a common carrier determinative. However, although C & E's proposed service is designed to meet the "distinct need" of supporting shipper, as evidence by its current operations for the supporting shipper from another origin and by shipper's requirement for use of specialized equipment, shipper's requirements have not changed, other than the opening of a new plant site, and, therefore, extended destination territory is not warranted. Granted accordingly.—T. I. Mccormack Trucking Co., Inc., Ext., 99 M.C.C. 725 (730-1).

Since applicant's request for authority is based upon past unlawful operations, since record is silent as to nature of shipper's requirements, and since only adverse effect of denial would be that applicant could not reinstitute the operations previously performed unlawfully, applicant has failed to establish that the proposed operations will be consistent with public interest and the national transportation policy. Denied.—Aubrey Extension, 100 M.C.C. 652 (658-60).

In view of the seasonal nature of the toy business, supporting shippers' specialized needs include: (1) service on less-than-truckload shipments with multiple deliveries; (2) deliveries made upon instruction; (3) deliveries timed and scheduled as to date and hours so as to coordinate delivery with receiving departments of consignees; and (4) loading or delivery performed 7 days a week at odd hours, so that the delivery can be effected when needed or to meet any special emergency. Applicant has geared and tailored proposed service to meet these individual needs. Granted in part.—Parkway Expediters, Inc., 103 M.C.C. 411 (443-5).

In light of decision in 227 F. Supp. 730, remanding instant application proceeding to the Commission, before need for proposed service to transport house trailers can be determined, it is first necessary to distinguish between the transportation and non-transportation needs of supporting shippers. Supporting shippers' need for a carrier to condition used trailers for over-the-road movement, connect electrical and plumbing facilities, and expand and set up "expando" home trailers at their destination constitutes a need for transportation services "incidental" to the movement of house trailers from one place to another; such services are, therefore, part of the total transportation service and are to be considered in determining whether issuance of a permit is consistent with the public interest and the national transportation policy. Applicant has made the requisite showing of need for specialized transportation service on part of supporting shippers; granted accordingly.—Griffin Mobile Home Transporting Co., 103 M.C.C. 482 (500-2)*.

Evidence of record is clear that North Central Airlines, a common carrier by air operating under authority issued by the Civil Aeronautics Board, requires proposed scheduled operations between Kalamazoo Airport, Kalamazoo, Mich., and O'Hare Field, Chicago, Ill.; these operations are not within the statutory exemption of §203 (b)(7a), since a regular, scheduled service is proposed as opposed to substituted motor-for-air transportation in emergency situations. And as only North Central will be served by applicant, who proposes to dedicate equipment to North Central's exclusive use permitting its employees to dispatch equipment at its convenience, applicant's proposed service is suited to North Central's special needs. Futhermore, North Central should not be required to use the services of protestant carrier with interests inimical to its own; application granted accordingly.—Howard Contract Carrier Application, 105 M.C.C. 354 (356-9).

On further consideration the Commission concluded that applicant has failed to establish that its proposed service meets shippers' special needs and is consistent with the public interest and the national transportation policy. Balancing all of the §209(b) criteria in light of 231 F. Supp. 905, the Commission found (1) that supporting shippers failed to demonstrate a need for service more specialized than that provided by protestant common carriers, (2) that a grant of the permit would have an adverse effect upon the service of certain protestant carriers, and (3) that applicant and none of the four supporting shippers would be adversely affected by denial of this application. Denied.—Samack, Inc., Contract Carrier Application Segundo, 105 M.C.C. 524 (545)*.

Need for proposed service is shown by supporting shipper's demands for (1) daily pickups, (2) a carrier prepared to handle a myriad of different types of shipments, (3) truckload as well as less-than-truckload service, (4) odd-hour pickups, (5) same-day service, (6) sequential loading, and (7) a carrier familiar with the various markings and codes used to identify imported merchandise. However, since the record concerns only foreign commerce, grant of authority will be limited accordingly; furthermore, although no additional authority is required for transportation of "rejected" shipments, applicant has not established need for transportation of "returned" shipments (those which have been accepted by consignee and which consignee later desires to return to the original consignor). Granted accordingly.—J & J Trucking Co., Inc., 106 M.C.C. 345 (351, 352-3)*.

Proposed operations found to be those of a contract carrier inasmuch as applicant seeks to serve only one shipper for whom applicant has provided a complete, integrated transportation service for five years. Evidence discloses that denial of sought authority would adversely affect applicant and supporting shipper but not protestant. Applicant has established that it is better able to meet shipper's total transportation needs than protestant, which is interested in only part of those needs.—United States Trucking Corp. Ext.—Sugar, 111 M.C.C. 26 (33-5).

Authority sought herein granted, with indicated exception, as supporting shipper's requirement for a more expeditious service constitutes a "distinct need" under §209(b) as previously decided in 113 MCC 329. Protestants' service is inadequate as they must interchange traffic to reach destination points whereas applicant proposes a direct-line service.—D & G Trucking Co., Inc., Contract Carrier Application, 113 M.C.C. 883 (888-9)*.

Commission will not grant an application if the "follow the traffic" principle is the only factor weighing in its favor but applicant has established a future need for its services by showing that shipper has definite plans for moving substantial volume of traffic from a designated plantsite and applicant would only expand the "house carrier" service it renders at shipper's other plant.—Bursal Transport, Inc., Extension—Clay, 114 M.C.C. 557 (559-60)*.

Specialized service: See also H. Prang Trucking Co., Inc.—Purchase—Hyer Trucking, at §5(2), n. 3.

Two supporting shippers have established a distinct need for a prompt, dependable, and expeditious motor carrier service closely coordinated with their overall operations, and applicant's service will be designed to satisfy those unique needs, which none of the protestants authorized to provide service from and to the points in question has shown they are capable of meeting.—Eddleman Bros. Contract Carrier Application, 98 M.C.C. 681 (691-692)*.

Although proposed trailer retention service is an accessorial service, it may be properly considered in determining proposed operation's consistency with public interest, because it amounts to a dedication of equipment at destination and is clearly a transportation service within meaning of the Act, distinguishable from proposal of common-carrier applicants to provide such nontransportation services as spreading asphalt in road construction or washing and repairing foreign cars.—H. Messick, Inc., Extension, 102 M.C.C. 492 (507)*.

Commission granted authority sought herein as the nature of the proposed service is specialized and tailored to shipper's needs as it is a flexible, single-line, multiple pickup and delivery service, offering numerous stops in transit. Applicant's drivers will perform many various additional services, as indicated, acting as shipper's emissaries to the public. Protestants are able but unwilling to provide such proposed service. Fact that applicant will serve seven shippers is not supportive of its case but is insufficient for a denial.—Continental Contract Carrier Ext.—45 States, 112 M.C.C. 145 (150-1).

Application granted as proposed service at all times will be closely geared to shipper's own operation in a specialized "house carrier" service uniquely designed to meet shipper's needs. Opposing carriers are unable to meet these transportation needs due to certificate restrictions on their territorial or commodity authorities and the uncertainty as to protestants' ability to furnish the required transportation on an assured basis.—C & R Trucking Co., Ext.—Winslow, N.J., 112 M.C.C. 336 (340-42).

Supporting shippers' testimony has shown a need for applicant's proposed service as shippers require a flexible, "round-the-clock" service and experienced drivers familiar with transportation of malt beverages who can be relied upon to exercise good judgment when conditions require deviation from shipper's instructions. Applicant has conclusively established that it is better able to meet these distinct needs because of its familiarity with such operations.—P-N-J Kornacker, Inc., Extension—Malt Beverages, 112 M.C.C. 580 (587-9)*.

Application granted as proposed operations are found to be contract carriage as defined in §203(a) (15) of the Act, and inasmuch as applicant will serve only two shippers by providing vehicles of sufficient interior dimensions specially equipped with recessed rollers to meet shippers' particular transportation requirements.—Fairchild General Freight, Ext.—Fiberboard Containers, 113 M.C.C. 598 (601)*.

Petition to modify existing permit to allow service to additional shipper is in reality an application for an extension of service. Application was granted as the proposed service was tailored to shipper's need and more specialized than that of protestants.—Blue Fleet Distributors Corp. Modification of Permit, 113 M.C.C. 778 (780-1)*.

Unopposed application granted as applicant will provide only one shipper with a service closely coordinated to shipper's distinct transportation needs.—Skriba, 115 M.C.C. 855 (860).

Dedication of equipment, coupled with the performance of multiple deliveries, does not make the resulting service distinct or specialized.—Wharthen Extension—Cranberrier, 117 M.C.C. 470 (477)*.

There was found to be nothing special or distinct about a shipper's requirement for the prompt return of empty containers, and several of the common carrier protestants in this proceeding actively participated in the transportation of shipper's traffic, which thereby negates any claim of specialization. Further, protestants offered to provide service as required by shipper. Application denied.—Wagner Express, Inc., Contract Carrier Applic., 117 M.C.C. 752 (757)*.

Denied: Petition to add proposed operations to existing permit denied as petitioner failed to establish proposed service is responsive to shipper's needs. Shipper testified it presently has no need for proposed service and its testimony supporting applicant is of a general nature, lacking specificity as to tonnage or percentage of traffic to be shipped. Application has not been shown to be required by public convenience and necessity, denied.—Luper Transportation Co.—Petition for Amendment, 111 M.C.C. 39 (42-3)*.

Application for authority sought herein denied as applicant was found unfit to perform proposed operation because applicant's president was shown to be closely affiliated with two carriers having a history of unlawful operations, and no evidence showed that these two carrier's had ceased such activity or that applicant had disassociated himself from such operations.—International Carriers, Inc., Contr. Car. Applic., 112 M.C.C. 195 (201).

Normally brokers merely arrange or provide for the transportation of traffic belonging to the general public, and as such are neither consignees nor consignors of the traffic. Because contract carriers are authorized to move the traffic of only a limited number of persons, brokers cannot be the principal supporting shipperwitnesses to successful contract carrier applications unless they can prove (1) that they have some overriding interest in the traffic for the purpose other than providing, selling, arranging or offering a transportation service therefor, or (2) that they engaged exclusively as agents for a limited number of shippers and as such cannot be said to be involved with the traffic of the general public, application denied.—Jensen Contract Carrier Extension, 113 M.C.C. 205 (210).

Approval of application herein would encourage a practice whereby common carriers would be relegated to handling l.t.l. traffic to the exclusion of more desirable truckload traffic. Application denied as applicant has not proven that shippers will derive such benefits from its proposed service as to offset the harmful effects on protestants, thus failing to comply with the third criterion of §209(b).—Fuller Contract Carrier Application, 115 M.C.C. 675 (682)*.

Shipper fails to demonstrate the nature of its manufacturing and/or distribution activities requiring a dedicated service. Common carriers now available can dedicate equipment to exclusive use of shipper, a legally acceptable service as long as they are willing to do so for other shippers, and are able directly or through interlining to provide multiple stopoff service. Denied.—Kerr Contract Carriage, Inc., Contr. Car. Applic., 115 M.C.C. 862 (869-71).

Conversion to contract carrier operation: Applicant, a common carrier of cash letters, seeks conversion of those portions of its outstanding certificates covering cash letters to corresponding contract carrier authority. Applicant is supported by 3 Federal Reserve banks and 67 other banking institutions who regard applicant's service as highly specialized and applicable to their shipping needs; they believe proposed operations will give them more flexibility and convenience, avoiding the stricture of 7-day billing requirements incident to existing common carrier service. Under this proposal, applicant would provide same service presently offered as a common carrier but under continuing contracts with each institution served. Since applicant had shown need for its service as a common carrier, a further showing of need is not required. Authority granted conditioned upon concurrent revocation of existing common carrier authority to carry cash letters.—Bankers Dispatch Corp. Conversion Application, 110 M.C.C. 294 (300, 302, 305, 308).

27. Fitness, in general.—[Vols. 10-12, 15, 17-19, 21].—See also Bracero Transp. Co., Inc., Extension, §209(a)(1), n. 18, supra.

Since applicant has contracted to sell both much of his operating authority and the very equipment necessary to provide the service which the supporting shipper desires, and there is no showing how, without such equipment, he would be able to perform this transportation, applicant has failed to show that he is fit to conduct the operations proposed; furthermore, a question is presented whether applicant intends to use the authority sought or include it in the planned sale of the equipment and related operating rights. The Commission has consistently refused to grant authority to a carrier not intending to perform operations thereunder, and a grant here, under the questionable circumstances, would not be in the public interest; denied.—Gorski Extension—Hardboard, 95 M.C.C. 514 (518).

Although applicant conducted proposed operation for a considerable time in the past without proper authorization, the evidence reflects no willful violation of the Act or of Commission's regulations. Applicant is prosecuting the application in good faith, and is endeavoring to comply with the law; therefore, applicant's fitness to conduct the operations has been established.—Bertsch Contract Carrier Application, 96 M.C.C. 108 (110)*.

Applicant has failed to establish that it is fit to conduct proposed operations. The record shows that applicant has failed to comply with leasing regulations, particularly with regard to proper receipt of equipment and inspection of leased equipment before taking possession of it; the evidence also shows numerous and persistent violations of safety regulations, including failure to report an accident to the Commission within 15 days, to observe drivers' log requirements, to comply with hours of duty requirements, and to observe regulations pertaining to systematic maintenance and inspection of vehicles. A belated effort to take remedial action shortly before the hearing, viewed in light of applicant's long-continued history of noncompliance, is insufficient. Moreover, applicant has transported shipments of cottage cheese, butter, and empty drums without appropriate authority.—Frigid Food Express, Inc., Ext.—Floor Covering, 106 M.C.C. 259 (261-3).

Applicant found unfit to perform proposed operations as record discloses applicant's president and sole stockholder was a principal officer in two carriers having a history of unauthorized activity. The record shows no mitigating circumstances for such activity or concrete evidence that such activity has ceased but does indicate that applicant's president remains closely affiliated with these carriers. Such unlawful past conduct indicates an unwillingness by applicant to comply with Commission's rules and regulations.—International Carriers, Inc., Contr. Car. Applic., 112 M.C.C. 195 (199-201).

Commission does not believe supporting shipper herein should be deprived of a required contract carrier service specially coordinated to its transportation needs because of applicant's past unlawful operations. However, applicant is admonished that the Commission cannot condone such operations in the future.—Skriba Contract Carrier Application, 115 M.C.C. 855 (860-1).

28.—Irregular routes.—[Vols. 10-12, 18]. —Shipper needs applicant's irregular-route carrier service to provide its customers located throughout eastern Texas and Louisiana with split deliveries. These customers maintain small inventories and neither rail service, which is to slow to be responsive, nor protestant's regular-route service, which only allows a fraction of shipper's customers to be reached with direct, single-line service, can meet the needs of providing multiple-dropoffs on consolidated truckloads of less-than-truckload shipments which fluctuate with seasonal demands. Also, applicant's service, from a rate standpoint, will be more economical for shipper. Application approved.—Western Lines, Inc., Extension.—Kansas City, Kans., 96 M.C.C. 657 (666).

29.—Operation in connection with other business.—[Vols. 10-12, 14, 15, 18, 19, 21].—Grant of contract carrier authority will not generally be made to an applicant whose primary business is other than transportation, and who proposes to conduct private carriage operations outbound in connection with its regular business, and for-hire operations on the backhaul movement. Since a private carrier has the advantage of assured traffic without the necessity for solicitation and other expenses, applicant will, by reason of the mixture of its private and for-hire operations, compete on better than even terms with other carriers engaged exclusively in for-hire operations. Denied.—Adams Egg Farms, Inc., Contract Carrier Application, 95 M.C.C. 282 (285-6).

Applicant's proposal to maintain separate corporate entities for conduct of its private and for-hire trucking operations would not alter the circumstances; same vehicles used in proprietary operation would be used in the for-hire one, with a view toward subsidizing private motor carriage of a company managed under common control and in a common interest with a for-hire carrier. Fact that applicant, a producer and marketer of eggs, transports otherwise exempt commodities in its private carriage does not effect application of that principle as its primary business is not transportation, and it still has advantages of assured traffic and the sharing of overhead expense with the commercial enterprise; also, the same principle would apply to both common and contract carriage. Proposed mixture of private and for-hire operations would not be consistent with the public interest and the national transportation policy.—Id., p. 286.

34. Extension of operations.—[Vols. 10-19, 21].—The number of applicant's outstanding contracts (6), detracts somewhat from the strength of its presentation, but standing alone or in conjuction with any possible minor effect on protestant does not warrant denial of application. It was clearly established that the supporting shipper's distinct transportation needs can best be satisfied by applicant.—Prang Trucking Co., Inc., Ext.—New Brunswick, N.J., 117 M.C.C. 38 (48)*.

Regulations of the Commission

34 FR 18392, Nov. 18, 1969, Part 1041: Interpretation—Certificates and Permits, Part 1042 amended by addition of §1041.23 Operating authority to serve a particular airport, effective Nov. 26, 1969.

37 FR 14307, July 19, 1972, Part 1041: Interpretation; Certificates and Permits, §1041.11(a) Service to, from, and between points in Hawaii, added effective Aug. 21, 1972.

37 FR 16944, Aug. 23, 1972, Part 1041: Interpretation; Certificates and Permits, §1041.11 Service to, from, and between points in each Alaska and Hawaii, codification and heading in order (37 FR 14307) corrected.

37 FR 24036, Nov. 11, 1972, Part 1053: Contracts for the Transportation of Property, §1053.7 Contract carrier authority—definition of shipper, added, effective Dec. 26, 1972.

Section 209. (a) (4), (5) [*§309(a)(4),(5) U.S.C.*] Traffic moving from, to, and within Alaska; "grandfather" provisions.—[Unchanged. See vol. 19, p. 15758.]

Section 209. (b) [*§309(b) U.S.C.*] Application for permit; form and contents; issuance of permit; terms and conditions.—[Unchanged. See vol. 18, p. 14494.]

Notes of Decisions

Volume 10—p. 8057; Volume 11—p. 9468; Volume 12—p. 10410; Volume 13—p. 11082; Volume 14—p. 11603; Volume 15—p. 12213; Volume 16—p. 12863; Volume 17—p. 13561; Volume 18—p. 14496; Volume 19—p. 15759; Volume 21—p. 17452.

2. Construction and interpretation.—[Vols. 19, 21].—See also Griffin Mobile Home Transporting Co. case, §209(a) (1), n. 25, supra; Keller Trucking, Inc. v. United States case, §203(a) (15), n. 1, supra.

In considering whether an applicant for contract carrier authority has established that its shipper possesses an individual need and whether the service which it proposes is specialized and tailored to meet that need, the standard is not the "furnishing of transportation services designed to meet the distinct need of each individual customer" as under §203(a)(15) but whether the shipper has a distinct or individual need for a different or more select or a more specialized service. §203(a) (15) is only the definition of a contract motor carrier and is nothing more. Its use of the phrase "distinct need" is to be distinguished from §209(b) phrase "nature of the service proposed". These two phrases are distinct and are not to be confused and used interchangeably. To do so is error.—Eddleman Bros. Contract Carrier Application, 98 M.C.C. 681 (684-686)*.

In determining whether issuance of a permit to applicant will be consistent with public interest and National Transportation Policy evidence must be considered in light of statutory criteria, each factor being weighed to find where the public interest lies with no room for a presumption in favor of, or against, any of the five factors; each factor must be given its proper weight, judged, in the words of the Supreme Court, "with as much delicacy as the prospective nature of the inquiry permits" (368 US 81, 89.) Only in rare cases would the balancing of competing interests of shippers, applicant, and existing carriers admit of the assignment of equal weight to each one of the five criteria.—H. Messick, Inc., Extension—Explosives, 102 M.C.C. 492 (499-500)*.

On reconsideration, application for a permit authorizing transportation of prospective purchasers to and from a planned community under continuing contract with the sponsoring foundation should be denied in view of the statutory criteria found in §209(b). The proposed service can be performed by applicant and protestants under their incidental charter authority pursuant to §208(c). Denial would not be harmful to the sole shipper since it can obtain by charter service substantially the equivalent of that proposed in the application and the evidence does not show that traffic growth would require additional service. Approval would probably give the applicant a preferred status, whereas denial would only preclude applicant from access to traffic from one city. Additionally the proposal, as granted by the board, further contemplates passenger service to and from a community with a projected population of 50,000. Even though applicant's contract is with the foundation, such a proposal is tantamount to an offer to serve the general public.—Suburban Transit Corp.—Contract Carrier Application, 106 M.C.C. 763 (771-73).

While protestant is correct that the review board erred in only considering its common carrier authority and not its pertinent contract carrier authority in granting the present applicant's contract carrier application, such inadvertence, standing alone, is not the decisive factor in modification of the review board's report. While a contract carrier has standing to appear in opposition to an application for operating authority, the interests of such contract carrier normally are protected only in unusual circumstances, as when it already is serving the supporting shipper or has obtained its authority with such shipper's support. There is no evidence presented in the instant proceeding to indicate that these unusual circumstances are present; however, the findings in the prior report are modified since applicant has not established a prima facie case with respect to a need for service between all points it proposes to serve.—Protective Motor Service Co., Inc.—Extension, 106 M.C.C. 867 (868-69).

Applicant has failed to establish a prima facie case of need for service between all points it proposes to serve since the certifications of support submitted with its application are not representative of applicant's many shippers and their need for service to the total area as it contends; the purpose of shipper certification is to assure the Commission that the application will be supported and serves as a source of information and guidance with a view toward expeditious and fair disposition of the proceeding. Conversely, the certifications of support are not intended for use as supporting evidence should the application be assigned for handling without an oral hearing. Additionally, the evidence of record does not support applicant's contention that the shippers who did submit verified statements are representative of shipper support to serve all points in a certain state since none of the shippers indicated either a present or future need for service from any points in the six counties in the state which comprise over half the population of that state.—Id., pp. 869-70.

Applicant's service is found not consistent with public interest and the National Transportation Policy; in considering criteria of §209(b), protestant has shown that it has the ability and willingness to meet shipper's transportation requirements as well as and in some instances better than applicant, and there is nothing in the record to show that rates can be used to aid applicant's case. Further, approval would adversely affect protestant since a grant of authority would permit supporting shipper to destroy, in effect, the value of protestant's certificate, which was obtained with the support of the shipper in the present case, but never utilized by the shipper. On the contrary, applicant holds no permanent authority from this Commission and would be placed in no worse a position by a denial of the application.—Wickliff & Son—Contract Carrier Application, 107 M.C.C. 652 (658-61).

In determining if issuance of a permit will be consistent with National Transportation policy, §209(b) requires consideration of five criteria: (1) number of shippers to be served, (2) nature of service proposed, (3) effect of granting permit upon services of protesting carriers, (4) effect of denial of permit upon applicant or his shipper, and (5) the changing character of shipper's requirements. Commission denied the application herein as the record failed to disclose who, as between shipper and its suppliers, controlled the selection of carrier; and the Commission was unable to determine whether or not the proposed service would actually be used, and the effect of a denial upon protestants or shipper. Also, testimony of sole witness for supporting shipper is too vague and general as to shipper's changing requirements.—Art Quiring Contract Carrier Application, 110 M.C.C. 480 (484-6).

On reconsideration, authority to transport limestone from York, Pa., to designated plant site granted under the "follow the traffic" principle as applicant proposes to serve only the same shipper and a denial of grant would probably cause applicant to go out of business. Commission further notes that inadequacy of existing service need not be proven in every case.—Patterson Extension—York, Pa., 111 M.C.C. 645 (648-9)*.

On reconsideration, Commission granted contract carrier authority to transport roofing and insulation materials as applicant seeks to serve only one carrier; proposed service is of flexible, on-call nature tailored to shipper's needs not satisfied by protestants; protestants have not shown such grant would divert significant traffic from them; and denial would deprive carrier of valuable backhaul traffic and the shipper of a "house-carrier" service particularly responsive to its needs.—Interstate Distributor Co., Contr. Car. Applic., 111 M.C.C. 746 (748-50)*.

In determining whether issuance of a permit will be consistent with public interest and National Transportation Policy, the facts of every case will determine which of the §209(b) criteria will carry the most weight in any given proceeding. Experience shows most cases turn, properly so, on the second standard because that criterion looks to the supporting shipper's specialized needs and applicant's ability to satisfy them.—Continental Contract Carrier Ext.—45 States, 112 M.C.C. 145 (153).

10. Applications, in general; parties; notice.—[Vols. 10-15, 17-19, 21].—See also Fox-Smythe Transp. Co. Extension—Oklahoma case, §206(b), n. 15, supra.

While a contract carrier has standing to appear in opposition to an application for operating authority, the interests of such a carrier normally are protected only in unusual circumstances, as when it already is serving the supporting shipper or has obtained its authority with such shipper's support. Generally, the Commission has granted applications for contract-carrier authority if the alternative would be to require a shipper to contract unwillingly with a given contract carrier. See 94 MCC 563.—Kendrick Cartage Co. Extension—Allied Oil Co., 95 M.C.C. 366 (369).

While applicant's amendment at the hearing of its request for authority to include transportation of "parts" broadened the application, opposing carriers present at the hearing apparently were not prejudiced thereby; however, other members of the public who relied upon the notice as published may have an interest which has been prejudiced by lack of proper notice. Accordingly, authority actually requested will be republished in the Federal Register, and issuance of permit withheld for 30 days from republication date, during which time any interested party may file a protest.—Minnesota Trucking Contract Carrier Application, Inc., 96 M.C.C. 330 (334).

Applicant holds common carrier authority to transport cash letters for banking institutions. It seeks conversion of its certificates authorizing such transportation to permits coextensive with its common carrier authority, basing its application upon our determination in 102 MCC 411 that transportation of cash letters for banking institutions was contract carriage. While characterized as a "conversion" application, there is no provision in the Act for conversion of a certificate to a permit such as that found in §212(c) for the one-time conversion of permits to certificates. Even though this proceeding is similar by analogy to a conversion of a permit to a certificate under §207, it involves considerations novel in nature and broader in scope than the usual proceeding in which a carrier seeks permit authority. Following our decision in 61 MCC 539, applicant must still show a public need for its contract carrier operations but the standards of proof will be more lenient than in the usual case.—Bankers Dispatch Corp. Conversion Application, 110 M.C.C. 294 (305-6).

Applicant's numerous violations did not prevent authorization of a limited term permit, since, while the considered unlawful operations must be classified as flagrant and willful, they were prompted by shippers' solicitation of applicant's services and were not initiated by applicant; moreover, applicant's proposed operations were unopposed, and a need for the service was established.—Jamerson Contract Carrier Application, 110 M.C.C. 469 (473-4).

Authority granted to applicant for transportation of general commodities, restricted to traffic having a prior or subsequent movement by water, after establishment by applicant of conformity to all criteria of §209(b) of the Act, specifically cited. Protestants' authority to conduct the transportation service required by shipper, and with respect to commodities subject to the water carriage restriction, was held to be doubtful.—Service Transfer, Inc., Contract Carrier Application, 115 M.C.C. 29 (34-35).

Supporting shipper failed to disclose that it was supporting several applications, filed at approximately the same time as this application, for common carrier authority duplicative in whole or in part of the contract carrier authority sought in this proceeding. While the denial of this application is based solely upon applicant's failure to demonstrate a need for its proposed contract carrier service in the light of the criteria embraced in §209(b), it should be noted by shipper absolute and complete candor is expected on the part of all parties coming before the Commission.—Warthen Extension—Cranberries, 117 M.C.C. 470 (478)*.

11. Amendments.—[Vols. 10-12, 14, 15, 17, 18].—See Fox-Smythe Transp. Co. Extension—Oklahoma case, §216(b), n. 16, infra.

18. Burden of proof.—[Vols. 10-13, 16-19, 21].—See also Continental Carrier Corp. v. United States case, and Samack, Inc., Contract Carrier Application Segundo case, §209(a)(1), n. 25; Mid-West Truck Lines, Ltd., Contract Carrier Application case, §209(a)(1), n. 24, supra.

When cost of transportation is considered in determining whether a proposed operation meets the "distinct need" test of contract carriage, the applicant asserting that it will meet a shipper's distinct need for low cost transportation has the burden of establishing that it can and will perform such service on an economical and sustained basis at a specified reduced level of changes. And, although one supporting shipper claims that competitors enjoy use of low-cost contract carrier service, this general statement is not supported by the names and locations of such competitors or the carriers involved. The shippers have not requested protestants to establish lower commodity rates nor is there any persuasive showing that the rates of existing motor common carriers are so high as to prohibit movement of the involved traffic. To the contrary, traffic data show that one of the protestants is presently moving a substantial amount of the traffic.—Liberty Transfer Co., Inc., Extension—Specified Points, 96 M.C.C. 530 (533-4)*.

Applicant predicating its contract carrier status upon the first alternative test of §203(a)(15) must establish not only that specific equipment will be assigned to the supporting shipper's use for a continuing period of time but, in order to meet the §209 standards, it must likewise demonstrate, inter alia, that the type and quantum of equipment to be so assigned is sufficient to meet the shipper's needs insofar as they relate to proposed service; and, since the performance of, or absence of, a backhaul movement influences latter requirement, applicant's showing as to arrangements for return of equipment to shipper's place of business must be weighed in the light of all other evidence affecting availability of equipment for shipper's exclusive use.—Owens Contract Carrier Application, 100 M.C.C. 34 (40-1)*.

On reconsideration, use of "adequacy-willingness-ability" test, basis for previous partial denial, rejected; citing 368 US 81 the division reiterated that such test is not applicable in contract carrier application proceedings and that the burdens of proof are allocated differently. Applicant must first demonstrate that proposed contract carrier service is specialized and tailored to shipper's individual need; then protestants may present evidence to show that they can and want to meet that specialized need; and finally burden shifts back to applicant to demonstrate that it is better equipped to provide needed service. Record shows that shipper requires service of a carrier that can transport all of its commodities between all points in its market area and, in addition, provide a flexible, on-call, coordinated service utilizing experienced drivers who are able to safeguard its business secrets. Applicant's proposal is specifically designed to meet these needs, while none of the protestants can provide the complete service required. Granted accordingly.—Interstate Sand & Gravel Transp., Extension—Nine States, 102 M.C.C. 60 (65-7)*; Mid-West Truck Lines, Extension—Pembina, N. Dak., 113 M.C.C. 329 (335)*.

Shippers and consignees supporting an application for a permit, which authorizes the transportation of property, must "identify clearly the commodities they ship or receive, the points to or from which their traffic moves, the volume of freight they would tender to applicant, the transportation services now used for moving their traffic, and any deficiencies in their existing services". This is the minimum showing expected of any applicant seeking a grant of motor carrier authority. In this proceeding these minimum legal requirements have not been met; applicant, therefore, has not made a prima facie case. Denied.—Novak Contract Carrier Application. 103 M.C.C. 555 (557); where the record lacks evidence of the volumes to be moved from and to the respective origin and specified destination points, such record prevents the proper framing of authority to applicant responsive to the supporting shipper's needs and is insufficient to meet the minimum requirements necessary to sustain a grant of authority; denied.—Yelle Contract Carrier Application, 115 M.C.C. 408 (413)*.

Applicant, a common carrier of cash letters, seeks conversion of those portions of its outstanding certificates covering cash letters to corresponding contract carrier authority. Application is based upon determination in 102 MCC 411 that transportation of cash letters was contract carriage. Protestant does not challenge applicant's position that proposed service is contract carriage but it argues that a contract carrier permit cannot be issued in absence of shipper support for each point sought in each portion of territory sought. Considering distinctly unique nature of service provided and proposed, including dominating factor that any permit which might issue will be limited not to any individual shipper but to a class of shippers (banking institutions), and to require applicant to show shipper need for its service at each point sought would be totally unwarranted.—Bankers Dispatch Corp. Conversion Application, 110 M.C.C. 294 (295-8, 307).

Since applicant failed to prosecute its application after being afforded ample opportunity to do so, Commission denied said application for lack of evidence, without prejudice to filing of a new application.—New Rochelle Moving & Storage—Contr. Car. Applic., 111 M.C.C. 418 (422).

In remanding this case, court ruled that Commission erred in placing burden on applicant of proving that protestant could not satisfy the changing requirements of supporting shipper. Burden is on the protestant to prove it can satisfy such requirements.—Continental Contract Carrier Ext.—45 States. 112 M.C.C. 145 (152-3).

Shippers are not automatically entitled to the authorization of a new motor carrier service by virtue of the discontinuance of a prior contract carrier service, but only where it is shown that existing services are unable or unwilling to meet the shipper's reasonable transportation requirement. (See also §206(b), n. 18 *Public*)—Saldutti & Son, Inc., Ext.—Inedible Fish Oils, 118 M.C.C. 58 (65)*.

20. Evidence; admissibility.—[Vols. 10-19, 21].—An exhibit, showing the elapsed length of time between placing order by shipper with consignor and the dispatching of protestant's equipment to consignor's plant, supported by oral testimony that shipper called consignor about the delays and was informed that they were due to the failure of protestant to send equipment, are both admissible. While it is true that no representative of consignor appeared to testify to the facts, the shipper witness was qualified to give testimony as to the accuracy of the data in the exhibit, although the exhibit itself does not establish that protestant was responsible for the delays. Furthermore, the oral testimony, admittedly hearsay, concerning conversations which witness had with consignor, is also admissible because it bolsters the materiality of the exhibit and can be accorded some weight as it consisted of information obtained in the regular course of business.—Owens Contract Carrier Application, 95 M.C.C. 586 (588-9)*.

In a contract carrier application proceeding, comparisons between applicant's proposed rates and the published rates of existing motor common carriers are relevant factors to be considered. Also, evidence by supporting shipper indicating that exempt commodities for backhaul traffic would be available if the permit were issued, is proper and admissible.—Continental Contract Carrier Extension—Plumbing Fixtures, 96 M.C.C. 321 (323).

Application seeking authority for contract-carrier service which does not meet the requisite criteria must be specifically denied on that basis before any alternatives are explored. Denial may be either on the grounds that the applicant has failed to establish that it is fit, willing, and able to perform service it proposes, or because the evidence, viewed in light of §209(b) criteria, fails to establish that the proposed contract carrier operation will be consistent with the public interest and the National Transportation Policy.—Eddleman Bros. Contract Carrier Application, 98 M.C.C. 681 (684)*.

In deciding whether proposed service is needed and whether granting it is consistent with public interest, frequently it is necessary to determine if another carrier is authorized to provide proposed service and, while no actual order may run against such carrier, this does not diminish effect of such interpretation. Therefore, the scope of protestant's authority to transport "paper mill material and supplies" is subject to interpretation when protestant appears in opposition to an application pending before the Commission and such interpretation can be considered in determining whether or not proposed service is, in fact, needed.—Ullery Contract Carrier Application, 99 M.C.C. 86 (91).

Rather than rewarding applicant for past illegal operations of its corporate alter ego, which has engaged in unauthorized operations within scope of authority sought, loss of potential traffic to protestants from these operations is considered as having an adverse effect on them; the effect of granting proposed permit on protesting carriers is one element considered in determining whether or not issuance of permit is consistent with public interest and National Transportation Policy, and, where protestants have not handled considered traffic, a grant to a newcomer effects them only in an "unusual case," citing 368 US 81. However, since grant of authority to applicant would divert traffic from protestants and discourage all such authorized carriers from making innovations and improvements, proposed operations are contrary to National Transportation Policy and constitute the "unusual case". Moreover, as applicant is a mere corporate shell, it would suffer no recognizably adverse effect. Denied.—Specialized Transp. Services, Inc., Contr. Car. Applic., 106 M.C.C. 70 (71-2, 76).

Although applicant failed to indicate certain shippers' support in the proper place in its application form, no harm has resulted from this deficiency as protestants had ample time to reply to these verified statements. Accordingly, such statements of these supporting shippers will be admitted with their full weight.—P-N-J Kornacker, Inc., Extension—Malt Beverages, 112 M.C.C. 580 (585-6)*.

Normally brokers merely arrange or provide for the transportation of traffic belonging to the general public, and as such are neither consignees nor consignors of the traffic. Because contract carriers are authorized to move the traffic of only a limited number of persons, brokers cannot be the principal supporting shipper-witnesses to successful contract carrier applications unless they can prove (1) that they have some overriding interest in the traffic for a purpose other than providing, selling, arranging, or offering a transportation service therefor, or (2) that they are engaged exclusively as agents for a limited number of shippers and as such cannot be said to be involved with the traffic of the general public; application denied.—Jensen Contract Carrier Extension—Foodstuffs, 113 M.C.C. 205 (210).

Evidentiary standards for establishing prima facie case include requirement that applicant show "*any* deficiencies in existing service" in initial verified statement (103 M.C.C. 555, 558). When applicant failed in its duty of submitting specific evidence of service deficiencies in its initial statement, but presented such specific evidence in its rebuttal statement, protestant (by rule of practice 23, prohibiting filing of a reply to a reply) was unfairly prevented from presenting an adequate defense. Rebuttal statements cannot be used to introduce new evidence not referred to in intial statements but must be confined to answering points raised by protestants in their reply statements. Motion to strike evidence in rebuttal granted.—Kerr Contract Carriage, Inc., Contr. Car. Applic., 115 M.C.C. 862 (866).

A party alleging fraud or misrepresentation bears a heavy burden when seeking to overturn a formal action by this Commission. Petitioner contends that it was induced to withdraw its opposition to applicant's proposed operation because applicant and its supporting shipper misrepresented the location of shipper's plant and then offered a restriction against service at St. Augustine, Fla., an area which was near but did not include said plant. The record fails to support petitioner. Shipper's use of St. Augustine on its company letterhead is a common business practice not designed to mislead the public.—Lawton, Inc., Extension—Foodstuffs, 118 N.C.C. 882 (890)*.

23. Official notice; res judicata; stare decisis.—Official notice is taken that petitioner under its presently held permits has contracts with 5 shippers, including 2 additional shippers which it now seeks to serve between points already authorized.—Kendrick Cartage Co. Extension—Allied Oil Co., 95 M.C.C. 366 (367).

25. Hearing, generally.—[Vols. 18, 21].—No oral hearing is required in contract carrier application proceeding where there is no material dispute of fact. In instant case, plaintiffs (protestants in Commission proceeding) allege there was "a material issue or a discrepancy of the facts"; however, the mere assertion that supporting shipper of explosives had no need for multiple pickup service, supported by no positive and little negative evidence, did not produce a material dispute of fact when the need for such service had been shown by applicant's actual operations on behalf of the shipper, as well as by the shipper's statement. Therefore, the Commission's refusal to grant an oral hearing on the application was not error; complaint dimissed.—C. I. Whitten Transfer Co. v. United States, 328 F. Supp. 1120 (1121-3)*.

The District Court held that the Commission failed to afford applicants a proper hearing, when it considered the question of public need for the service in contract carrier application proceeding, inasmuch as evidence of need was irrelevant to the issues. Therefore, in the future, proper care should be taken so that there can be no mistake concering the disposition of a formal application for a permit; however, when the application appears, in substance, more appropriately one for common carrier rights, the Commission believes that the applicants are entitled to additional consideration, as if they were seeking a certificate.—Eddleman Bros. Contract Carrier Application, 98 M.C.C. 681 (683, 685)*.

Failure of applicant's attorney to appear at a duly scheduled hearing, because of a conflicting appearance before the Commission, did not constitute "good and sufficient cause" for postponement as provided in rule 55(b) of the Rules of Practice. If applicant relies upon counsel with limited time for the client's interests, then client must bear the consequences thereof. Application denied.—New Rochelle Moving & Storage—Contr. Car. Applic., 111 M.C.C. 418 (421-2).

Regulations of the Commission

36 FR 4984, March 16, 1971, Part 1003: List of Forms, §1003.1(a) Application forms, amended by adding Form OP-OR-10, Application for Postal Motor Carrier Certificate, effective on date of order.

36 FR 5911, Mar. 31, 1971, Part 1003: List of Forms, §1003.1(a), Form OP-OR-10 (36 FR 4984) prescribed for use by person who were contractors under a star route, mail messenger, or contract motor vehicle service contract on effective date of the Postal Reorganization Act (P. L. 91-375), effective on date of order.

37 FR 14307, July 19, 1972, Part 1033: List of Forms, §1033.1 Motor Carrier and Broker Froms, OP-OR-9 revised, effective Aug. 21, 1972.

Section 210. *[§310 U.S.C.]* Dual operations.—[Unchanged. See vol. 11, p. 9469.]

Notes of Decisions

Volume 10—p. 8063; Volume 11—p. 9469; Volume 12—p. 10411; Volume 13—p. 11083; Volume 14—p. 11604; Volume 15—p. 12214; Volume 16—p. 12864; Volume 17—p. 13562; Volume 18—p. 14499; Volume 19—p. 15766; Volume 21—p. 17459.

1. Construction and interpretation.—[Vols. 10-16, 18, 19, 21].—See also Hourly Messengers, Inc., Extension case, §207(a), n. 6 *Prior-air;* Northern Motor Carriers, Inc.—Purchase—Bonded case, §5(2), n. 48 *Dual;* Ryder System, Inc.—Control—Complete Auto Transit case, §5(2), n. 110 *Dual;* Vancouver Fast Freight case, §207(a), n. 5, supra; W. T. Mayfield Trucking Co.—Interpretation case, §212(a), n. 1, infra.

The proposed purchases, control, and merger by vendee do not change the situation with respect to dual operations of vendee and its carrier affiliates which are under the common control of a holding company, since vendee is now authorized to serve the sole supporting shipper, and the operating rights proposed to be acquired authorize service to the same shipper; the areas or operations to be added by vendee do not duplicate, as to commodities, shippers, or territory, those served by vendee's affiliates.—Signal Delivery Service, Inc.—Purchase—Marc's Delivery Corp., 104 M.C.C. 280 (287).

The holding by applicant of a certificate of public convenience and necessity authorizing transportation of aluminum dross is substantially dissimilar from the authorization held by applicant's contract carrier affiliate to transport dry fertilizer, ammonium nitrate, classes A and B explosives, blasting materials and agents, clay and clay products, and corrugated fiberboard boxes and related items, and there does not appear to be an opportunity for engaging in any of the discriminatory or other undesirable practices against which §210 of the Act is aimed, and with the reservation of the Commission's right to impose such conditions or limitations as may be deemed necessary in the future, the holding by applicant of the certificate granted herein and of the permits held by its affiliate will be consistent with the public interest and the National Transportation Policy.—Truck Transport, Inc.—Extension, 106 M.C.C. 880 (883).

Applicant sufficiently separated the service operations to be performed for different classes of shippers to allow approval of the proposed dual operations under §210 of the Act. It was noted that essentially similar dual operations of protestant were approved.—Loomis Courier Service, Inc., Com. Car. Applic., 117 M.C.C. 424 (429)*.

3. Discrimination resulting from dual operation.—[Vols. 10-19, 21].—Fact that common carrier applicant's major stockholder is also principal owner of a contract carrier holding authority to serve part of the territory involved does not stand in the way of granting common carrier authority shown to be needed since the same shippers will not be served by both; applicant seeks authority to transport empty milk containers to dairies whereas permit held by the contract carrier authorizes transportation of such merchandise as is dealt in by wholesale, retail, and chain grocery stores and food business houses and equipment, materials, and supplies used in the conduct of such businesses. The distinct nature of the two transportation services thus does not create the mischievous situation against which §210 was directed.—La Bar's, Inc., Common Carrier Application, 95 M.C.C. 773 (775, 777).

Since common carrier authority granted is restricted against service for department or retail stores and against service to premises of persons served by applicant or its affiliates pursuant to their permits, dual operations which would result from applicant holding considered authority and by it and its affiliates holding contract carrier authority to serve retail accounts may be approved.—United Parcel Service, Inc., Extension—Midwest Territory, 96 M.C.C. 10 (14).

Although there is great deal of territorial duplication between the authority held by applicant in its outstanding permits and certificates, as well as authority sought in the instant proceeding, the commodities transported under these authorities, petroleum products in containers, dry manufactured fertilizer, animal feed supplements, industrial urea, steel articles, and highway construction materials, differ substantially, and there does not appear to be any possibility for discrimination. However, jurisdiction is reserved for future in this matter.—Western Lines, Inc., Extension—Kansas City, Kans., 96 M.C.C. 657 (667).

Since corporate vendee, organized by vendor and his family for purpose of proposed purchase of vendor's contract-carrier rights and property, would be managed by its stockholder (vendor's son) who also holds common-carrier authority to transport the same commodities in the same general area, approval of the §5 transaction would afford opportunity for discriminatory practices by commonly controlled carriers which are prohibited by the statute. On the evidence of record, proposed dual operations under common control and management of vendee's manager are not shown to be consistent with the public interest and the National Transportation Policy and, while objectionable aspects have been minimized or removed in some cases by restriction of operating rights involved, the requested cancellation of part, and restriction of part, of considered certificated rights would not eliminate the objectionable features of proposed operations, would be inconsistent with the common-carrier duty to serve the public, and would also complicate enforcement by the Commission. Application denied.—Milton K. Morris, Inc.—Purchase—Morris, 97 M.C.C. 544 (545, 546-8).

There can be no discrimination by carrier applicant when its common carrier authority is for the transportation of "household goods" and its proposed contract carrier authority is for the transportation of new furniture, even though the same territory is involved, because new items of furniture for shipment from a factory to dealers and institutions are not "household goods"; nor can new home furnishings be transported from a factory or store under "household goods" authority unless they have been purchased by householder who intends to use them in his dwelling and who arranges for their transportation as an incident of his moving from one dwelling to another. Granted.—Ferree Moving & Storage, Inc., Contract Carrier Application, 99 M.C.C. 454 (457).

If Refiners' common carrier application is granted, it could operate to some of the same points and serve some of the same consignees as does its affiliated contract carrier, Sugar Transport, and if applicant Conley's common carrier authority is granted, it would have extensive and somewhat duplicating contract and common carrier authority, thereby enabling these carriers or their affiliates to engage in operations as both common and contract carriers over the same route or within the same territory without any evidence that such operation is consistent with public interest and the National Transportation Policy. Such duplication of authority, if granted, would enable the considered carriers to engage in prejudicial and discriminatory practice. Denied.—T.I. McCormack Trucking Co., Inc., Ext.—Montezuma, N.Y., 99 M.C.C. 725 (728-30).

Because grant of authority sought would place applicant in position of being able to serve West Virginia Pulp and Paper Company as both a common and contract carrier, approval of proposed operations is withheld. However, applicant is given opportunity to select or suggest method by which possibilities for conducting objectionable dual operations could be eliminated. Therefore, proceedings held open for 90 days during which applicant can present to Commission some plan of action which would enable it to perform contract-service shown to be required by supporting shipper while at same time eliminating any objectionable dual operations.—Schock Transfer Co., Inc., Extension—Kansas City, 100 M.C.C. 718 (722); because grant of contract carrier authority to applicant common carrier creates opportunity for discrimination due to nature of supporting shipper's business, proceeding is held open for 90 days to allow applicant to select or suggest method of eliminating objectionable dual operations.—Interstate Distributor Co. Contr. Car. Applic., 111 M.C.C. 746 (750-1)*.

Applicant was granted a certificate in lieu of its permit. Its permit allows it to transport the same commodities between points in the same general territory, and, therefore, it would be placed in a position to serve the same shippers both as a common and a contract carrier. Such a situation would create the possibility of discrimination against which the provisions of §210 of the Act are directed and would preclude the required findings that the resulting dual operations would be consistant with the public interest and the National Transportation Policy. Applicant has indicated that it is willing and able to convert its operations to those of common carriage. To prevent dual operations, issuance of a certificate will be conditioned on applicant's prior submission of a written request for cancellation of its permit.—Frost Trucking Co., Inc., Extension—Philadelphia, Pa., 110 M.C.C. 203 (211)*.

Applicant, holder of a permit, was granted a certificate for the transportation of ex-air shipments of freight in radial operations between three airports. Grant of authority is subject to reservation of jurisdiction by the Commission to impose terms, conditions, or limitations in the future as it may deem necessary to insure that applicant's operations shall conform to the provisions of §210 of the Act, and be consistent with the public interest and the National Transportation Policy.—Turner Expediting Service Extension—Montgomery County, Ky., 110 M.C.C. 342 (350, 351)*.

Authority as contract carrier of sugar sought herein granted as any possibility of discrimination is eliminated by authorizing applicant to transport both bulk and packaged sugar under contract authority and restricting applicant's current common carrier authority against those commodities and against serving facilities of the supporting shipper herein.—United States Trucking Corp., Ext.—Sugar, 111 M.C.C. 26 (36).

While there is no specific showing that applicant for common carrier authority and its affiliate holding contract carrier authority would engage in discriminatory practices, the resulting dual operations would give rise to opportunities for discrimination. To preclude the possibility of such discrimination the common carrier authority was granted upon the condition that the permit authority of applicant's affiliate be transferred or that applicant and its stockholders divest themselves of their interest in the affiliate corporation.—Transloric Trucking Corp. Common Carrier Application 113 M.C.C. 82 (87)*.

As the commodities authorized to be transported by applicant as a contract carrier are entirely different from that requested as a common carrier, there does not appear to be any opportunity for discriminatory or other undesirable practices, dual operations approved.—Ashton Trucking Co. Extension—Pulverized Limestone, 113 M.C.C. 142 (146)*; commodities entirely different and to be transported for different shippers; granted.—Mid-West Truck Lines, Extension—Pembina, N. Dak., 113 M.C.C. 329 (337)*; commodity and territorial descriptions in certificate and permit granted herein sufficiently distinguishable; granted.—Fairchild General Freight, Ext.—Fiberboard Containers, 113 M.C.C. 598 (601)*; commodities authorized by certificate granted herein different from those authorized by permit; however, express condition reserves Commission's jurisdiction in the matter; granted.—Nationwide Carriers, Inc., Extension—Hide-a-Bed, 117 M.C.C 582 (584)*.

Applicant's alternate request to retain part of its contract carrier authority in a conversion proceeding denied because approval of such request create a situation in which applicant could employ discriminatory practices prohibited by §210 of the Act inasmuch as applicant could transport similar commodities in same territory as both a common and contract carrier.—Cleveland General Transport Co., Inc., Conversion, 114 M.C.C. 536 (546).

5. Relinquishment of dual operation.—[Vols. 10-15, 18, 19, 21].—See also Miller Van Lines, Inc., Certificate of Registration case, §206(a)(6),(7), n. 75, supra.

Since it appears on this record that the present and proposed operations of affiliated contract and common carriers, including applicant, reflect transportation of the same or similar commodities to destinations in the same widespread territory, all of these carriers, managed under common control, have reached a state in their respective present and proposed operations wherein the spectre of objectionable dual operations confronts, or is likely to confront, each carrier. Accordingly, not intending to preclude another decision by the common management of these carriers, a practical solution may be for all outstanding contract carrier authority held by the contract affiliate to be converted to common carrier authority, and for all pending applications by this carrier for permit authority to be amended so as to request certificated rights.—Schilli Motor Lines, Inc., Conversion Application, 105 M.C.C. 90 (98-9).

Applicant, a common carrier of cash letters for banks and banking institutions, was granted contract carrier authority coextensive with its common carrier authority for the transportation of cash letters pursuant to Commission's decision in 102 MCC 411 that such operations were contract carriage. In order to prevent dual operations prohibited by §210 of the Act, the grant of authority will be conditioned upon the concurrent revocation of all existing authority to the extent that it authorizes the transportation of cash letters with reservation of the right by the Commission in the future to impose such terms and conditions as it deems necessary to assure that applicant's operations will conform to the requirements of §210.—Bankers Dispatch Corp. Conversion Application, 110 M.C.C. 294 (298, 313).

When the matter of common control has been raised in any proceeding, an applicant or the person who controls an applicant and another carrier bears the burden of showing complete divestiture of interest therein. Mere asserted transfer of ownership does not meet that burden.—Crete Car. Corp.—Maremont Contr.—Auto Parts, 117 M.C.C. 634 (637-638)*.

Section 210a. [*§310a U.S.C.*] **Temporary authority.—[Unchanged. See vol. 18, p. 14501.]**

Amendments, see footnote, vol. 11, p. 9472; historical notes, vol. 11, p. 9472, vol. 12, p. 10412, vol. 18, p. 14502, vol. 21, p. 17465.

Historical Note

For extension of temporary authority pending determination of permament authority see the last sentence of §558(c) of the Administrative Procedure Act, 5 USC §558(c).

Notes of Decision

Volume 11—p. 9472; Volume 12—p. 10412; Volume 13—p. 11084; Volume 15—p. 12215; Volume 16—p. 12864; Volume 17—p. 13563; Volume 18—p. 14502; Volume 19—p. 15771; Volume 21—p. 17465.

1. Construction and interpretation.—[Vols. 11-13, 15-19, 21].—See also East Tex. Motor Frt. Lines—Purchase—Lee case, §5(2), n. 110 *Temporary*, supra; I.C.C. v. Milk Producers Marketing Co. case, §212(b), n. 10, infra.

The statute gives the Commission wide discretionary power to grant motor carriers temporary authority to provide a "service for which there is an immediate and urgent need" and where there is "no carrier service capable of meeting such need'; applications for such authority are processed under the Temporary Authority Rules which require, among other things, that applications be accompanied by supporting statements of shippers which contain certain information to establish an immediate and urgent need for service that cannot be met by existing carriers. Those rules were promulgated in order to provide "necessary information" for the Commission's use in deciding temporary authority applications; they were not adopted, or intended, to confer important procedural benefits on individuals in the face of otherwise unfettered discretion as in 359 US 535; thus instant case falls within general principle that it is always within the discretion of a court or an agency to relax or modify its procedural rules when in a given case the ends of justice require it; and such action is not reviewable except on a showing of substantial prejudice to complaining party.—American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (533-4, 538-9)*.

Though rule 2(c) says that each shipper statement "must contain at least" 11 items of information, failure of Department of Defense statement (on which grant of appellant's temporary authority was based) to provide particular specifics in rule 2(c)(8) and (9) did not prejudice carriers in making precise and informed objections to the application. Neither was the statement so devoid of information that it, along with protesting carriers' replies, could not support a finding that appellant's service was required to meet shipper's immediate and urgent transportation needs. Decision in 292 F. Supp. 842, aff'd, 394 US 718, which upheld a temporary authority grant even though there may not have been literal compliance with 2(c)(8) and (9), was in line with design of §210a(a) to give the Commission a swift and procedurally simple ability to respond to urgent transportation needs; that functional approach is served by treating (8) and (9) as tools to aid agency exercise of its discretion, not as inflexible procedural conditions.—Id., pp. 534, 536-9.

The Commission's Temporary Authority Rules, unlike some rules, do not involve "jurisdictional" problems but only require certain information to be set forth in statements filed in support of the application; they are mere aids to the exercise of the agency's independent discretion. Therefore, in setting aside the grant of appellant's temporary authority application because the Commission failed to require strict compliance with its own rules, the three-judge district court exacted a standard of compliance with procedural rules that was wholly unnecessary to provide an adequate record to review the Commission's decision; judgment reversed.—Id., pp. 537-9, 542.

In suit seeking judicial review of Commission order granting temporary authority to 25 household-goods carriers, review of the administrative record shows that the Commission acted on basis of applications filed by carriers and supported by letters from shippers which asserted immediate and urgent need for proposed additional service and lack of other available service; and shows, further, that the Commission determined that an urgent and immediate need for service existed in each of the cases. In issuing the temporary authority certificates on the basis of an application thus supported, the Commission did not act arbitrarily or capriciously. Therefore, though defendants' motion for dismissal because of lack of jurisdiction to review grants of temporary authority is denied, judgment in favor of the Commission is entered.—Hussey v. United States, 271 F. Supp. 650 (653-4)*.

On basis of additional evidence received at further hearings, the oral arguments and the entire record before the court, plaintiffs' motions (1) for a new trial, (2) to order the Commission to answer certain of plaintiffs; interrogatories, and (3) to file an amended complaint, are denied; judgment sustaining the Commission order in issue remains in effect. However, denial of the motion to amend the complaint, adding a second cause of action based on the allegedly unreasonable delay of the Commission in making final determinations on carriers' applications for permanent authority, should not be construed as a decision on the merits of a possible cause of action based on delay in hearing and deciding such applications.—Id., pp. 654-5.

Temporary authority may be granted without extensive investigation into factors which will determine a grant of corresponding permanent authority, and it would be contrary to the purposes and express language of the statute to limit the Commission's ultimate decision as to the permanent authority by its grant of temporary authority to applicant. Decision relied on by plaintiff (applicant in Commission proceeding), 253 F. Supp. 891, does not support its argument that the Commission, having granted it temporary authority, has an additional burden to specify its reasons for subsequently changing its position and denying corresponding permanent authority. Commission order denying a portion of the authority sought, sustained; complaint dismissed.—Caravelle Express, Inc. v. United States, 287 F. Supp. 585 (587, 589)*.

By its terms, §210a(a) vests discretion in the Commission to grant temporary authority only when both conditions specified therein are shown; and when both conditions exist, the Commission has wide latitude in exercising such discretion. However, language of the statute makes it clear that, before the Commission may exercise that discretion, existence of both conditions is mandatory and absent either one of them the Commission has neither power nor discretion to grant temporary authority applications. When, as authorized by the statute, the Commission had adopted Temporary Authority Rules emphatically requiring applicants to provide essential information specified therein, it was capricious and arbitrary of the agency, without good cause shown, to ignore or waive compliance with critically important provisions thereof in granting considered temporary authorities.—Acme Cartage Co. v. United States, 290 F. Supp. 453 (455-7)*.

In action by motor carriers (protestants in Commission proceeding) to set aside orders of Temporary Authority Board granting temporary authorities to seven noncertificated carriers in the State of Washington to continue service they previously provided under "grandfather" certificates of registration of intrastate authority (the certificates having been cancelled pursuant to decision in 266 F. Supp. 287), evidence shows that none of supporting statements accompanying the seven applications contained information as to shippers' efforts to obtain service from existing carriers, or as to failure or refusal of existing carriers to provide needed service, which is mandatory under the Temporary Authority Rules; nor is such information otherwise shown in the record. Requirement to furnish such information is not satisfied by supporting statements concerning applicants' previous "grandfather" service; and, obviously, such information bears directly on whether needed service can and will be provided by existing certificated carriers. Therefore, as a matter of law, considered temporary authorities were erroneously granted; each of them is held null and void.—Id., pp. 456-7.

In action to annul Commission orders granting REA temporary authority to transport general commodities in express service between Washington, D.C., and Richmond, Va., the Commission did not err in considering supporting shippers' statements. While regulations governing temporary authority applications require that such statements contain detailed information on the shipper's needs, inquiries of §2(c)(8) and (9) thereof were reasonably answered when each shipper explained why it had made no effort to obtain express service from existing carriers; also, the statements were sufficiently particular to alert the Commission to continuing transportation needs of the shippers. Furthermore, the Commission could consider shippers' statements along with REA's supporting statement and in light of protesting carriers' failure to show that they were providing service comparable in all respects to REA's nationwide, co-ordinated, express service. The exercise of its discretionary authority was not arbitrary or capricious; complaint dismissed.—Estes Express Lines v. United States, 292 F. Supp. 842 (843-4)*.

In action to enjoin and set aside Commission orders granting temporary authority to transport steel to defendant carrier, the reviewing court need find only some evidence in the record to support the Commission's findings; substantial evidence is simply not required to uphold a grant of temporary authority. The Commission had before it the fact that (prior to its issuance of a cease-and-desist order) carrier and its predecessor had provided service for several years, under incorrect assumption that it had authority to do so, as well as supporting statements from 13 shippers filed with the application; thus some evidence in the record supported its finding that there was an immediate and urgent need for defendant carrier's service in a territory that had no carrier service capable of meeting that need.—Superior Trucking Co. v. United States, 302 F. Supp. 257 (261-2)*.

Although Commission regulations governing temporary authority applications require that supporting statements contain detailed information on the shipper's needs, the regulations were designed to facilitate the Commission's findings of an urgent and unmet need; thus, if facts supporting those findings are in the record, the fact that the regulations were not strictly followed should be immaterial. While numerous cases clearly state that agency regulations have the force of law and are binding on both the agency and the applicants acting thereunder, those decisions also found either substantial prejudice to one party or a tainted proceeding because crucial regulations were not followed. In instant case, however, plaintiffs cannot be prejudiced by the Commission's alleged failure to follow §2(c)(8) and (9) of the regulations, since the decision is supported by some evidence of record; also, there was substantial compliance with the temporary authority rules. As the Commission did not act arbitrarily or capriciously and did not abuse its discretion, the grant of temporary authority is sustained.—Id., pp. 262-6.

In suit to enjoin and annul Commission orders granting temporary authority to defendant carrier scope of judicial review is limited to determining whether the orders are arbitrary or capricious, an abuse of agency discretion, or otherwise unlawful. Unlike court review of many Commission orders relating to grants of certificates, the "substantial evidence" rule is not applicable in temporary authority grants. In accord with Commission Temporary Authority Rules, promulgated under §210a, many supporting letter statements of shippers were filed with the application; after considering the statements and checking them with the 11 requirements of its rule governing content, the Commission found there was immediate and urgent need for proposed service and no carrier service was available capable of meeting the need, and granted the temporary authority sought. Since the application and supporting letters, considered with all other record information including the several carrier protests, presumedly constituted a sufficient showing for the grant, considered orders are supported by the evidence of record.—Bell Lines, Inc., v. United States, 306 F. Supp 209 (213, 215, 218)*.

The Commission's Temporary Authority Rules were designed to aid shippers and carriers in furnishing information required of applicants; they were not intended as rigid limits on the Commission's discretion but as administrative guidelines; and the 11 items of information required to be contained in supporting statements have consistently been considered as guides and not as prerequisites in every case. Commission chart of the letter statements accompanying the application shows that, after checking them with the 11 criteria, each of those requirements was checked a varying number of times. Also, while it is not the court's duty to read all the letters statements, examination of a number of them verifies that some deny existence of carrier service capable of meeting shippers' need while others affirm the fact that certain carriers refused to render service desired by shippers and receivers. Thus, in view of the Commission's statutory discretion, the nature and application of its rules, and the record information before it, the court cannot say that the grant of temporary authority was arbitrary or capricious or an abuse of its discretion.—Id., pp. 215-6, 218.

Plaintiff's position in alleging that the grant of temporary authority deprives them of their property without due process of law, i.e., deprives them of revenues to be derived from services rendered thereunder, is not tenable. Under §210a, a grant of temporary authority creates no presumption that corresponding permanent authority will be granted; discretion is vested in the Commission to ascertain the need, whether carrier services capable of meeting the need are available in the area, and, if not available, to grant temporary authority to a carrier to supply the need for a limited period of time. That was a policy decision of the policy making branch of the government. Plaintiffs' position echoes arguments urged in the 268 F. Supp. 239; but the Supreme Court reversed that decision, 389 US 409, negating any such property rights of those protestants. Also, in 355 US 83, the court quoted with approval a Commission statement that no carrier should be protected from competition in continuing service that fails to meet a public need, nor should the public be deprived of a new and improved service because it may divert traffic from other carriers. Complaint dismissed.—Id., pp. 217-19.

Standards for granting temporary authority are not the same as those demanded for grants of permanent authority; the Commission has broader discretion and may act much more summarily under §210a; and administrative review process for grants of temporary authority calls for different legal evaluations than for permanent orders. In short, the procedures for granting temporary and permanent authority are statutorily and legally separate and distinct. Therefore, when the Commission, after its decision and order granting similar permanent authority to 19 household goods carriers was set aside and remanded by the court, proceeded to consider and grant the same carriers' applications for temporary authority to transport household goods between Hawaiian points and points on the mainland, it did not interfere in the slightest with the court's order regarding grants of permanent authority. Thus, it was not necessary for the Commission to seek the court's permission before processing the applications for temporary authority. Moreover, even if the Commission may have based its orders granting temporary authority upon the same evidence that the court found insufficient to support the permanent-authority grants, that was properly within its discretionary power under§210a and did not contravene the court's orders under §§206 and 207. Plaintiffs' motion to enforce judgment and for temporary relief is denied.—H C & D Moving & Storage Co., Inc. v. United States, 317 F. Supp. 881 (883)*.

The Commission's action granting temporary authority is subject to judicial review only when it is arbitrary or capricious or where the agency exceeded its statutory authority or committed an error of law. As the definition of an arbitrary or capricious administrative action in 155 F. Supp. 581, applies to Commission grants of temporary authority, the record must show only that there was "some evidence" upon which it could based its decision. Therefore, the Commission's initial grant and extension of temporary authority to defendant carrier were not arbitrary or capricious when record before the court, to which more than 30 supporting statements of shippers are attached, shows the agency had sufficient information to give the application therefor reasoned consideration. The court will not inquire into soundness of the decision reached by the Commission after such consideration.—Navajo Freight Lines, Inc. v. United States, 320 F. Supp. 318 (320)*.

Also, the Commission acted within its legal authority in extending considered temporary authority until final disposition of pending application for permanent authority. The Supreme Court held in 353 US 436, that the Commission has authority to extend duration of temporary authority until final disposal of the permanent-authority application; and though plaintiff contends that, in addition, that case requires the Commission to meet four listed criteria before exercising that power, and claims two of those criteria were not met, the evidence of record in the case shows, to the contrary, that all four of those criteria were, in fact, met. Accordingly, since there was some evidence to support the initial grant and extension of temporary authority, and the Commission acted within its legal authority, plaintiff's action to enjoin the Commission's orders is dismissed.—Id., pp. 320-1.

It is argued in action to review Commission decision which found plaintiff (applicant) unfit to receive the certificate applied for, that plaintiff had received temporary authority to provide the service which it held for a considerable period of time prior to final denial of its application for permanent authority and that, consequently, the Commission should have found that plaintiff was a fit applicant; however, by statutory command, the grant of temporary authority created no presumption of fitness in plaintiff's favor. Also, the Commission's conclusion is supported by substantial evidence in the record of violations of the law and Commission rules and regulations. Complaint dismissed.—Consolidated Carriers Corp. v. United States, 321, F. Supp. 1098 (1100)*.

Review of the record in competing carriers' action to set aside and annul Commission order granting temporary authority to defendant carrier and, also, authorizing it to tack the authority with its existing authorities and to interline traffic at Silver City, N. Mex., reveals evidence in support of the required statutory finding by the Commission of an immediate and urgent need for the service and a present lack thereof in the service area. The cases speak of "any" and not "substantial" evidence as being sufficient to support the finding; and in fact, carrier's statement in its application and the supporting letters as to urgent need and lack of service constitute a sufficient evidentiary showing. [265 F. Supp. 669.] Also, the Commission's finding of need for and lack of service in the area necessarily means toward and from; that need is met by the tacking and interlining authority in considered order; and resulting "bridge" for through east-west service is incidental to the requisite satisfaction of that need.—Braswell Motor Freight, Inc. v. United States, 336 F. Supp. 709 (713)*.

Under §210a, the Commission has discretionary authority to grant temporary authority to meet urgent needs for service through either the tacking and interlining technique or by an express wording of a temporary duplication of existing routes east and west of the service area. In addition, equities are with intervening defendants because the temporary operating rights granted are merely a replacement of long time services that had been disrupted by cancellation and discontinuance of joint or connecting services by other carriers. The Commission did not abuse its discretion nor act arbitrarily or unlawfully in (1) reopening defendant carrier's temporary authority proceeding, (2) granting it the temporary authority, and (3) authorizing it to tack that authority and to interline traffic; and the challenged order is in all respects a lawful, valid and enforceable order. Complaint dismissed.—Id., p. 713.

Contrary to plaintiff's contention, the precedent governing judicial review of the Commission's orders granting temporary authority to intervenor to transport trailers designed to be drawn by passenger vehicles, in initial movement over irregular routes, between named points in the "some evidence" test as set forth in 302 F. Supp. 257. Review of instant record clearly shows that supporting shippers filed numerous affidavits to the effect that there was an immediate and urgent need for service and that they were unable to obtain service from plaintiff (as well as receive services promised by it) and from carriers holding permanent authority to provide transportation of the kind, and in the area, involved; thus, there was some evidence supporting the grant of temporary authority to intervening carrier. Commission orders under review, sustained; complaint dismissed.—National Trailer Convoy, Inc. v. I.C.C., 352 F. Supp. 945 (946)*.

Nothing in §210a(b) suggests that the Commission has authority to impose employee protective conditions thereunder, and its authority to do so under §5 is found only in the power to impose just and reasonable conditions in connection with authorizing and approving §5 transactions. Therefore, in view of denial of proposed motor carrier purchase transaction, employee union's argument that employees are entitled to severance pay even if application is denied, which is premised on the grant of temporary authority under §210a(b), and union's claim that temporary authority granted was in contemplation of possible approval of the purchase, need not be further considered.—National Freight, Inc.—Purchase—Pittsburgh Wheeling Exp., 97 M.C.C. 642 (649-50, 655).

In cases involving conversions of certificates of registration to certificates of public convenience and necessity under §207 when they are directly related to a §5 application, the Commission's objective in approving temporary authority under §210a(b) pending disposition of the §5 application is to preserve existing motor carrier operations, if failure to grant such temporary approval may result in their destruction or interfere substantially with future performance of continuance service to the public. New operations instituted under such temporary authority which deviate substantially from operations conducted under existing authority cannot alone be considered evidence of past lawful operations supporting a public need for their continuance. Thus, applicant's operation under temporary authority is not best evidence of public need for the proposed service.—Transport Serv.—Control—Gould, Inc., & Co. Frt., 109 M.C.C. 359 (378-9).

In this rulemaking proceeding, Commission abolished the exception accorded the Department of Defense allowing the Department, when appearing as a supporting shipper in applications for temporary operating authority, to furnish its supporting statements directly to Commission's Motor Carrier Board, which exception placed an undue burden on possible protestants. Commission also required Department to certify the accuracy of such statements as this would impose no burden on the Department and would place it on an equal footing with other shippers.—Motor Carrier Temporary Authorities, 112 M.C.C. 288 (297-9)*.

The Commission was unable to find satisfactory evidence to establish an immediate and urgent need for service which could not be met by existing carriers, and such evidence is statutorily required for the issuance of emergency temporary authority. Applicant was found to seek to restructure an existing service rather than to institute a needed service. Denied.—REA Express, Inc., Application for ETA, 117 M.C.C. (87, 90).

Although operations under temporary authority raise no presumption of a need for corresponding permanent authority and are alone insufficient to justify a grant of authority, evidence of past operations under temporary authority is, nonetheless, of probative value to support an application for permanent authority where it is used to determine the ability of a carrier to provide the proposed service and indicates the volume of the traffic involved and the effect of a grant of authority on existing carriers, and there is other evidence to support the application. Since applicant has been providing the transportation of general commodities, with exceptions, in single-line service, between Portland, Oreg., and Seattle, Wash., under temporary authority and has satisfactorily met the reasonable transportation requirements of the supporting shippers application granted subject to conditions.—Trans West, Exp., Inc., Ext.—Seattle-Portland, 118 M.C.C. 1 (10, 11).

Entire Commission rejected proposed modifications of present procedures in processing of contract carrier temporary authority applications as regards filing and notice requirements, and permission for automatic extensions of service by contract carriers to displace service not subject to part II of the Act. Petitioner failed to show an immediate and urgent need for the types of temporary authority at issue; existing service must be accorded a reasonable trial before new service is authorized even temporarily; proposals are inherently discriminatory against common carriers; and the proposals would void the Commission's statutory responsibility to determine if an immediate and urgent need exists for new service. The Commission feels that present regulations are sufficiently flexible and responsive to meet any immediate and actual emergencies that may arise.—Motor Carrier Temporary Authority, 118 M.C.C. 444 (455-60).

Regulations of the Commission

34 FR 441, Jan. 11, 1969, Part 1131: Temporary Authority Applications Under Section 210a(a) of the Interstate Commerce Act, §1131.2(a), (c), and (d)(4), §1131.4(a)(1) and (b), and §1131.6(a) and (c) are amended by changing "Temporary Authorities Board" therein to read "Motor Carrier Board", effective Jan. 21, 1969.

34 FR 18122, Nov. 11, 1969, Part 1131: Temporary Authority Applications Under Section 210a(a) of the Interstate Commerce Act, §1131.2 Filing of applications, "BOR-95" changed to "OP-95" in paragraphs (b) and (d)(1), effective on publication in the Federal Register.

35 FR 17045, Nov. 5, 1970, Part 1131: Temporary Authority Applications Under Section 210a(a) of the Interstate Commerce Act, §1131.2 Filing of applications, paragraph (c) *Supporting statements* amended to read as set forth, effective Dec. 14, 1970.

36 FR 14384, Aug. 5, 1971, Part 1131: Temporary Authority Applications Under Section 210a(a) of the Interstate Commerce Act, new General Policy Statement Concerning Motor Carrier Temporary Authority Procedures, to appear ss a note following §1131.2, effective as of the date of service.

36 FR 14431, Aug. 5, 1971: General Temporary Order 7, temporary authority to perform motor carrier services during emergency caused by strike of railroad employees, effective on date of order.

38 FR 4457, Feb. 14, 1973: General Temporary Order No. 8, temporary authority for motor carriage of property or passengers, for not more than 30 days, because of emergency caused by strike of Penn Central Transp. Co. railroad employees, effective Feb. 8, 1973.

38 FR 10445, Apr. 27, 1973, Part 1003: List of Forms, §1003.1 Motor carrier and broker forms, subhead OP-95 (temporary authority applications) revised to read OP-MCB-95 (revised 1972), effective May 28, 1973.

38 FR 26205, Sept. 19, 1973, Part 1003: List of Forms, Prescribing Form OP-F 46 to be used for application for temporary operation of motor carriers pursuant to §210a(b), effective Sept. 23, 1973.

39 FR 2771, Jan. 24, 1974, Part 1341: Temporary Authority Applications Under §210a(a) of the Interstate Commerce Act. Promulgates 49 CFR 1131.7 regarding State registration of temporary authorities, effective Mar. 1, 1974.

39 FR 7925, Mar. 1, 1974, Part 1341: Temporary Authority Applications Under §210a(a) of the Interstate Commerce Act. Effective date of order of Dec. 17, 1973, regarding State Registration of Emergency Temporary and Temporary Authority set at May 31, 1974.

39 FR 11192, Mar. 26, 1974, Part 1131: Temporary Authority Applications under §210a(a) of Interstate Commerce Act. Correction of regulations published at 39 FR 2771 and 39 FR 7925 as to part heading.

39 FR 12010, Part 1131: Temporary Applications Under §210a(a) of Interstate Commerce Act. Effective date of order entered Dec. 17, 1973, set for May 31, 1974.

Section 211. *[§311(a) U.S.C.]* Motor transportation brokers—(a) License required.—[Unchanged. See vol. 10, p. 8067.]

Notes of Decisions

Volume 10—p. 8067; Volume 11—p. 9473; Volume 21—p. 17468.

5. Employment of carriers not authorized to operate.—[Vols. 10, 11, 21].—Operations of plaintiff broker (defendant in Commission complaint) in arranging for daily bus transportation of individual passengers on a per capita fare basis between Milwaukee, Wis., and Sportsman's Park near Chicago, Ill., are prohibited by the statute when carrier used holds no authority to operate between those points and considered transportation does not involve incidental charter-party service permitted by §208(c). The Commission found that plaintiff advertised the trips as available to an individual, without mentioning any group activity or nontransportation features, and sold individual tickets; patrons did not appoint plaintiff as agent to arrange trips for the group; also the transportation was arranged before a group was formed and was so frequently performed that it amounted to a regular scheduled or non-scheduled service. Commission findings being supported by substantial evidence, and no error of law being shown, complaint to set aside the cease-and-desist order is dismissed.—Travel & Tour Service, Inc. v. United States, 302 F. Supp. 188 (191-2, 193)*.

Section 211.(b) [*§311 (b) U.S.C.*] Issuance of license; brokers in operation prior to enactment of section.—[Unchanged. See vol. 11, p. 9473.]

Amendments, see footnote, vol. 11, p. 9473, historical note, v. 14, p. 11605, vol. 21, p. 17468.

Notes of Decisions

Volume 10—p. 8068; Volume 11—p. 9474; Volume 12—p. 10413; Volume 13—p. 11084; Volume 14—p. 11605; Volume 15—p. 12215; Volume 16—p. 12865; Volume 17—p. 13564; Volume 18—p. 14503; Volume 19—p. 15772; Volume 21—p. 17468.

3. Applications, generally; parties; notice.—[Vols. 11-15, 17, 18, 21].—On further consideration the entire Commission affirmed grant of broker authority to applicant, a wholly owned subsidiary of Kerrville Bus Company; the majority found that discriminatory possibilities were not present, since applicant and Kerrrville Bus Company have separate corporate identities, since while operated by common officers and directors such officials have no financial interest in either corporation, and since there is no indication on record that applicant will favor parent bus company over other bus companies. Futhermore, applicant has affirmatively shown on the record that it will use the motor bus carrier best able to perform service for tour patrons; therefore, circumstances herein do not negate exercise of independent action and decision by applicant broker (but see dissent).—Kerrville Tours, Inc., Broker Application, 100 M.C.C. 270 (271-2)*.

While applicant corporate broker and Texas, New Mexico and Oklahoma Coaches, Inc., have common officers and directors, such persons have very little financial interest in the bus company. In addition, there is no indication that applicant will prefer said company over other carriers; in fact, to the contrary, applicant has shown that it will use all available bus carriers and that it will exercise discretion in awarding traffic to particular carriers. Therefore, on reconsideration the entire Commission reversed prior findings and granted the requested authority (but see dissent).—T. N. M. & O. Tours, Inc., Broker Application, 100 M.C.C. 279 (281)*.

Fitness of applicant: Applicant's past violations, consisting of arranging tours similar to proposed operations without authority, were not the result of a willful design to evade the regulatory jurisdiction, but appear to be the result of misunderstanding of the applicable law, and apparently it will henceforth operate lawfully. In the circumstances, applicant is fit to receive the authority requested; however, such findings are not to be construed as condoning the past unauthorized operations, and applicant is admonished to conform to the statutory requirements.—Howard Tours, Inc., Broker Application, 95 M.C.C. 405 (411).

Protestants' assertion that applicant is unfit, because its Rhode Island corporate charter may not authorize it to engage in the proposed operation, is without merit. The Commission has no jurisdiction to determine whether or not operations by applicant under the license here sought would be *ultra vires*.—Automobile Club of R.I., Inc.—AAA Broker Application, 98 M.C.C. 540 (542).

Applicant's petition for operation as broker denied on following bases: failure to establish fitness, willingness, or ability to perform the proposed service (including financial inadequacy); proposals by applicant appear to be needlessly duplicative of existing service; and applicant's relationship with common carriers. It has long been held by Commission that common directorates and common ownership between a broker and a motor carrier of passengers would deprive the broker of the unrestrained independence of judgment which is required of a broker in order that he may provide the best and most economical services available. 83 MCC 406 (1960). Applications granted in exception to such relationships were generally unopposed and approved after establishment of public interest.—Gray Line National Tours Corp. Broker Application, 114 M.C.C. 914 (921-923).

4. Public interest, in general.—[Vols. 10-19, 21].—See also The Gray Line, Inc., Extension case, §208(c), n. 10; Gray Lines National Tours Corp. case, §211(b), n. 3, supra.

In passenger brokerage applications an essential element is a showing that proposed service will benefit the traveling public and carriers providing the acutal transportation service, and will fulfill a public need not already being met. Such showing would normally be made through testimony of interested members of the public, or, under certain conditions, a plan of future operations, coupled with supportive evidence by existing motor carriers, might suffice. No public witnesses appeared, and declarations of applicant's operating witnesses that there is public support for its tour service are unconvincing in absence of a showing of specific future plans and public response to applicant's past offerings. Insofar as applicant seeks authority for general brokerage of round-trip tours from York, Pa., to all points in eastern States, it has clearly failed to sustain its burden of proof.—White Rose Motor Club Broker Application, 95 M.C.C. 101 (104).

Insofar as applicant seeks authority to arrange motor transportation from York to airports and steamship docks in connection with its foreign travel tours, a grant might be justified without public support from prospective tour patrons, since that limited type of service is one which it requires if its foreign tours are to be attractive and which it would be in better position to arrange than protestants. However, applicant's evidence so completely lacks specificity that it is impossible to determine the actual requirements for brokerage authority. Although applicant has arranged 65 to 70 all-expense tours, there is no evidence concerning the number of its patrons who used motor service, nor any showing of the points to which applicant has arranged or expects to arrange bus service from York; denied.—Id., p. 104-5.

Although supporting evidence did not demonstrate with clarity a need for applicant's service to the entire extent proposed, and the record is uncertain whether applicant's proposed tours would receive substantial public response in certain locations, applicant has demonstrated a need for proposed service from points in California; applicant has had experience in arranging tours in the past, and an educator who appeared in support of the application asserted that students and teachers desire and would benefit from tours of an educational nature as proposed; furthermore, protestant does not provide educational tours, and will benefit from business thus generated. Granted in part.—Howard Tours, Inc., Broker Application, 95 M.C.C. 405 (408-9).

Applicant broker, authorized at New Bedford, Mass., is required to show that its proposed service will fulfill a useful function and be of benefit to carriers or the public; and the record is persuasive that another authorized service at Fall River, Mass., will be responsive to a public need and generate traffic to the benefit of certificated motor carriers. Moreover, although applicant has performed considered operations through an unauthorized branch office at Fall River, it did not intend to evade regulation, but rather it misunderstood the extent of its operating authority. Granted.—Paragon Travel Agency, Inc., Extension—Mass. and R.I., 100 M.C.C. 641 (644)*.

Proposed broker operation would be conducted only in connection with passenger service to be provided by applicant bus line, and there is no indication that broker applicant is willing to perform brokerage service using other underlying carriers; therefore, and in absence of any reasonable showing of public demand for such service, the application is denied.—Gray Line Scenic Tours, Inc., Contract Carrier Application, 103 M.C.C. 807 (808, 818)*.

Applicant, a travel agency, seeks a license authorizing operations as a broker at Washington, D. C., for transportation by motor vehicle, of passengers and their baggage, in charter operations, between points in United States. On exceptions, examiner's denial as to transportation for domestic passengers was affirmed. However, as to brokerage service in behalf of passengers from foreign lands, applicant proposes to promote and organize custom-made tours, of various nationalities gathered in Europe, designed to cater to European tastes. One protestant has an office overseas; but applicant is proposing custom-made tours whereas protestant offers package tours. Protestant uses New York and California gateways for such brokerage service whereas applicant will use Washington, D. C. Thus, proposed service will not result in useless duplication of service but will generate traffic beneficial to both public and existing carriers; application granted in part.—Sanders World Travel, Inc., Broker Application, 110 M.C.C. 246 (248).

To meet the statutory requirement of consistency with the public interest, applicant for a borkerage license must establish that the proposed service will contribute something of value or be of benefit to carriers or the public.—Elegante Tours, Inc., Broker Application, 113 M.C.C. 156 (159).

Applicant, a bus terminal operator, has merely shown that it acts as a ticket agent for several motorbus operators, but it has shown no plans to arrange or formulate tours, no professed expertise or experience in this overall field, and no support by the traveling public or the carriers it serves as agent. Denied.—Newburgh Terminal Corp. Broker Application, 115 M.C.C. 358 (364-5).

5. License covering part of operations sought.—[Vols. 10, 12, 14, 18, 21].—The Commission may grant applicant's requested authority in whole or in part. Evidence shows that applicant's proposed service will meet the needs of the traveling public and that the Providence and Cranston, R.I., areas are clearly able to support additional broker services; however, need is shown for broker activities only in connection with round trip, all-expense tours, and authority granted is so limited.—Automobile Club of R.I., Inc.—AAA Broker Application, 98 M.C.C. 540 (544).

10. Hearings; evidence.—[Vol. 19].—Although its counsel was unable to attend hearing, protestant's requests for postponement were denied, after applicant pointed out that protestant had already delayed disposition of case through late intervention and that numerous witnesses had planned to appear on scheduled date. Protestant's right to select counsel and have reasonable continuity in representation is not an unqualified one, and it does not give him right to choose a particular attorney without regard whether attorney has time to try case; furthermore, counsel's inability to attend hearing does not in itself deprive protestant of right to due process of law. In instant proceeding, protestant had sufficient time to call on other counsel, and, although protestant's president, experienced in examing witnesses and giving testimony, appeared at hearing, he declined to cross-examine witnesses or present evidence. Full opportunity was given protestant to present evidence and confront applicant's witnesses in cross-examination, and any further delay in disposition of case would constitute infringement upon applicant's right to prompt decision.—Francisco Oliveira Travel Agency, Inc., Broker Applic., 99 M.C.C. 545 (548-50).

The division granted a motion to strike the testimony of more than 30 witnesses for whom no certifications of support had been filed. This proceeding was handled under special rules of procedure, and at a prehearing conference applicant had specifically agreed to submit certifications. The rule in 111 MCC 630 (1970), did not apply because (1) applicant did not show it was unaware of the interests of these witnesses when it prepared its initial statement regarding support, and (2) the witnesses themselves were not members of the travelling public, but rather were professional travel agents whose interests are generally fixed and who should be familiar with the requirements of testifying in support. That case cannot be viewed as an open-ended invitation to secrete witnesses and spring them on unsuspecting protestants.—Gray Line National Tours Corp. Broker Application, 114 M.C.C. 914 (917-918).

24. When license necessary, in general.—[Vols. 10-19, 21].—See also Automobile Club of R.I., Inc.—AAA Broker Application, §203(a)(18), n. 1.

A New York City newspaper was charged with illegally engaging in operations as a broker without first having obtained appropriate authority from the Commission. Defendant entered into a purported agency agreement with an authorized broker; however, the defendant had assumed the power to establish and develop tours, to enter into contracts, to establish charges, to take the risk of profit and loss, and had assumed the responsibility to maintain records of the transportation arranged without consultation with the purported principal. An independent travel agent may perform those functions which establish and maintain contact between a tour patron and the broker who is licensed to establish and conduct such tours. However, a broker's license entails many responsibilities of a personal nature that can be performed only at a point specified in the license and only by the actual holder of the license.—Manhattan Transit Company v. Staats Herold Corp., 108 M.C.C. 168 (173).

The basic discretionary acts of a broker may not be performed by another, separate entity, and the power to exercise a broker's primary functions may not be leased, sold, or otherwise transferred without the approval of the Commission. A licensed broker may not delegate to another under a purported agency agreement those basic functions of direction and control for which the authorized holder of the license is primarily responsible. In this case there was no domination, direction, and control by the actual holder of the license over the tour operations of the defendant. Defendant was found to be performing many of those functions which a broker may not delegate to another, and is therefore operating as a broker without holding appropriate authority in violation of §211(a) of the Act. A cease and desist order was entered against the defendants.—Id., pp. 172-3.

28. Change in control of association or corporation licensed.—[Vol. 15].—Change in control of a corporation holding a broker license may be accomplished only with Commission approval upon application and proof that the change in control will not be contrary to the public interest. Showing that defendant signed a refund check of A-1 Coach, while indicating that he holds a position of some authority in that company, is not sufficient evidence to establish that he has acquired control thereof.—Allied Bus Corp. v. Goldman, 103 M.C.C. 559 (569).

30. Conditions imposed; scope of operations.—[Vols. 17-19, 21].—Generally, in grants of brokerage authority, limitations either as to a class of users or as to a type of tour should not be imposed, except where only specialized brokerage service, e.g. ski tours, is proposed or where the protection of existing services warrants appropriate limitation. There are no circumstances which warrant a narrowing of the service proposed by applicant to the conduct of "educational tours" or "tours available only to students and teachers". Such a limitation would be undesirable, as it would preclude applicant from including others who might reasonably want to be included in touring groups, even those primarily with an educational purpose, and would not be in the public interest.—Howard Tours, Inc., Broker Application, 95 M.C.C. 405 (409-10).

Kirkland case, 61 MCC 691, not only limits broker's making or entering of contracts to point or points of authorized operation, but also restricts operations in arranging for and selling of transportation by motor vehicle to point or points named in broker's license; such restriction cannot be defeated by using or establishing agencies located at other points. Therefore, except for noted exceptions, operations of a broker in arranging for and selling of transportation by motor vehicle is restricted to point or points named in its license; applicant's activities at Fall River, Mass., where he is not licensed to operate, are unlawful.—Paragon Travel Agency, Inc., Extension, 100 M.C.C. 641 (643-4)*.

Applicant, a travel agency located at Washington, D.C., was granted authority to transport foreign tourists between points in United States, in sightseeing and pleasure tours. All of the protestants (except one) have authority to transport domestic passengers in similar operations. In order to protect the interest of existing motor carriers of passengers, applicant's authority is restricted to making arrangements for persons having a prior movement in foreign commerce by air and using Dulles International Airport, Va., as a port of entry so that the authority granted will conform to the need shown.—Sanders World Travel, Inc., Broker Application, 110 M.C.C. 246 (252).

Commission found it unnecessary to adopt separate regulations concerning the meaning of terms used in brokerage licences as Commission herein categorized and described various types of passenger brokers, including "tour" brokers; brokers of regular route, charter, and special operations; brokers of "special and/or charter operations"; and brokers of all forms of passenger transportation as well as the relationship between a broker and its agents.—Passenger Transportation in Special Operations, 112 M.C.C. 160 (186-90).

When granting passenger brokerage authority, a limitation either as to a class of users or as to a particular type of service should not be imposed, except where a specialized service is proposed or where the protection of existing service warrants appropriate limitation.—Elegante Tours, Inc.—Broker Application, 113 M.C.C. 156 (159).

Citing 61 MCC 691 (1953), it has been consistently held that a broker, although limited by the terms of his license to doing business at a particular location, may nevertheless solicit business and interview prospective patrons, either himself or through agents at other points, provided that the actual brokerage contract is entered into or executed at his authorized place of business. That is, the parties must mutually sign the contract at that specific point. The reason is that a need for brokerage services at other points has not been shown. The defendant was therefore issued an order to cease and desist from the practice of contracting tours through unauthorized agents at points other than Dallas, Tex.—Trails West, Inc. v. Continental Trailways, Inc., 115 M.C.C. 269 (273-276)*.

Section 211. (c) [§*311(c) U.S.C.*] Rules and regulations; bond or other security required.—[Unchanged. See Vol. 10, p. 8072.]

Notes of Decisions

Volume 10—p. 8072.

10. Amount of security or bond.—[Vol. 10].—See also Gray Lines National Tours Broker Application case, §211(b), n. 3 *Fitness*, supra.

CONSULT THE TABLE OF CASES WHENEVER A CITATION IS FOLLOWED BY AN ASTERISK

In a proceeding instituted on the Commission's own motion, it was found that no affirmative action with respect to changing or modifying the existing bonding requirements for brokers subject to economic regulation under the Act was warranted. This finding was based on the following: since the implementation of record-keeping requirements of brokers no problem has been found with respect to the handling of funds entrusted to licensed brokers; there have been only two complaints filed against licensed brokers since 1936; since in all but a few cases bonds are obtainable only on a full collateral basis, any increase in required security would eliminate effective brokers and prevent others from entering the field; and the public interest is already well protected by the conservative practices of surety companies.—Broker Security for Protection of the Public, 115 M.C.C. 1 (8-11).

Section 211.(d) [*§311(d) U.S.C.*] **Inspection of accounts, records, etc.**—[Unchanged. See vol. 10, p. 8073.]

Section 212.(a) [*§312(a) U.S.C.*] **Suspension, change, revocation and transfer of certificates, permits, and licenses.**—[Unchanged. See vol. 10, p. 8074, vol. 11, p. 9476.]

Amendments, see footnotes, vol. 10, p. 8074, historical note, vol. 14, p. 11607, vol. 21, p. 17472.

Notes of Decisions

Volume 10—p. 8074; Volume 11—p. 9477; Volume 12—p. 10416; Volume 13—p. 11085; Volume 14—p. 11607; Volume 15—p. 12218; Volume 16—p. 12866; Volume 17—p. 13566; Volume 18—p. 14505; Volume 19—p. 15775; Volume 21—p. 17472.

1. Construction and interpretation.—[Vols. 11-19, 21].—See also Ace Doran Hauling & Rigging Co. Investigation case, §204(b), n. 7 *Heavy;* All-American Transport, Inc.—Control and Merger case, §206(a)(1), n. 2; Bowser—Investigation of Operations case, §206(a)(1), n. 26; C & H Transp. Co., Inc. Petition for Interpretation case, §204(b), n. 7 *Heavy;* Connecticut Limousine Service, Inc. v. United States case, §207(a), n. 6 *Passenger;* Lester C. Newton Trucking Co.—Purchase—Buglio case, §5(2), n. 115; May Trucking Co. v. United States case, §17(3), n. 1a; Passenger Transportation in Special Operations case, §211(b), n. 30, and §208(c), n. 3; Southwest Freight Lines Ext.—Removal of Restriction case, §207(a), n. 10, supra; Zuzich Truck Lines, Inc., Investigation of Permit case, §212(c), n. 5, infra.

The Commission's conclusion, in its investigation proceeding, that terms of certificate in issue are not patently ambiguous and that, therefore, the certificate must be construed in accordance with language therein without considering any matters antecedent to its issuance, is without a rational basis in the record. The Commission found that certificate granting general commodity authority and describing geographical scope thereof in two sub-paragraphs, each indented from (and placed below) the granting clause, conferred two separate operating rights that could be tacked at common points; however, there is another equally (if not more) reasonable interpretation of the authority that reasonably could be adopted, i.e., that the two sub-paragraphs, each of which permit service from and to certain points and places, merely modify a single right—the authority to transport general commodities. Hence, conceding *arguendo* that the Commission's interpretation is a reasonable one, and concluding that interpretation as a single right is also a reasonable one, then by any plain use of the English language, considered certificate is "patently ambiguous".—Akers Motor Lines, Inc. v. United States, 286 F. Supp. 213 (219-22)*.

The court is not displacing the Commission's choice of two reasonable interpretations of the certificate with its own preference; rather, it is the existence of two conflicting, but plausible, constructions which creates sufficient ambiguity in the certificate terms to warrant holding that the Commission's finding of no patent ambiguity was erroneous, and that such finding was arbitrary, capricious, and constituted an abuse of agency discretion. Furthermore, since the Commission's interpretation permits a cross-haul service for which no need was shown, and since it discontinued the investigation without determining whether the certificate could be modified because inadvertently issued, the Commission acted in disregard of its statutory mandate. Reversed and remanded with instructions to (1) examine administrative history of, and determine scope of authority conferred by, considered certificate and (2) decide whether inadvertent issuance thereof illegally enlarged the scope of carrier's authority.—Id., pp. 222-3, 226.

In suit to set aside the Commission's decision on further consideration, following remand in 251 F. Supp. 526, wherein it found that plaintiff's certificate was clear and unambiguous on its face and that territorial description therein "Between points in Connecticut, Pennsylvania, New Jersey, and New York within 100 miles of Columbus Circle, New York, N.Y., ***" did not permit it to serve any points or places in those four States which are more than 100 miles from Columbus Circle, the Commission improperly concluded that disputed language of the restriction "within 100 miles of Columbus Circle" involved technical terms of art, interpretation of which was subject to its own peculiar expertise. As a matter of grammatical construction, there can be no question but that the 100-mile provision applies only to New York; and whether under rule of grammar designated as "Doctrine of the Last Antecedent", or as a matter of simple common sense, absence of a comma after first reference to "New York" clearly indicates such interpretation of authorized base territory described in plaintiff's certificate. Commission order at issue is set aside and enjoined.—T. I. McCormack Trucking Co., Inc. v. United States, 289 F. Supp. 39 (40-42)*.

In suit to enjoin enforcement of Commission decision as an unreasonable interpretation, on its face, of plaintiff's certificate, nothing of record marks as clearly erroneous the Commission's finding that language in the certificate limited commodities authorized to road-building machinery and equipment and, thus, plaintiff's authority to transport "road building machinery and equipment which because of size or weight requires special equipment" permits it to transport only such machinery and equipment which is identified with road construction and which, because of size or weight, requires the use of special equipment. Evidence in initial proceeding on application of plaintiff's predecessor clearly shows that road-building machinery and equipment, not complete heavy-hauling, authority was sought and granted. And the Commission's application of its "intended use" test, i.e., that the machinery and equipment be intended for use in road construction, was not unreasonable, arbitrary, impractical, or inappropriate to the issues involved. Injunction denied, previous issued restraining order dissolved, and Commission decision sustained.—Heavy Duty Haulers, Inc. v. United States, 293 F. Supp. 879 (882-6)*.

The Commission's interpretation of plaintiff's certificate (Part B) to transport "Buildings, complete, knocked-down, or in sections, * * * materials, * * * and when shipped with such buildings, accessories used * * * ", as not authorizing it to transport considered independent shipment of ornamental iron columns is supported by a rational basis of record. Part B of the certificate is limited by the "intended use" restriction, a commodity description technique used by the Commission as a practical necessity whenever use of specific names or generic terms to identify commodities to be transported would prove impractical; and, as the authority is clearly limited, restricted, and characterized by the phrase "buildings, complete, knocked-down, or in sections" and cannot reasonably be construed as "building(-) *** materials" generally, the materials plaintiff transports must be related to either "buildings" or "pre-fabricated and precut buildings or houses" (Part A of the certificate), or be so destined.—Pre-Fab Transit Co. v. United States, 306 F. Supp. 1247 (1251)*.

Plaintiff's reliance on earlier decision of the court as authority under Part B for its transporting building materials generally, such as ornamental iron columns, is misplaced. That decision held that plaintiff could transport independent shipments of building materials which were intended to be used as a part of some determinable building in the future; but deciding that it could haul building materials (including component parts) for transportable buildings independently—not as part of same shipment—of the entire building, however, is not the same as holding that it has authority to haul "building materials" generally. And measured by entire context of plaintiff's certificate, the Commission's finding that the ornamental iron columns in question constituted "standardized building material" in general was, under the circumstances, the only reasonable conclusion to be reached. Therefore, since on the record the Commission properly and reasonably decided the issues presented, its decision is sustained.—Id., pp. 1250, 1251-2.

While only condition specified for revoking or modifying a certificate under §212(a) is "willful failure to comply" with applicable law or a lawful Commission order or regulation, both court and Commission decisions recognize that the Commission has inherent power to correct an obvious injustice by revoking or modifying a certificate obtained by fraud or misrepresentation or inadvertently issued. Plaintiff's ostensibly restrictive amendment actually broadened scope of its application; thus, when that amendment (accepted after notice of application was published) was incorporated into the certificate without republication of notice, intervening defendants who had no notice of the amendment could not have anticipated that the certificate would enable plaintiff to operate in competition with them; lack of proper notice deprived interveners of the opportunity to appear in opposition to the application and, therefore, the Commission had inherent power to correct the obvious injustice. A broadening amendment having been incorporated therein without notice to competing carriers, the Commission had the power to cancel plaintiff's certificate and issue the modified one; it correctly exercised such power; sustained.—Carl Subler Trucking, Inc. v. United States, 313 F. Supp. 971 (976-7)*.

The Commission had jurisdiction to act on carriers' complaint requesting investigation into alleged unlawful operations under certificate which one plaintiff (defendant) was seeking to transfer to the other and, also, that such certificate (if transferred) be corrected to show that carriage of general commodities was not authorized between named Montana points. Plaintiff's argument that the Commission lacked grounds for an investigation under §212(a), as the complaint did not specify any illegal operations, is based on cases involving certificate revocations but, in instant case, there was no revocation; the Commission's decision withdrew nothing from plaintiffs which they legitimately had. Also, as noted in 358 US 133, correction of inadvertent ministerial errors is authorized by §17(3); and it is well settled that the Commission may review mistakes due to inadvertence. The Commission specifically found that patent ambiguity in considered certificate was due to inadvertent ministerial error and it was justified in reviewing the certificate. Thus, the court can find no jurisdictional deficiency.—Lund v. United States, 319 F. Supp. 552 (555-6)*.

The Commission concluded that the certificate should be modified because portions thereof were ambiguous, never intended to be authorized, and were the result of inadvertent clerical error; and the reviewing court is bound by the Commission's interpretation of an interstate certificate unless it is capricious or arbitrary, constitutes an abuse of discretion, or violates a principle of law. Congress placed the task of construing a certificate upon the Commission and such construction will not be disturbed unless clearly erroneous. The Commission was not in clear error when it found an ambiguity on the face of certificate in question; indeed, litigants' arguments express a manifest ambiguity in language used therein; and, since neither interpretation of the general-commodity authority is without some merit, the Commission properly reviewed original "grandfather" proceedings to decide the extent of authority intended to be granted. Review of the record discloses no error in the Commission report regarding the originally intended grant of general-commodity authority or in the order correcting and modifying the certificate transferred; sustained.—Id., pp. 556-8.

The courts have recognized the Commission's power to interpret certificates it has issued in the light of its own standards and industry usage. And in instant case, the Commission was interpreting plaintiff's certificates with reference to a long-existing regulatory scheme and industry usage when it concluded that certificated authority to transport "complete buildings" and "prefabricated buildings" did not authorize plaintiff to transport single-unit mobile homes, and required it to cancel its tariff rates on mobile homes; the Commission's action in that regard was proper. The substantial evidence of an historical, both industrial and regulatory, distinction between mobile housing—exemplified by house trailers—and prefabricated, sectionalized buildings designed to be permanently erected at delivery site, supports the Commission's finding that there is a valid distinction between the terms "mobile home" and "prefabricated building" as used in commodity description of the authority granted. The Commission's order is founded upon substantial evidence and is sustained; temporary restraining order dissolved and complaint dismissed.—Pre-Fab Transit Co v. United States, 321 F. Supp. 1147 (1150-2)*.

The interpretation of a certificate it issues is properly with the Commission, not the courts; and such interpretation is binding on the courts unless it is capricious or arbitrary, constitutes an abuse of discretion, or departs from established legal standards. Plaintiff's "grandfather" certificate, granting authority between Vichy, Mo., and International Stockyards, Ill., explicitly states that the general-commodity authority is (eastbound) from Vichy to International Stockyards; in addition, it granted specific commodity authority from International Stockyards to Vichy, and authorized service to and from named intermediate points. Under the Commission's construction of the language used, considered certificate does not authorize westbound transportation of general commodities; and, though a different interpretation of the certificate is possible, the Commission's interpretation is a reasonable one and is neither capricious nor arbitrary.—Beaufort Transfer Co. v. United States, 324 F. Supp. 649 (652-3)*.

Also, there was no abuse of discretion in the Commission's denial of the petition to modify the "grandfather" certificate so as to authorize westbound transportation of general commodities. The Commission found, and plaintiffs agree, that the certificate is not ambiguous; and, in analyzing the material available, the Commission further found that it had not in fact originally intended to grant general-commodity authority other than for eastbound movements. Therefore, plaintiffs having failed to demonstrate that the Commission's decision is arbitrary or capricious or not in accord with the applicable law, the complaint is dismissed.—Id., pp. 652, 653.

Where the Commission, in issuing motor carrier certificate, intended to include all authority applied for and the carrier's outstanding authority, any other interpretation would be invalid, and limits of the grant are not clearly defined, authority granted should be interpreted as intended. Accordingly, when the Commission combined two such authorities and issued the carrier a certificate to operate "between Centre, Alabama and Atlanta, Georgia, serving all intermediate points between Centre, Alabama and Rome, Georgia, including Rome," as intended, the certificate conferred authority to transport cargo (1) between Centre and Rome and (2) between Centre and Atlanta, provided that (a) cargo originated in Atlanta go directly to Centre before being delivered to intermediate points between Centre and Rome (including Rome), (b) cargo terminating in Atlanta come directly from Centre, and (c) cargo originating at points intermediate to Centre and Rome (including rome) destined for Atlanta is transported first to Centre and then directly to Atlanta.—Georgia Highway Exp., Inc. v. United States, 331 F. Supp. 906 (911-12)*.

On review of Commission decision that plaintiff's heavy-hauler certificate does not authorize it to transport 500- and 750-pound bombs on pallets each of which, when loaded, weigh over 3,000 and 1,700 pounds, respectively, the question for the court is whether the agency findings and order are arbitrary, capricious, or unsupported by substantial evidence. The reviewing court is bound by the Commission's interpretation of its own certificate unless it is clearly erroneous or insufficiently supported in the record. Due to the Commission's informed and time-tested expertise, it is the natural one to interpret a certificate which it has issued; and it is free to draw upon its accumulated experience to assist it in reaching a decision. On careful examination, the evidence is convincing that all of the Commission's findings of fact, on further hearing, are fully supported by substantial and credible evidence of record, are not arbitrary or capricious, and are not dependent on any presumption as such; sustained.—International Transport, Inc. v. United States, 337 F. Supp. 985 (991, 994-7, 1001-2)*.

In addition, since plaintiff's heavy-hauling certificate has been properly found not to include authority to haul the palletized 500- and 750-pound bombs, nothing has been taken from it that it ever possessed; and since nothing has been taken away from plaintiff, there was no violation of the §212(a) procedure that must be used if a carrier's certificated authority is to be lessened. Nor is plaintiff deprived of due process of law where the Commission has not changed or narrowed its certificate under the guise of interpretation to deprive it of something it once had; and the facts of record fail to show that there has been a partial revocation of plaintiff's authority. Therefore, it is not contrary to law for the Commission to interpret its certificates in the manner it employed in considered case.—Id., pp. 1000-1.

Structuring and interpreting a motor carrier certificate is an exercise of the Commission's special expertise. A presumption of validity attaches to such exercise of expertise, and those who would overturn the Commission's judgment take on heavy burden of proving that it is invalid because it is unjust and unreasonable in its consequences; thus, in absence of exceptional circumstances, the Commission's interpretation of a certificate issued by it will not be overturned. Function of the reviewing court is limited to ascertaining whether there is warrant in the law and facts for the Commission's action. Substantial evidence of record supports the Commission's judgment that, since its certificated authority to serve "points in . . . North Carolina" is territorially limited and does not allow service at points beyond prescribed limits, plaintiff could not serve Chesapeake, Va., which is beyond the limits authorized in its certificate. Therefore, Commission cease-and-desist order is upheld; temporary restraining order is dissolved; and action dismissed, with prejudice, at cost of plaintiff.—R-C Motor Lines, Inc. v. United States, 350 F. Supp. 1169 (1171-2, 1174)*.

The Commission will not go behind a certificate which, after applying the usual rules of grammar and punctuation, is found to be clear on its face. Since the respondent's certificate contains a modifying heavy-hauling restriction which follows the last antecedent "boats" and is not preceded by a comma, only term "boats" is qualified by the restriction. Such interpretation is consistent with the usual rules of grammar and punctuation. A contrary interpretation requires a strained and illogical construction and would necessitate resort to matters extrinsic to the certificate.—Road Paving Materials Between Points in New England, 329 I.C.C. 199 (203)*.

Although questions were raised at the hearing on Canadian carrier's application for motor carrier authority from certain United States points to ports of entry near Buffalo, N.Y., respecting the scope of one protestant's authorized operations within Canada, it would be manifestly improper for the Commission to presume to determine the scope of such operations; that is a matter for the Canadian authorities.—Balazs Commom Carrier Application, 95 M.C.C. 631 (636)*.

The cardinal rule in interpreting motor carrier authority is that the certificate must speak for itself. Consideration may properly be given to circumstances surrounding authority granted only if the authority itself is patently indefinite or ambiguous. Since the wording of applicant's present permit makes it unclear whether radial or nonradial operations were to be authorized, the permit was patently indefinite and unclear and the proceedings underlying its issuance must be examined. In the prior proceeding, applicant sought authority to transport construction materials between railheads, in named states, on the one hand, and construction sites in same states, on the other hand.

Therefore, it is clear that, even though the words "on the one hand" and "on the other" were left out, authority intended was for radial operations between railheads and construction sites actually served and no service was authorized outside the named states.—Contractors Cargo. Co.—Extension, 96 M.C.C. 306 (310-12)*.

An interpretation of authority has the effect of delineating the transportation which the Commission intended could be performed; thus, such an interpretation, unless "clearly erroneous," cannot be construed as constituting a revocation of authority. Since the courts have already concluded that the Commission's interpretation of Dillner's authority is not erroneous, it is clear that its operating rights have not been revoked improperly, and its argument to such an effect amounts to a collateral attack on 79 MCC 335, sustained 193 F. Supp. 823, and need not be considered further.—W. J. Dillner Transfer Co., 99 M.C.C. 485 (488).

Since Commission's power to revoke, suspend, etc., under §212(a) is corrective, rather than punitive, this section charges the Commission with choosing the proper remedy to effect the remedial objectives of the Act. Here the majority concluded that since respondent had engaged services of experienced motor carrier consultant in apparent good faith attempt to achieve compliance with previously entered cease and desist order and had instituted certain remedial measures, a 30-day suspension of respondent's considered operating authority, would be best suited to bring about remedial action.—Querner Truck Lines, Inc.—Investigation, 100 M.C.C. 215 (220-1).

Defendant's certificate authorizes service at "points in Pennsylvania east of the Susquehanna River;" and in order to provide a convenient delineation of the authorized service area, the branch of the Susquehanna River referred to must be the Sayre-Slate Hill Susquehanna, which clearly bisects the State into east and west portions, because the other branch [West Branch] runs primarily east and west and, unless coupled with other geographical features such as highways, county lines, or the like, cannot be used to define any clear-cut territorial boundary.—AAA Trucking Corp., Inc. v. Burgmeyer Bros., Inc., 100 M.C.C. 470 (474).

Moreover, the irregular-route operating rights in defendant's certificate are multiple grants of authority. If considered certificate described a single grant in separate paragraphs it would be usually because the base area for the outbound radial authority is smaller than, and usually included within, a larger base area for corresponding inbound authority, necessitating a separate description of each; however, such is not true of considered authority and therefore, since outbound radial areas are completely different, two separate authorities are granted which may be tacked.—Id., p. 475.

Respondent's commodity authorization for "packinghouse products, and supplies, restricted to items incidental to and directly connected with the business of the slaughtering of animals and the preservation and sale of meats but not including dairy products" is clear and unambiguous on its face. The restrictive phrase applies to both "packinghouse products" and "supplies"; while the phrase "the business of the slaughtering of animals and the preservation and sale of meats," is used as a definition of, and synonymously with, the term packinghouse. Thus, considered authority should be interpreted as if it reads "packinghouse products and supplies, restricted to items incidental to and directly connected with the packinghouse business, but not including dairy products."—Commercial Freight Lines, Inc.—Investigation, 103 M.C.C. 683 (684, 686-88).

Petitioner's certificate authorizing transportation of "contractors' machinery and equipment" does not permit it to transport such machinery and equipment unless at the time of the actual transportation it is intended for use by a contractor. Although petitioner conducted operations under prior temporary authority similar to those now authorized, §210a(a) of the Act provides that such temporary authority "shall create no presumption that corresponding permanent authority will be granted"; in addition, basic procedural fairness dictates that a grant of certificated operating authority under §207 of the Act must be based on objective evidence of record. Thus, since no evidence is adduced indicating that anyone required considered transportation to be used by someone other than a contractor in the initial application proceeding, or, for that matter, in the proceedings involving the applications for temporary authority, the Commission's interpretation of the scope of petitioner's certificate has neither narrowed nor limited its scope.—W.T. Mayfield Sons Trucking Co.—Interpretation, 103 M.C.C. 736 (736,744-5)*.

It is well established that in interpreting a certificate, unless there is patent ambiguity on the fact of the instrument, the Commission may not refer to extraneous matters such as the record which gave birth to the certificate. And, while complainants argue that ambiguity is created because certain portions of defendant's authority are "descriptive" while other portions are subject to the "intended use" test, a careful analysis of considered certificate indicates that each paragraph or clause in it is readily susceptible to interpretation independently of every other.—Jack Cole Co. v. Brooks Trucking Co., Inc., 105 M.C.C. 41 (45).

Therefore, the Commission concluded that defendant's authority to transport "such commodities as are manufactured, processed, or dealt in by rubber or rubber-products manufacturers" does not limit defendant to service for these manufacturers, provided that the commodities transported are of the actual type manufactured, processed, or dealt in by such manufacturers (see 94 MCC 605.) However, those portions of defendant's certificate which include the words "used in" and/or "incidental to" require an "intended use" test, that is, it must reasonably appear to the carrier that the commodity is intended for use by a rubber or rubber-products manufacturer.—Id., pp. 45-7.

Although respondent's considered authority is restricted against combining the separate parts thereof for the purpose of performing any through service, it has combined separate portions of this authority to permit movement from a terminus on one portion to a terminus on a second portion by tacking at and proceeding through a middle point common to both portions. Respondent's position is that there is a distinction between through service, which respondent desires to equate with single-line service, and joint-line service, which allows it to combine separate portions of its restricted authority provided that it interchanges the freight involved with another carrier, which freight originates at or is destined to points beyond its authority; however, the Commission does not recognize the existence of any such distinction. The meaning of this restriction is clear and unambiguous; thus, respondent, in combining the separate portions of its certificate, has violated restriction against tacking.—Baggett Transportation Co.—Investigation of Operation, 105 M.C.C. 628 (632-3).

Although one of defendant's authorities is restricted against service at Phillipsburg, N.J., this does not prevent it from offering such service under another certificate, which is not so restricted. Separate grants of operating authorities may be combined at a point of service common to both, unless there is a tacking restriction in one or both of these certificates. Therefore, defendant may join two authorities at an authorized point of service, common to both, although this has the effect of permitting it to provide service which it has been specifically precluded from offering under one of its certificates.—Public Service Coordinated Transport v. Trans-Bridge, 105 M.C.C. 679 (680-2).

Defendant's certificate authorizes, in part, transportation of mobile-home trailers in initial movements from places of manufacture to Bourbon, Ind., to all points in the United States; it does not authorize secondary movements from Bourbon to Harahan, La. Since term "initial movements" embrances only transportation of new vehicles from place of manufacture or assembly for delivery to consignee or connecting carrier, subsequent movement by a second carrier is a "secondary movement". Movement in private carriage, equivalent to intraplant shuttling from assembly line to storage area, would not, in most cases, destroy initial character of subsequent for-hire carriage. However, considered trailers move in private carriage some 30 miles from city of manufacture to Bourbon, where no further manufacture or assembly occurs before they are tendered to defendant. The character of this private movement is "initial", and defendant's initial movement authority is insufficient to perform subsequent movement.

Cease and desist order entered.—Morgan Drive-Away v. Mid-States Trailer Transport, 105 M.C.C. 896 (900-01).

Respondent's regular-route authority, restricted to serving "all intermediate and off-route points within 25 miles of Churdan, Iowa", does not authorize service from Dennison, Iowa, and to and from Cedar Rapids, Iowa, because, although these points are intermediate points on respondent's authorized routes, they are not within 25 miles of Churdan. The adjective "intermediate" modifies the noun "points" which in turn is modified by the prepositional phrase "within 25 miles of Churdan, Iowa." "Intermediate" cannot stand alone, but must be read (and only has meaning) when considered in connection with the word "points." Thus, fact that words "and off-route" separate "intermediate" from "points" is of no consequence; it is insignificant that there is no punctuation between the words "points" and "within"; and the rule of the last antecedent is not applicable. This view does not make the words "intermediate and off-route" superfluous; the Commission traditionally uses "intermediate" and "off-route" as words describing points, other than the termini. Cease and desist order entered.—Nolte Bros. Truck Line, Inc.—Investigation and Revocation, 106 M.C.C. 330 (331-2).

Applicants' general commodities authorities, restricted against the transportation of "articles of unusual value," permit the transportation of commodities of "high value" including considered aerospace parts and items, chemicals and dyes, communications equipment, drugs and pharmaceuticals, electric and electronic equipment and components, fabricated metal products, industrial control equipment, optical and photographic equipment and materials, radio and tape recorders, refractory metals, and scientific equipment and instruments. Thus, since applicants can already transport considered commodities, they have failed to establish need for proposed authority.—Garrett Freightlines, Inc.—Modification, 106 M.C.C. 390 (400).

The Commission's and the transportation industry's past usage distinguishes between articles or commodities of "unusual value" and "high value" articles or commodities. "Articles of unusual value" embraces the concept of both service and value, see 95 MCC 551; the value involved is an "intrinsic value" based upon rarity, high monetary value (both in permanence and marketability), and legal usage or negotiability and exchangeability in channels of commerce. Such a description does not include, per se, those articles in commercial, educational, industrial, or scientific usage named by supporting shippers which merely have a "high" monetary value; similarily, although fabricated metal products might be "high value" products, they are not necessarily "unusual value" products. Furthermore, while iridium, osmium, paladium, rhodium and ruthenium are "precious metals," they have not been shown to have the negotiability and exchangeability of other more common precious metals, and therefore, they have not been shown to be "articles of unusual value."—Id., pp. 398-9, 400.

In accordance with §208(a), and with the Commission's duty to review its past actions in order to correct any which—through changing conditions—have become out of gear with public need, the public convenience and necessity require removal (on a national scale) of "truckload lot" restrictions from all outstanding certificates; also, such restriction being imprecise and having become onerous, removal thereof is in the public interest and consistent with the national transportation policy. Therefore (in lieu of physical reissuance of each affected certificate at this time), for reasons of efficiency and economy, "truckload lot" restrictions with or without additional weight provisions henceforth will, by appropriate rule, be considered as having no force or effect, and their excision from existing certificates will be accomplished on subsequent administrative reissuance of those certificates, should such reissuance occur.—Removal of Truckload Lot Restrictions, 106 M.C.C. 455 (480, 493-4)*.

No sufficient or proper cause exists for the invalidation of respondents' state certificates registered under §206(a)(7) of the Act since the investigation proceedings disclose that while respondents' operations were unauthorized, they were conducted under color of right and in good faith, without intent to deliberately flout the statutory requirements.—Imperial Truck Lines, Inc.—Common Carrier Application, 106 M.C.C. 741 (751).

Petitioner seeks to have its heavy machinery "grandfather" authority either construed according to what was intended to be granted, revised to conform to what should have been granted, or enlarged by a grant of additional authority based upon a showing of public convenience and necessity. In the early days of federal motor carrier regulation, commodity descriptions set forth in certificates then granted to heavy haulers were not uniform. The Commission, in 2 MCC 703, identified heavy haulers as carriers of heavy machinery which description lacks precision and is susceptible to differing interpretations, Therefore, the Commission may review the records in which this type of authority was granted in order to determine whether the authority encompasses all services performed and all commodities transported by applicant during the grandfather period or whether a need for such service has been demonstrated by shippers, and to modify certificates to reflect the service that was initially intended to be granted.—Jetco, Inc., Investigation & Revocation, 108 M.C.C. 498 (501-03)*.

Respondent excepted to the lack of clarity in the definition of household goods and argued that the unauthorized transportation of new fixtures had been conducted in good faith under its household goods authority. In 17 MCC 467, this Commission provided for the transportation by household goods carriers of, among other things, fixtures and furniture which are parts of stores, offices, and various other establishments but only when moving such fixtures and equipment of stores to new locations. Since the inception of regulation, the proper nature of the household goods carriers' transportation of new fixtures has historically been considered to be the transportation of new fixtures as an incident to a change of location of a business establishment. The definition in this respect has been unambiguous. Thus, transportation of new fixtures from places of business unassociated with removal of the establishment or a portion thereof, that is, normal repetitive transportation in regular commercial channels as performed by applicant, is not permissible under household goods authority.—American Red Ball Transit Company, Inc.—Investigation, 108 M.C.C. 774(776).

Commission concluded that the commodity description of petitioner Home's certificate reading "machinery, equipment, and supplies used in maintenance and operation of industrial plants" was equivalent to the description in petitioner H & S's certificate reading "industrial plants, and in connection therewith, machinery, equipment, and bulk stocks" although stated differently and that the record shows that each discription was originally intended to cover heavy hauler authority and that therefore each certificate should be modified so as to clarify that each petitioner holds heavy hauler authority.—Home Transp. Co., Inc.—Extension, 109 M.C.C. 137 (151-55)*.

Cardinal rule in interpreting motor carrier authority is that the certificate or permit must speak for itself. Absent the authority itself being patently indefinite or ambiguous, or errors of a ministerial nature, operating rights must be construed according to their terms regardless of what may have been intended at the time of issuance. The paragraph in certificate in question granting general-commodity authority "between the above-specified points and over the above-specified routes" follows four paragraphs granting livestock authority, first two of which grant authority between named Montana points while the last two grant livestock authority from Lewistown to Great Falls and from Lewistown to Billings; thus, with respect to authorization of general-commodity service at Lewistown, Great Falls, and Billings, it is not clear from language of the certificate whether return movements are authorized since livestock authority at those points is only for one-way movements. Consequently, there is considerable patent ambiguity in the certificate, and it is necessary to review the underlying record to determine its meaning.—Great Northern v. Stendal Transp. and Elmer's Exp., 110 M.C.C. 35 (39)*.

Review of record in "grandfather" proceedings granting considered authority to defendant Stendal Corp. shows that the Commission did not intend to authorize transportation of general commodities between Lewistown, Great Falls, and Billings, Mont.; that the only commodity applicant transported between those points was livestock; and that findings in the report did not grant applicant any general-commodity authority involving those cities. Moreover, though all of the livestock grants were erroneously placed ahead of the general-commodity authority in the original certificate, there can be no doubt that such rearrangement thereof so as to authorize an apparent service at Lewistown, Great Falls, and Billings, in carriage of general commodities, was an inadvertent ministerial error, and that such general-commodity authority was never intended to be granted. Thus, even if certificate issued to defendant Elmer's—following approval of transfer of the rights—were not ambiguous, it would have to be modified to correct the Commission's inadvertent error in the initial certificate; certificate in question corrected accordingly.—Id., pp. 38, 40-2.

The Commission has no power to enlarge any operating authority except in accordance with the standards established by the Act. To warrant the proposed modification of petitioner's certificate in the absence of evidence as to the present and future public convenience and necessity, it must be shown that such modification is necessary to eliminate a patent ambiguity or to correct a manifest injustice. At the least, it must reasonably appear that the broader grant of authority sought would more accurately reflect what should have been issued on the basis of the evidence adduced at the original hearing.—Widing Transp., Inc., Investigation & Revocation, 110 M.C.C. 106 (109-10).

Complaint alleges that defendant has been operating in contravention of a tacking restriction placed in its certificate at the time defendant purchased the authority. Restriction precludes "joinder or tacking for the purpose of performing a through service between Omaha, Nebr., Council Bluffs or Des Moines Iowa, on the one hand, and, on the other, points beyond St. Joseph, Mo." Examiner recommended that complaint be dismissed; division affirmed the examiner, finding that the described restriction does not preclude joinder at those points within the commercial zone of St. Joseph which are located outside the city limits. On reconsideration, Commission found questioned restriction capable of two reasonable interpretations. In construing motor carrier authority, consideration may properly be given to the record upon which such authority was granted and other extraneous matter if the authority is itself indefinite or patently ambiguous.—Couch Bros., Inc. v. Byers Transportation Co., Inc., 110 M.C.C. 127 (128, 131,132)*.

Defendant is authorized under both its original and purchased authorities to serve St. Joseph, Mo. and points in its commercial zone. The authority granted defendant was restricted to preclude joinder with the existing regular and irregular rights of carrier at St. Joseph, Mo., for the purpose of performing a through service between Omaha, Nebr., Council Bluffs or Des Moines, Iowa, on the one hand, and, on the other, points beyond St. Joseph, Mo. Defendant has been operating between Council Bluffs and Kansas City, Kans. by tacking at point within St. Joseph commercial zone outside the city limits of St. Joseph claiming that the restriction does not preclude such operation. On reconsideration, Commission found questioned restriction ambiguous on its face, and susceptible of two reasonable interpretations; on the one hand there is defendant's interpretation that the restriction against service at St. Joseph did not preclude tacking at points within St. Joseph commercial zone beyond municipal limits of that city, and on the other, the avowed purpose of restriction is included in certificate itself and is notice to the world of its intent i.e., to preclude any service between the involved points. Commission concluded that latter construction was the one that was intended to be imposed in the purchase proceeding in order to preclude all overhead operations between the involved points.—Id., 131,133.

The cardinal rule in interpreting motor carrier authority is that the carrier's certificate or permit must speak for itself. Following judicial remand in 298 F. Supp. 39, Commission finds, in accordance with the district court's decision, that the qualifying phrase "within 100 miles of Columbus Circle, N.Y." applied solely to points in New York State and not to those in Connecticut, Pennsylvania, and New Jersey. Thus, applicant may serve all points in the three last named states.—T. I. McCormack Trucking

Co., Inc.—Investigation, 110 M.C.C. 499 (502-3)*.

Court's remand is based on finding that the issue is not a review of "technical terms of art" as the territorial description is nontechnical and court need not defer to Commission expertise in interpretation of certificates; and the grammatical and statutory "doctrine of the last antecedent" which states that placement of the comma in English usage as shown in applicant's certificate permits an interpretation which allows applicant to serve the broader territory which applicant claims.—Id., p. 502.

On reconsideration, recognizing that adherence to interpretive law would render totally useless many of the involved routes, it was found that the considered restriction against tacking as now framed in relation to subject routes is ambiguous and resort must be had to the underlying record to determine what authority was intended to be granted.—Consolidated Freightways Corp. of Del.—Interpretation, 110 M.C.C. 667 (669-70)*.

Applicant's contention that intermediate point authorization, because of its "specific" nature, takes precedence over, and is unaffected by, a general "territorial" restriction found not proven. Such an interpretation was specifically rejected in 54 MCC 21 and by careful study of applicant's certificate we are convinced the Commission intended a territorial limitation of applicant's authority, which limitation is unambiguous and clear in meaning.—Bi-State Express, Inc., Interpretation, 111 M.C.C. 615 (617-9).

Territorial restriction limiting applicant's operations to points south of U.S. Highway 50 deleted to allow applicant to serve involved small, rural communities which straddle said highway as these communities have traditionally experienced difficulties in obtaining adequate service and protestants face no additional competition in view of applicant's past operations under color of right.—Id., p. 619.

On petition for interpretation, Commission found petitioner's authority to transport commodities defined as "store fixtures and store equipment" cannot be construed to allow transportation without any regard to article's ultimate intended use. Such construction would actually be an extension or modification of authority without sufficient evidence and clear notice. Record of "grandfather" operations of the petitioner's predecessor provide no valid basis for relief sought in instant case.—Mural Transport, Inc., Interpretation, 111 M.C.C. 637 (641-3)*.

Applicant is a holder of *Mercer*-type authority which is an example of authorities which identify the type of commodities to be transported by reference to their intended future use. A carrier holding such authority has a duty to investigate the intended use of the commodity to be transported, if that use is not known to the carrier. To facilitate such investigations, a "rule of reasonableness" was developed in 61 MCC 666. Upon application of that rule, Commission found that transportation of plate steel does not fall within applicant's *Mercer* authority because the controlling intended use of plate steel has not been established and the commodity was not "earmarked" for use in the natural gas and oil industries encompassed in *Mercer* description.—Eagle Trucking Co.—Investigation of Operation, 113 M.C.C. 148 (152-54).

In remanding the investigation proceeding to the Commission, the District Court for the Western District of North Carolina, in 286 F. Supp. 213, had determined that certain motor common carrier operating rights held by carrier in two separate paragraphs of its certificate were patently ambiguous with respect to whether they constituted two separate grants of authority, in which case such rights could lawfully be combined with each other, or a single grant of authority, in which case such rights could not be combined; and that, therefore, the Commission, on remand, must examine the administrative history of such rights to resolve this issue. On remand, Division 1 of the Commission found that the administrative history of the subject operating rights disclosed that they constituted a single grant of radial authority; and that, accordingly, such rights may not be tacked or combined with each other.—Malone Freight Lines, Inc., Investigation of Operations, 113 M.C.C. 442 (446, 461)*.

In respondent's certificate which contains a restriction against service "between Lubbock, Tex., on the one hand, and, on the other, Clovis, N. Mex., and Amarillo and El Paso, Tex., and between Lubbock, Tex., and Hobbs, N. Mex., through Tatum, N. Mex.," the last quoted phrase found to modify only the phrase immediately preceding it, that is, against service between Lubbock and Hobbs; that the restriction prohibits movements through as well as from and to the named points; that even if respondent's interpretation were found to be reasonable, a review of the underlying proceeding which gave rise to the restriction would affirm the result reached; and that respondent may not be accorded the same rights as a bona fide purchaser for value.—Illinois-California Express, Inc.—Investigation, 113 M.C.C. 532 (534-38).

Commission concluded that §212(a) does not require the issuance of an order under §204(c) of the Act prior to a suspension of operating authority. The Memorandum of Agreement between Commission and the Department of Transportation does not and could not limit the statutory jurisdiction of either agency.—Federal Highway Admin. v. Safeway Trails, Inc., 113 M.C.C. 815 (821-2). .

The rule of the last antecedent, adopted in 89 MCC 5, 102 MCC 577, and 110 MCC 499, does not apply in the interpretation of respondent's authority, since application of the rule would require interpreting the certificate to entail a grant to transport the almost limitless commodity of "raw material", and such an interpretation does violence to logic, grammar, experience, established practice, and common sense. Therefore, all commodities named in the sentence in question are modified by the phrase "used in the manufacture of piece goods", rather than only the immediately preceding commodity named.—Skyline Transport, Inc.—Investigation & Revocation, 115 M.C.C. 807 (823-824).

Respondent's authority to transport store, restaurant, and bar fixtures and equipment does not include authority to transport generally manufactured displays, not specifically intended for use in bars, restaurants, or stores. Therefore, respondent's transportation of displays, display materials and exhibits for use at various trade shows and exhibitions was not authorized. Cease and desist order entered.—Roberts Cartage Co. Investigation & Revocation, 115 MC.C. 830 (834-39).

Following district court's instructions in 318 F. Supp. 763, Commission, on remand, considered whether a Department of Transportation (DoT) regulation prohibiting the rolling of "explosives, except barrels or kegs" precluded the commodities at issue herein (500 and 750 pound bombs) from manual handling. The Commission agrees with a written interpretation by DoT's General Counsel that these bombs are "basically round objects capable of being rolled". Additionally, undisputed testimony given by a former Army safety engineer with 24 years experience in supervising munitions indicated that rolling was regarded as an acceptable method of handling bombs of the size and weight involved. Therefore, such bombs are found capable of manual handling and are not within respondent's heavy-hauler authority.—International Transport, Inc.—Investigation, 118 M.C.C. 536 (554-55)*.

Commodity description "such commodities as are dealt in by wholesale, retail, and chain grocery and food business houses" is not limited by the "intended use" test. Although commodities embraced in descriptions such as one at issue are broad, there are limits as to scope. These descriptions neither limit the class of shippers served nor do they permit transportation of general commodities. Compare 94 MCC 605. A merchant operating as a wholesale or retail grocer may carry a line of merchandise beyond scope of petitioner's authority and thus is operating as more than a grocer. See 78 MCC 275, 282. The broad, generically described, range of commodities at issue reaches far beyond the proper scope of grocery or food business house merchandise and are not within petitioner's authority as expressed in the considered commodity description.—Russell Transfer, Petition for Declaratory Order, 118 M.C.C. 862 (865-67).

However, nonprescription medicines, such as common pain relievers, cold remedies, and other nonprescription drugs sold over-the-counter are ordinarily carried on chain grocery store shelves and we conclude that nonprescription patent medicines are included within the considered commodity description when moving in the form in which they are normally sold by such chain groceries.—Id., p. 867-68.

Many certificates, such as that considered herein, were issued in the early days of motor carrier regulation, without formal proceedings and using descriptive commodity terms which then seemed clear to all parties but which subsequently have been found ambiguous and susceptible to conflicting interpretations or which did not describe accurately the type of service the "grandfather" applicant performed. In such cases, we must look behind the certificate to determine what service was authorized. From the record of Commission proceedings and applicant's transportation history, we conclude that applicant performed services beyond those included in its certificate description of "supplies" under the belief that it held proper authority and therefore applicant's certificate should be modified as requested to reflect applicant's past transportation services.—Paffile Petition, Modification, "Grandfather" Certif., 118 M.C.C. 904 (907-909)*.

The commodity description "heavy machinery, mining equipment, supplies, and mine ores not including coal" in petitioner's "grandfather" certificate was interpreted by petitioner and his predecessor, with some justification, to embrace more than mining supplies. We agree and will therefore modify petitioner's certificate as set forth herein to reflect petitioner's past operations. This is not, however, a grant of general-commodity authority.—Paffile Petition, Modification, "Grandfather" Certif., 118 M.C.C. 904 (907-909)*.

10. Remedy of abuses, in general.—[Vols. 10, 12, 17-19, 21].—Defendant contract carrier's unlawful entry into the common carrier field was unintentional because a substantial number of the contracts which exemplified the expanded availability of its services were entered into by its predecessor, and the continued increase in their number did not constitute an abrupt change in the nature of the operation; therefore, entry of cease and desist order would not be appropriate until defendant has been given an opportunity to bring its operations into conformity with the statute. Proceeding held open for 90 days, during which period defendant may reduce the number of its contracting shippers, make application for conversion of its permit to a certificate, or present some other plan of achieving compliance with the law and the commission's regulations.—E.A. Gallagher & Sons v. Cleveland General Transport, 98 M.C.C. 356 (359-360).

In considering language of the statute in several cases, the Commission has said that its findings should not be understood as holding that a certificate obtained by fraud or misrepresentation or inadvertently issued may not be changed or revoked without §212(a) procedure. In instant case, seeking modification of previously issued certificate because petitioners had no notice of application amendment accepted at the hearing, circumstances are not present which permit a certificate to be changed or revoked under §212(a); thus, as there is no claim or suggestion of fraud or misrepresentation, the issue is whether certificate can be revoked or modified, or both, because issued without proper notice, i.e., if lack of such notice constitutes inadvertence. Examiner's apparent mistake at initial hearing in accepting amendment without providing for published notice, while not condoned, is not considered to be an inadvertent administerial error that would justify collateral attack on the certificate; once duly granted consistent with the Commission's intent, authority should not be revoked, particularly absent any certainty that, but for an apparent mistake, a different certificate would have been issued.—Carl Subler Trucking, Inc., Modification of Certificate, 99 M.C.C. 193 (196-8)*.

However, the Commission's power to correct an obvious injustice is not limited to situations envisioned by §212(a) or where a certificate or permit is obtained by fraud, misrepresentation or inadvertently issued. Thus, while a certificate issued as a result of proceedings conducted without proper giving of notice is not void *ab initio*, it is voidable by the Commission after appropriate proceedings in which the holder has been given due notice of the issues involved and an opportunity to be heard; and such procedures have been followed in instant case. Amendment of considered application, after notice of its filing had been published, broadened scope thereof and resulted in issuance of a certificate that enabled applicant to institute a new service which no competitor could have anticipated from the original notice; thus, the original lack of notice resulted in a failure of due process of law, depriving those who rely on Federal Register publication of their statutory right to notice and the opportunity to participate in the proceedings in which the certificate was issued.—Id., 103 M.C.C. 307 (310-14)*.

On reconsideration, therefore, the questioned certificate is canceled and, concurrently therewith, a corrected certificate is issued which (consistent with published notice of the application as filed) precludes service in Indiana located in the Owensboro, Ky., commercial zone. However, in order to give applicant all possible opportunity to show that it should be authorized to continue rendering service through those Indiana points, notice of such proposed operation will be published in the Federal Register and the proceeding assigned for further hearing on the question of need for such operation.—Id., pp. 315-17.

Statute does not limit Commission jurisdiction in petition for reopening of eight §5(2) proceedings (wherein respondent Greyhound acquired passenger rights encircling petitioner) and for a general supplemental order requiring, in effect, that Greyhound abide by its commitments which the Commission relied on in approving the acquisitions. As Greyhound is not charged with operations contrary to its certificates, and certificates are not the sole measure of legality of its activities, its argument that to order it to cease actions which are not unlawful *per se* would be to modify or revoke its certificates, contrary to §212(a), is not relevant or correct. Certificates are not licenses to destroy a competitor, when it suits holder's interest, by practices that are opposite to commitments made to secure them. Also, even if not unlawful *per se*, actions may be unlawful when they are part of a plan to restrain commerce; and if false statements are willfully made, a certificate may be revoked without resort to §212(a). Greyhound's failure to abide by its commitments, without sound reason, justifies §5(9) supplemental proceedings which, though the certificates were issued 10 years earlier, are not contrary to §212(a).—Mt. Hood Stages, Inc.—Petition for Modification, 104 M.C.C. 449 (455-8)*.

Respondent's failure to provide a direct-line service of less-than-truckload shipments from and to 366 named points found to constitute failure to provide a reasonably continuous and adequate service in violation of §216(b) and the terms of its certificates even though respondent claims its service is satisfactory to the shipping public. Respondent ordered to institute continuous and adequate service within a specified term.—T.I.M.E.—D.C., Inc.—Investigation & Revocation of Certs., 113 M.C.C. 897 (900-02).

15. Change of status.—[Vols. 10-15, 19, 21].—Although §203(a)(14) uses the terms regular and irregular routes, nowhere is regular- and irregular-route carriers defined, or the identifying characteristics of either set forth in the Act; and while the statutory dichotomy was recognized and generally described at the inception of federal motor carrier regulation, no attempt was made to trace definitely a line of demarcation between the two types of service until 47 MCC 23, in which the Commission enunciated 8 specific guidelines for use in distinguishing between the two. Noting the tendency of irregular-route carriers of general commodities or of a wide range of diverse commodities to evolve into regular-route operations between certain terminals, the Commission imposed the duty on irregular-route carriers in such circumstances either to check this tendency by preserving their status or to obtain appropriate authority for the conversion.—Midwest Motor Exp., Inc., Extension, 96 M.C.C. 402 (407).

20. Abandonment, generally.—[Vols. 10-15, 17-19, 21].—Respondent found to have failed to provide a continuous and adequate service and to have discriminated against interline and l.t.l. traffic. Evidence showed that respondent refused to accept interline traffic in 1968 and 1969 and also had refused interline shipments under 10,000 pounds. Financial difficulties found to be no excuse for a cessation of operations. Compliance and cease and desist order entered.—A.C.E. Freight, Inc.—Investigation and Revocation, 115 M.C.C. 96 (103).

25. Revocation of authority.—[Vols. 10-19, 21].—See also Brinke Freight Forwarder Application, at §410(c), n. 35; Greyhound Lines, Inc., Ext.—Grand Canyon, at §5(2),

n. 110 revocation; May and Pearson—Modification of Certificate, at §205(e), n. 10; Mt. Hood Stages, Inc.—Petition for Modification, at §212(a), n. 10; and Pacific Intermountain Exp. Co.—Investigation, at §216(b), n. 550.

Revocation or cancellation of petitioner's registration of its Massachusetts certificate under the second proviso of §206(a)(1), because of finding that it has used that authority in performing an unauthorized freight forwarder operation, cannot be accomplished in a proceeding on petition for declaratory order, but only in a proceeding brought for that purpose under §212(a).—Bab Transfer, Inc., Petition for Declaratory Order, 323 I.C.C. 574 (599).

Certificate of a motor common carrier authorized to transport passengers moving on a through rail ticket between named points revoked on carrier's own petition inasmuch as the involved rail service has been discontinued and further motor carrier operations are neither possible nor required by the public convenience and necessity.—Kansas City S. Ry. Co. and Louisiana & A. Ry. Co., 334 I.C.C. 807 (809,823).

Although the record is clear that the defendant has been violating Wisconsin regulations, these violations have not been shown to be willful or of a sufficiently serious nature as to warrant formal compliance action or revocation of its authority to operate in that State. Defendant has initiated many improvements in its safety and compliance program; has increased its field inspectors as well as its office staff; established an inspection terminal at Chicago for checking the compliance of all equipment entering the State of Wisconsin; and has obtained an agreement with that State's officials for immediate notification of all violations of the kind dealt with here. In view of the above considerations, especially the subsequent reduction in safety violations during 1963, no formal compliance action is required at this time.—Wisconsin Public Service Comm. v. Ace Doran, 96 M.C.C. 347 (356).

Although applicant has brought itself into compliance with §215 of the Act, its permit should be revoked as it has not operated as an actual contract carrier for over three years since the cancellation of its contract with the Great Atlantic and Pacific Tea Company in October 1964. Moreover, its authority to carry cement and carbon dioxide has been dormant for 9 years or more, and it has made no attempt to revitalize these latter operations. Since the cancellation of its groceries contract respondent has disposed of most of its equipment and its solicitations of shippers in this category have gone unrewarded. It appears unlikely that there will be a need for the resumption of such transportation service in the future. Under these circumstances there are no mitigating factors which would indicate that respondent is affected by a mere temporary inability to negotiate a contract with a potential shipper. Accordingly, applicant is found to have ceased to engage in the business of transportation as a contract carrier.—Kenny Transfer—Revocation of Permits, 107 M.C.C. 81 (82-4).

By statutory definition a motor contract carrier has an obligation which requires that it "engage in transportation" rather than merely holding itself out to transport; the Commission may call upon both common and contract carriers who cease to engage in the business specified in their authority to resume such business upon penalty of revocation.—Id., p. 83.

Although a sound beginning had been made, control by another carrier failed to reverse the decline of respondent and the reestablishment of it as a competitor. Therefore, respondent should demonstrate the sustained performance of service throughout its system of a quantum, quality, and consistency clearly indicative of its capacity to effect future compliance with the Act. If respondent's efforts should not prove effectual Commission could revoke its certificates without instituting a new investigation. Order entered directing compliance for 3 years in which period reports will be submitted at the close of each 6-month period describing efforts at such compliance.—A.C.E. Freight, Inc.—Investigation and Revocation, 115 M.C.C. 96 (102).

27. Suspension of authority.—[Vols. 15, 16, 18, 19, 21].—Although respondent's continued violations of the Commission's leasing regulations and violations of §206(a) in performance of unauthorized transportation demonstrate either intentional disregard of, or plain indifference to, the regulations and compel conclusion that it is in willful noncompliance with the Act and regulations thereunder, the Commission is reluctant to suspend respondent's certificates at this time because of the somewhat stale nature of the record, the last compliance or road check shown having been made almost a year prior to hearing on investigation. Moreover, respondent has recently undertaken a program a realign its operations. For these reasons, respondent's certificates will not now be suspended, but the proceeding will be held open to allow the Bureau of Inquiry and Compliance to petition for suspension or revocation if future compliance is not forthcoming or sustained.—S & C Transport Co., Inc., Investigation and Revocation, 96 M.C.C. 642 (646).

On finding that respondent had willfully failed to comply with Commission's cease and desist order by continuing to engage in unauthorized transportation of certain commodities in interstate commerce in violation of §206(a) of the Act and by continuing to disregard specific sections of safety regulations, all operations under considered certificates suspended for 30 days, affording respondent opportunity to bring its procedures and operational equipment within acceptable requirements prior to the resumption of operations.—Querner Truck Lines, Inc.—Investigation, 100 M.C.C. 215 (221). [But see dissent].

Upon investigation of a complaint by the Federal Highway Administration, the Commission suspended defendant's certificates insofar as they authorize charter or special operations for thirty days for willful failure to comply with rule 395.3(b) of the Motor Carrier Safety Regulations. Commission rejected complete suspension because of the probable adverse effect on persons who rely upon daily intercity regulated service when weighed against the remedial effect of a complete suspension.—Federal Highway Admin. v. Safeway Trails, Inc., 113 M.C.C. 815 (822-8).

30. Amendment of certificate or permit.—[Vols. 12-19, 21].—See also Atlas Van Lines, Inc., Extension, at §207(a), n. 28 elimination; Cole's Exp. Route Conversion Application, at §207(a), n. 28 change; Great Northern v. Stendal Transp. & Elmer's Exp., at §212(a), n. 1; Southwest Freight Lines Ext.—Removal of Restriction, at §207(a), n. 6 truckload; and Zirbel Transport, Inc., at §204(b), n. 7 building materials.

The Commission had authority to grant carrier's petition for modification of its initial-movement authority to transport automobiles (from Detroit manufacturing plant to Texas points) to include secondary movements of its former traffic shipped part way by rail from the plant. The procedure established in 91 MCC 935, which was approved in 235 F. Supp. 250, was followed; and the modification order was based on the Commission's recognition of fact that TOFC and MLRC methods of movement had caused substantial trend from motor to rail shipment and on carrier's showing as to its loss of revenue resulting from the manufacturer's switch to rail movements. While considered order was issued without a hearing and a finding of need for the secondary-movement authority, nothing in the record indicates that the Commission failed to consider all available relevant evidence; also, plaintiff has failed to show what relevant testimony, if any, it would have offered if the Commission had granted oral hearing. Complaint dismissed and Commission order allowed to stand.—United Transports, Inc. v. United States, 245 F. Supp 561 (563-5)*.

For the same reasons set out in 245 F. Supp. 561, the Commission's order under review in another case involving identical issues, and consolidated for trial with the cited case, which granted modification of petitioner's initial-movement authority to transport trucks and other motor vehicles (from manufacturing and assembly plants to twenty-seven State area served by petitioner) to include secondary movements of its former traffic which manufacturer ships part way by rail, is sustained. Complaint dismissed.—Id., 245 F. Supp. 570 (571-2)*.

It is clear that the Commission has statutory power—and the duty—to modify certificates issued improperly through inadvertent error on the part of its staff. Similarly, while properly issued certificates cannot be modified under the guise of interpretation, the Commission can, by interpretation, declare the authority inhering in a certificate at the time of its issuance.—Akers Motor Lines, Inc. v. United States, 286 F. Supp. 213 (223)*.

Inasmuch as the original Commission decision in defendant carrier's application proceeding became final with the issuance of a certificate of convenience and necessity therein, the Commission was thereafter without jurisdiction or authority to modify that certificate merely on the basis of a change of policy which it may have subsequently adopted. Therefore, since the Commission's order on reconsideration and the revised certificate, issued on authority thereof, constituted changes based wholly on a change of policy, order of the Commission under review, granting certain changes in defendant carrier's certificate, is annulled and set aside.—Garrett Freightlines, Inc. v. United States, 324 F. Supp 575 (575-6)*.

On further hearing, the Commission had authority to modify plaintiff's certificate to include a "single plantsite" rather than "mixed load" restriction, under the law and the court's order remanding prior decision because competing carriers were not given proper notice and hearing as to the consequences of Commission substitution of a "mixed load" restriction for "multiple pick-up and delivery" restrictions in the application, as published, in granting greater authority than that sought. The court's mandate is mute as to what action, if any, the Commission could or should take if it set aside the "mixed load" certificate; thus, since the action taken is neither prescribed not proscribed, the Commission had authority and power to modify the certificate as it did on rehearing. In fact, the court intended for the Commission to re-examine the "mixed load" certificate in light of all the circumstances, particularly those developed on rehearing, and to take whatever action seemed appropriate; the Commission has done so. Sustained.—Greenstein Trucking Co. v. United States, 343 F. Supp 194 (195-7, 200)*.

Modification of contract carrier's permit for transportation of residual fuel oil, presently restricted to service for a single named shipper, to authorize performance of same service between same points for two additional shippers specified, is warranted when it is already serving those shippers between other points and modification sought will not increase the number with which it has contracts or otherwise affect its status. No other motor carrier in the area can provide those shippers with the personalized service required, except one whose route would be circuitous, and petitioner's proposed operation will serve a useful public purpose responsive to their distinct needs.—Kendrick Cartage Co., Extension, 95 M.C.C. 366 (368-9).

Petitioner Strang, on the basis of its, and its predecessor's, past unauthorized operations as well as shipper support, has established need for modification of its operating authority to transport "grain and animal feeds;" however, as Strang is reluctant to relinquish unrestrictive parts of its present authority, considered modification includes only those commodities which serve to enlarge Strang's present authority and omits duplicating any authority already authorized. Therefore, grant to Strang is for authority to transport "poultry feed and animal and poultry feed ingredients (except grain)," instead of requested authority for "animal and poultry feed and animal and poultry feed ingredients."—Strang Transp., Inc., Modification of Certificate, 99 M.C.C. 364 (367-8).

Description of authority in petitioner's certificate amended to include "sound recording, sound reproduction, and sound amplifying equipment, parts and supplies used in connection with *** photographic equipment, parts, acessories, materials, and supplies" because the original description in the certificate as employed, and as subsequently interpreted by the Commission, did not authorize the complete service required and then intended by the Commission to be granted and because supporting shipper demonstrates present need for such complete service.—I.L.&C. Corp. Petition for Modification of Certificate, 99 M.C.C. 400 (402-4).

In seeking modification of its certificate, it is incumbent upon petitioner to indicate in what manner it is being prejudiced by the present wording of the certificate and to give reasons for the requested change. This petitioner has not done and in the absence of any factual or legal basis for reinserting the disputed comma in petitioner's certificate the requested relief should not be granted.—

W. J. Dillner Transfer Co., 99 M.C.C. 485 (491).

Applicant, a wholly-owned subsidiary of the Missouri Pacific Railroad Company, sought removal of Laredo, Texas, key point, which, together with other key points, had been imposed on its motor carrier authority to insure that its operations remained supplemental to those of parent railroad. In denying this modification it was pointed out that a substituted motor-for-rail operation must replace an existing rail service and that parent railroad is not now providing, in any significant sense, such service; therefore, there is no showing that a rail service is being performed for which motor service can be substituted. In addition it was noted in disposing of applicant's disclaimer of any intention to operate as an independent motor carrier that it is not what applicant intends to do that is critical, but rather, what it could do.—Missouri Pac. Truck Lines Ext.—Removal of Key Point, 99 M.C.C. 754 (759-760).

In light of the record and in order to make it commensurate in scope with applicant's current intrastate authority, applicant's certificate is amended by removing restrictions which (1) prohibit applicant from charging less than the rate applicable to a specified weight level and (2) limit applicant to transporting shipments moving from one consignor to one consignee. The record shows that these restrictions penalize shippers and prevent them from toploading larger shipments, that they have been removed from applicant's California intrastate authority, that their removal will advance the efficiency and economies of applicant's operations, and that there is a specific and convincing need by shippers for a complete service.—Miles Motor Transport System, Extension 100 M.C.C. 255 (257, 260-1).

Filing a petition for modification of existing authority is a proper and long-established practice; it is, in fact, a better vehicle for modification of existing authority than application for additional authority. Since public convenience and necessity is found in operating economics and improvements in existing service and since modification would not result in a new or substantially different service, considered authority is modified to authorize Salem to transport up to 11 passengers in a vehicle. However, as one of the most important characteristics of door-to-door limousine service is that it is not scheduled, considered authority is not modified to include scheduled operations.—Salem Transp. Co., Inc., 100 M.C.C. 373 (376-80).

Since Carter's commodity description, "heavy machinery, contractors' equipment and parts and accessories, in special equipment, in quantities of not less than 10,000 pounds", consists of several redundant terms each of which has been the subject of interpretive difficulties, and since commodity description sought more accurately reflects that which should be issued to Carter on basis of interpretation of its certificate and evidence of current shipper support and past bona fide operations, certificate clarified to read "commodities which, because of size or weight, require the use of special equipment." And although Commission is reluctant to impose proposed complex territorial limitations, they will be imposed insofar as they tend to serve public purpose in protecting existing carriers in areas where Carter has not been a competitive factor and as they are based primarily upon pre-existing conditions.—Ray Carter, Inc., Extension, 102 M.C.C. 217 (219, 221-22).

Since the limitation of limousine service to transportation of passengers having prior or subsequent movement by air is unduly restrictive, inasmuch as it prohibits the transportation of persons who wish to accompany travelers to airports, it is eliminated.—Brown's Connecticut Airport Service, Inc., Conversion, 103 M.C.C. 6 (14).

Considered certificate amended by deletion of St. Joseph, Mo., from the authorized territory, since petitioner, in absence of evidence showing otherwise, should not be compelled to continue and uneconomic and unnecessary service. The critical underlying issue is whether a present need exists for petitioner's service at St. Joseph. The lists of the numerous carriers authorized to serve St. Joseph and other points do not show precisely the qunatum and quality of motor transportation which will remain available; however, such evidence is not decisive. The absence of any opposition from shippers, receivers, carriers and others arranging for transportation clearly negates public need.

In addition, because there is limited traffic available to petitioner, there can be no finding that it has "skimmed off the cream," and there is no probative basis for concluding the shipping public will suffer by granting the partial revocation of service.—Arkansas-Best Frt., Inc., Petition for Revocation, 103 M.C.C. 621 (624-5).

Respondent's certificate modified to permit heavy hauling operations, since the record leaves no doubt that its predecessor, Arrow, was engaged in heavy hauling operations when it filed its "grandfather" application and that Arrow and its successors in interest continued to engage in such operations under color of right. In addition to the record in the original "grandfather" proceeding, the documentary material is substantiated by the independent testimony of a former manager and part owner of Arrow, and former employees of Arrow and its competitors; citing 94 MCC 120, the Commission ruled that these are qualified witnesses.—Heavy & Specialized Haulers, Inc., Investigation & Revocation, 105 M.C.C. 63 (66-7).

Considered authority modified to allow petitioner to provide service in both directions over its authorized routes. The Commission on review of the record in the grandfather proceeding and of the records in successive transfer proceedings failed to find any regulatory purpose in limiting service in the disputed manner; in fact, since said authority does not apply to shipments moving locally between New Jersey points, the limiting of petitioner's regular-route service to movements in one direction without further explanation lacks a clear rational or regulatory basis and appears to be the result of error. In addition, modification does not alter the territorial scope of the involved authority; it merely allows petitioner to render to its shippers a more economical, efficient, and expeditious service between points it is presently authorized to serve.—Tarantola Trucking Co., Inc., Modification of Certificate, 105 M.C.C. 783 (786)*.

Commodity description in carrier's certificate amended to authorize transportation of "textile factory products" in lieu of "cotton factory products." The evidence demonstrates that the two terms are virtually synonymous and that the latter term, originating when the principal fiber of the textile industry was cotton, has become obsolete with the development and subsequent increased use of synthetic fiber. Thus, considering carrier's past operations in serving the textile industry and the changing character of that industry, no basically new service is proposed, no new field of carrier operations is to be invaded, and no change is involved which will materially affect the competitive situation of existing carriers. In addition, the Commission removed the "in truckloads" restriction in Dixie's certificate on the basis of its present policy against the imposition of such restrictions, the need for less-than-truckload service, and the problems presented to shippers in their use of Dixie's existing service.—Dixie Ohio Exp., Inc. Investigation and Revocation, 105 M.C.C. 835 (843-5)*.

Petitioners herein request heavy hauler authority based on "grandfather" claims performed by their respective predecessors and continued by petitioners. Both petitioners were competitive in the same area and both adduced same evidentiary basis for their claims but the commodity descriptions in each certificate were stated differently although covering equivalent commodities. Petitioners' heavy hauling operations had been unquestioned for 30 years; documentary evidence and oral testimony also confirm that heavy hauler operations have been continuously performed since prior to the "grandfather" date. Therefore, both certificates were modified so as to reflect that each petitioner has heavy hauler authority.—Home Transp. Co., Inc.—Extension, 109 M.C.C. 137 (155-57)*.

The title and embraced proceedings arose as a result of Commission's investigation into the operations of respondent, and of a petition by respondent for clarification and modification. In the investigation proceeding, respondent was found to be engaged in unauthorized for-hire transportation under its certificate of violation of §206(a) of the Act; in the modificatio proceeding, joint board modified alleged ambiguous term "jobsite" to mean a place at which work is in progress, about to begin, or recently terminated, involving construction or destruction of improvements to real property. Respondent's movements of shipments from docksite to damsite is clearly not a movement from one jobsite to another jobsite. The fact that the Commission's interpretation of the certificate differs from respondent's is not controlling; the Commission's expertise in these matters and its construction is controlling unless clearly erroneous, arbitrary, an abuse of discretion, or in contrevention of some established principle of law; Commission's findings constitute a definitive declaration of what rights existed from the very beginning under the certificate and cannot be equated with modification; modification denied and cease and desist order entered.—Widing Transp., Inc., Investigation & Revocation, 110 M.C.C. 106 (107, 109, 110, 111).

It would be appropriate that petitioner's certificates, that authorize it to transport various motor vehicles from Warren Township, Macomb County, Mich., be modified to reflect the fact that Warren Township no longer exists as a political entity, due to its recent incorporation into a municipality known as Warren, Mich., and is now totally comprised of a city that has a commercial zone under the mileage-population formula which would include other important automotive centers. However, petitioner's proposed modification so as to authorize service from Warren is unacceptable since, like present origin area description in its certificates, the new description should be territorial in nature. Accordingly, to reflect the present nominal and political situation, each of the considered certificates is modified by substituting in lieu of the words "Warren Township, Macomb County, Mich." therein, the new territorial description set forth.—Dallas & Mavis Forwarding Co., Inc., Modification, 110 M.C.C. 253 (254).

In light of prior holdings that authority granted in early days of motor carrier regulation for "heavy machinery" was actually intended to authorize a complete heavy hauling service, amendment of petitioner's grandfather" authority to transport "heavy machinery" to authorize transportation of commodities which because of size or weight require the use of special equipment is justified by evidence that at the time of passage of the Motor Carrier Act its predecessor was transporting a variety of heavy and bulky commodities in addition to machinery and that it has continued to do so. Amended description will permit it to continue the general heavy hauling service provided in the past.—Case Driveaway, Inc., Petition for Modification, 113 M.C.C. 512 (518-20).

Petitioner's certificate is amended to include the transportation of "fresh meats", as evidence of record shows that a need for such transportation was shown but the Operating Rights Board granted authority, erroneously, to transport such "fresh meats" under commodity description of "food products" which does not cover "fresh meats" as herein defined.—Hilt Truck Lines, Inc., Petition for Interpretation, 113 MC.C. 784 (799).

Evidence of supporting shipper shows that approval of proposed modification will allow petitioner to provide a more complete service, including expedited movement of the considered traffic. Protestant lacks authority to transport significant portion of involved traffic and has not shown that its operations will be materially and adversely affected. Approved.—North American Van Lines, Inc.—Modification, 113 M.C.C. 867 (871-2).

Respondent's petition for modification of "grandfather" authority to transport stock in trade of drugstores, on basis of ambiguity, denied, since respondent introduced no evidentiary justification for enlarging the authority to general commodities and no ambiguity was present.—North Central Truck Lines, Inc., Invest & Revoca., 117 M.C.C. 180 (192).

35. Cessation of operations exceeding authority.—[Vols. 15-19, 21].—See also R-C Motor Lines, Inc. v. United States, at n. 1 supra.

While Commission order under review required plaintiffs to cease and desist from operations "of the character found in the examiner's report to be unlawful" unless authority therefor be obtained, and it would have been better form had the report capsulized elements of those unlawful operations, such elements can be gleaned from the report with sufficient clarity to give adequate directions to plaintiffs. And, though the hearing was limited to operations conducted by plaintiffs between particular points, operations of the same character between other points without authority would be equally unlawful. Framing the cease and desist order in terms of the unlawful operation wherever conducted, without limiting it to unlawful operation between specific points, does not render such order vague or invalid. The Commission's crucial findings are based on substantial evidence and record shows no error of law; complaint dismissed.—Travel & Tour Service, Inc. v. United States, 302 F. Supp. 188 (193)*.

Since, following the decision in 214 F. Supp. 34, defendant's transportation of considered large military cargo trucks in the manner described is beyond the scope of its heavy-hauler certificate, and is in violation of §206(a), an order requiring defendant to cease and desist from such operation will be entered.—United Transports, Inc. v. Gulf Southwestern Transp. Co., 95 M.C.C. 443 (449)*.

Railway Exp. Agency's extension of its intraterminal motor carrier activities at Salt Lake City, Utah, to include Tooele Ordnance Depot 36 miles away, through publication of §22 rates, exceeds the permissible limits of a reasonable terminal area; therefore, motor carrier operations conducted by defendant between those points are in violation of §206(a)(1); cease and desist order entered.—Barton Truck Line, Inc., v. Railway Exp. Agency, Inc., 95 M.C.C. 625 (627, 628-30).

On finding that respondent has been and is engaged in interstate transportation of salt in furtherance of his transportation business without appropriate authority and not in furtherance of his noncarrier business as contended, cease and desist order entered.—Johnson and Independent Salt Co.—Investigation, 96 M.C.C. 164 (172).

Record clearly shows that applicant contract carrier, by radically expanding the number of shippers it serves and by making its service available to any shipper willing to contract with it, has abandoned operations as a contract carrier and has been operating unlawfully as a common carrier without appropriate authority. In addition, it has exceeded its authorized 100-mile radius of railheads in operations in three States. Applicant ordered to cease and desist from further unlawful common carrier operations and, also, from exceeding the territorial scope of its existing permit.—Contractors Cargo Co.—Extension, 96 M.C.C. 306 (313, 317-8)*.

However, on reconsideration and further examination of the antecedents of the carrier's operations, record is not convincing that it has deliberately expanded its operations into the common carrier field without regard to the requirements of regulation. Therefore, since its past unlawful conduct is not presumed to have been willful, entry of a cease and desist order—as to unlawful common carrier operations—would not be appropriate until carrier has had an opportunity to bring its operations into conformity with the principles expressed. Complaint and investigation proceedings held open for 90 days in order to give carrier opportunity to pursue one of the courses of action outlined that are open to it.—Id., 105 M.C.C. 683 (696-705)*.

Record clearly shows that, despite respondent bus lines' agreement to interchange their equipment reciprocally for the mileage operated over each other's routes, control of the vehicles never passed from whichever respondent originated a through run; thus, such through runs may properly be characterized as operations by one carrier over the routes of another without authority in violation of the Act. Furthermore, even though respondents are now operating under common control, they will continue to exist as separate corporate entities and, therefore, their separate operations must be conducted in accordance with the commission's rules and regulations. Cease and desist order entered.—Carolina Scenic Stages—Investigation and Revocation, 96 M.C.C. 566 (571).

Inasmuch as respondent is found to have been engaged in charter operations originating at certain points not within the territory served by its regular routes, in violation of §206(a), cease-and-desist order is entered.—Arrow Stage Lines, Inc., Investigation and Revocation, 96 M.C.C. 572 (573, 574, 581).

Respondent's continued performance of unauthorized transportation and continued violations of the Commission's leasing regulations compel conclusion that it is in willful noncompliance with the Act and regulations thereunder. Cease-and-desist order entered; providing that respondent shall file with the Commission a report setting forth the manner of its compliance, and further providing that it may petition for vacation of such order at any time after expiration of 1 year from effective date thereof.—S & C Transport Co., Inc., Investigation and Revocation, 96 M.C.C. 642 (646).

Respondents' unauthorized transportation of complex rolling mill rolls and stamping dies under their "iron and steel products" authority was the result of an honest misunderstanding of the scope of their respective operating authorities; and therefore, without prejudice to their filing appropriate petitions seeking modification of their "grandfather" authorities and without finding that respondents are unfit to receive a grant of operating authority, a cease and desist order entered.—Charles J. Rogers Transp. Co.—Investigation, 99 M.C.C. 351 (358, 359).

Respondent's authority to transport (1) road building machinery and equipment which because of size and weight requires the use of special equipment and (2) road building machinery and equipment requiring special equipment, does not authorize it to transport items clearly not related to or connected with road construction work; its argument that the words "road building" modify only "machinery" and not "equipment" is without merit. Thus, considered shipments of commodities, including a boiler destined for installation in a textile mill, a dryer and parts removed from a minerals producing plant, air washer tanks for installation in a textile plant, and doll houses are clearly beyond its authority. Cease and desist order entered.—Heavy Duty Haulers, Inc., Investigation of Operations, 99 M.C.C. 578 (579-80, 84)*.

Respondent's transportation of kymane and plasticizers is not authorized under its authority to transport petroleum products; fact that a small percentage of the total composition of these products might have been derived from a recognized petroleum product does not mean that they automatically classifiable as petroleum products. Cease and desist order entered.—Zirbel Transport, Inc., 100 M.C.C. 307 (312-3).

The phrase "points in Pennsylvania east of the Susquehanna River" in defendant's certificate is meant to provide a convenient delineation of the authorized service area. And only the Sayre-Slate Hill Susquehanna provides a boundary to effectuate that purpose, since the Sayre-Barnesboro Susquehanna does not define any clear-cut territorial boundary. Therefore, defendant's operations to points west of the Sayre-Slate Hill Susquehanna, but east of the Sayre-Barnesboro Susquehanna, are unauthorized. Cease and desist order entered.—AAA Trucking Corp. Inc. v. Burgmeyer Bros., Inc., 100 M.C.C. 470 (474-6).

Since defendant motor carrier issued no bill of lading and marked his transportation charges on the air bill of lading, which was executed only after the air carrier received physical custody of the goods, there was no bill of lading covering defendant's operations. Furthermore, since considered transportation does not qualify as "incidental to transportation by aircraft" within meaning of §203(b7a), defendant's operations between Stapleton International Airport at Denver, Colo., and Golden, Colo., which is within 25 miles of the airport, are subject to Commission regulation. Cease and desist order entered.—Colorado Cartage Co., Inc. v. Murphy, 100 M.C.C. 745 (748-50).

Cease and desist order entered on finding that respondent unlawfully transported flakeboard under its authority to transport lumber and that it unlawfully performed service between points in its radial authority area by using the radial base point as a gateway.—Barnes Truck Line, Inc., Investigation & Revocation, 102 M.C.C. 281 (287).

On finding that respondent was engaged in unauthorized interstate for-hire transporation of asphalt a cease and desist order entered.—Garland—Investigation of Operations and Practices, 102 M.C.C. 437 (455).

On finding that respondent association was not a lawfully constituted agricultural cooperative within requirements of the Agricultural Marketing Act and therefore not entitled to operate under exemption of §203(b5), cease and desist order entered.—Agricultural Transp. Assn. of Tex. Investigation, 102 M.C.C. 527 (552)*.

Respondent's heavy-hauler authority does not include transportation of considered imported farm tractors on ordinary flat-bed equipment when special equipment is not "required" for loading or unloading. Such tractors are comparatively light vehicles and not only may be, but usually are, pushed manually on and off flat-bed trailers; and fact that a small tractor is sometimes used to push them abroad cannot change the factor that manual loading and unloading is a practicable method of handling which, in fact, is used in transporting them. Respondent's handling of such farm tractors in manner described of record has been unauthorized; cease and desist order entered.—Moss Trucking Co., Inc., Investigation of Operations, 103 M.C.C. 91 (112, 114)*.

Motor transportation, in interstate or foreign commerce, in collection and delivery service, beyond municipalities of Los Angeles, San Francisco, Oakland, Alameda, and Richmond, Calif., offered by defendant water-carrier includes points not embraced within the industrial, commercial, and business communities at defendant's authorized ports. Cease and desist order entered.—Atchison, T. & S.F. Ry. Co. v. Sea-Land Service, Inc., 103 M.C.C. 184 (193-4).

Cease and desist order entered on findings that A-1 Coach failed to restrict performance of its broker operations to Brooklyn and that defendants Sheldon Goldman and Travelers' Bus Service, Inc., individually and collectively, have been holding themselves out to engage in broker operations, and that Travelers' Bus Service, Inc., has actually performed unauthorized operations. Since a broker may not perform service at a point not authorized by its license nor establish a division or agent to do so and since A-1 Coach is authorized to operate only at Brooklyn, any advertising, soliciting, or distributing activities in which it engages in Manhattan must be done in such a way as to make it clear that the actual arrangements and sale of transportation are conducted by A-1 Coach in Brooklyn.—Allied Bus Corp. v. Goldman, 103 M.C.C. 559 (567-9, 571).

Cease and desist order entered on finding that respondent has been, and is engaged in the transportation of cheese and other commodities not authorized to be handled under the terms of its certificate, which authorizes it to transport "packinghouse products, and supplies, restricted to items incidental to and directly connected with the business of the slaughtering of animals and the preservation and sale of meats but not including dairy products."—Commercial Freight Lines, Inc.—Investigation, 103 M.C.C. 683 (684-89).

Cease and desist order entered on finding that respondent jobber was rendering unauthorized transportation services not in furtherance of its primary business, but as a secondary enterprise.—T & T Supply, Inc.—Investigation of Operations, 103 M.C.C. 946 (955).

Cease and desist order entered on finding that respondent agricultural cooperative is engaged in performing direct transportation for nonmembers, which is neither incidental to its exempt traffic nor necessary for its continued operations.—Edgerton Coop. Oil Assn.—Investigation, 105 M.C.C. 100 (108-9).

On finding that respondent had combined separate portions of its considered authority to permit movement from a terminus on one portion to a terminus on a second portion by tacking at and proceeding through a middle point common to both portions in violation of restriction in its certificate which prohibited combining the separate parts thereof for the purpose of performing any through service, cease and desist order entered.—Baggett Transportation Co.—Investigation of Operation, 105 M.C.C. 628 (632-3).

On findings that defendant Mid-States Trailer Transport was unlawfully operating beyond scope of its "initial movement" operating authority in performing initial and secondary operations and that Mobile Homes Express was unlawfully operating in interstate commerce without authority, cease and desist order entered.—Morgan Drive-Away v. Mid-States Trailer Transport, 105 M.C.C. 896 (901).

Respondent Shelby ordered to cease and desist from performing unauthorized for-hire carriage, since the record shows that its transportation of sugar was neither part of its primary business as a distributor of cookies nor in furtherance of any other primary business as a dealer or distributor of sugar.—Shelby Biscuit Co. Investigation of Operations, 106 M.C.C. 79 (85)*.

On finding that respondent's regular-route authority, restricted to serving "all intermediate and off-route points within 25 miles of Churdan, Iowa," does not authorize service from Dennison, Iowa, and to and from Cedar Rapids, Iowa, a cease and desist order entered.—Nolte Bros. Truck Line, Inc.—Investigation and Revocation, 106 M.C.C. 330 (332).

On finding that considered motor carrier operations are in violation of the Act, the Commission can under §204(c) issue an appropriate order to compel compliance therewith; furthermore, §2 of the Elkins Act provides that shippers participating in transportation covered by the Act are subject to investigations, orders, and such provisions authorized by law with respect to carriers. Since respondent lessee-shipper Marane has failed to (a) control, direct, and dominate the leased vehicles' operations and (b) assume the responsibilities, duties, risks, and burdens of transportation, it is not a bona fide private carrier; in addition, since respondent lessor-carrier Uxbridge does not have authority to transport considered commodities, it is also operating without appropriate measure; however, entry of such an order does not preclude the lawful transportation of property by Marane in a vehicle leased from Uxbridge. Cease and desist order entered accordingly.—Uxbridge Motor Lines, Inc.—Investigation of Operations, 106 M.C.C. 372 (374).

Respondent is required to cease and desist from transporting bicycles and plywood under the commodity description of "merchandise as is dealt in by wholesale, retail and chain grocery and food business houses" since these articles are not commonly or ordinarily dealt in by either retail and wholesale grocery houses across the country as a whole or by food business houses in the area of respondent's operations and are thus beyond the scope of respondent's certificates.—Wiley & Sons, Inc.—Investigation and Revocation, 106 M.C.C. 686 (690-91).

Since, under its certificate to transport (A) prefabricated and precut buildings or houses, etc., and (B) Buildings, complete, knocked-down, or in sections, etc., defendant is not authorized to transport the ornamental iron columns involved, its transportation of independent shipment of such columns is violative of its authority; cease and desist order entered.—Miami Transp. Co. of Indiana v. Pre-Fab Transit, 107 M.C.C. 383 (390)*.

Since it is beyond question that respondent's transportation of 500- and 750-pound bombs is outside the scope of its heavy-hauler authority and, so far as appears of record, it continues to participate in the movement thereof, respondent is ordered to cease and desist from its unlawful operations. Moreover, in view of the abundant indication of other heavy haulers' present or intended participation in the carriage of explosives, all such carrier are admonished to conform their operations with the conclusions in instant report regarding the transportation of explosives generally by heavy haulers.—International Transport, Inc.—Investigation, 108 M.C.C. 275 (292-4)*.

On reconsideration by the entire Commission, respondent's transportation of earth-moving tractors, telescoping trailers, rails, pipe, and other specified commodities, is found to be beyond the scope of its heavy-hauling authority; cease-and-desist order entered. Also, to the extent that heavy-haulers generally are engaged in activities of the type found by the decision to be not covered by their franchises, they are admonished immediately to discontinue such operations until appropriate authority is obtained.—Ace Doran Hauling & Rigging Co. Investigation, 108 M.C.C. 717 (758)*.

Since operations which respondent had been conducting in movement of imported iron and steel articles from docksite to a jobsite violated its certificate authorizing operations "between jobsites," they were unlawful. Contrary to carrier's argument, the certificate is not ambiguous merely because it authorized service at "jobsites"; cease and desist order entered.—Widing Transp., Inc., Investigation and Revocation, 110 M.C.C. 106 (111).

Restriction in defendant's certificate is susceptible of two reasonable interpretations, and the two conflicting but plausible and rational constructions of the same certificate create sufficient doubt as to its true meaning such as to characterize the certificate itself as patently ambiguous, and upon analysis of the questioned restriction against a through service between specific points; defendant's single line, overhead operations between said points is in contravention of the restriction in its certificate and is unlawful; cease and desist order entered.—Crouch Bros., Inc. v. Byers Transportation Co., 110 M.C.C. 127 (133)*.

Defendant has been operating in excess of its authority by unlawful tacking of its separate state certificates of registration in order to provide an unauthorized through service. Cease and desist order entered requiring defendant to abstain from providing unlawful through service until appropriate authority has been obtained.—Flying Freight v. Van's Auto Express, Inc., 110 M.C.C. 358 (361, 362).

A cease and desist order is entered only in cases where respondent is likely or is in a position to continue its unlawful operations and the record herein indicates that much of this unlawful transportation is being continued by respondent. Although a suspension of respondent's certificate is possible under §204(c), suspension is not warranted without a showing that the unlawful activities were conducted "willfully" but a cease and desist order may be issued whether involved violations were "willful or otherwise".—Gleason Transportation Co., Inc., Revocation, 112 M.C.C. 228 (230-31).

Respondent's refusal to operate within the limits of its authority to transport "stock in trade of drugstores", despite Supreme Court ruling that the commodity description is not ambiguous [355 US 554], resulted in cease and desist order, and an acknowledgment that continued violation may result in suspension or revocation of the authority.—North Central Truck Lines, Inc., Invest. & Revoca., 117 M.C.C. 180 (184, 195).

Section 212.(b) [*§312(b) U.S.C.*] Transfer of operating rights.—[Unchanged. See vol. 11, p. 9479.]

Amendments, see footnote, p. 9479.

Notes of Decisions

Volume 10—p. 8077; Volume 11—p. 9479; Volume 12—p. 10418; Volume 13—p. 11087; Volume 14—p. 11608; Volume 15—p. 12222; Volume 16—p. 12872; Volume 17—p. 13573; Volume 18—p. 14523; Volume 19—p. 15790; Volume 21—p. 17596.

10. Transfer of operating rights, including "grandfather" rights.—[Vols. 10-19, 21].—See also Beaufort Transfer Co. v. United States, at §5(2), n. 126; and Heavy & Specialized Haulers, Inc., Investigation & Revocation, at §212(a), n. 30.

Contrary to plaintiffs' contention, neither §212(b) nor due process required the Commission to hold a hearing before denying their petitions for reconsideration of its order approving intervening bus lines' transfer application. A transfer involving small carriers is governed by §212(b) and the Commission regulations pursuant thereto; the Commission's transfer regulations give it the discretionary right to hold or refuse to hold a hearing; and examination of the record reveals no abuse of that discretion. Nor does the Administrative Procedure Act require any Commission hearing since, as stated in 339 US 33, the limitation in that Act to hearings "required by statute" exempts from application thereof those hearings which an administrative agency may hold by regulation, rule, custom, or special dispensation; thus, in the context of a §212(b) proceeding, APA imposes no hearing requirement on the Commission.—Monumental Motor Tours, Inc. v. United States, 316 F. Supp. 663 (666-7)*.

However, on judicial review of Div. 3 order approving the application, which also reversed Transfer Board's initial denial thereof because, since transferor was found to have ceased operating under the rights due to financial difficulties not shown to have been beyond its control, proposed transfer was not in conformity with §1132.5(b) of the transfer rules, that order leaves unanswered three questions relative to transferor's "cessation of operations" and gives no reason why the transfer should be approved. It is the Commission's failure to state its reasons with regard to applicability or nonapplicability of relevant parts of §1132.5(b) of the regulations, not is denial of plaintiffs' reconsideration requests, that is important since, in exercising its discretion, the agency is required to make findings of fact that show the basis of that exercise. Therefore, case is remanded to the Commission to state clearly and precisely, in the context of its own regulatory language, its reasons for approving or not approving, in whole or in part, considered application; and, further, to specifically address itself to the transferability of transferor's charter, and special service, rights.—Id., pp. 668-70.

Where after defendant agricultural cooperative was enjoined from engaging in unlawful carrier operations, the Commission approved transfer of certificated rights to cooperative and, because the transfer order was stayed pending determination of certain issues raised, granted it temporary authority to lease the certificate under which it is operating, the Commission should make initial decision on the issues. Therefore, while the doctrine of primary jurisdiction is not applicable where only a question of law is involved, and defendants' motion to modify the injunction involves questions of law which the court could decide, the court will stay its hand pending Commission determination of whether an agricultural cooperative may hold temporary authority to lease from the owner a certificate which it has a contract to purchase and, conversely, whether the Commission can issue, or authorize transfer of, certificate to a qualified agricultural cooperative, either on a temporary or permanent basis. Proceedings on defendants' motion are stayed pending Commission decision or further court order.—I.C.C. v. Milk Producers Marketing Co., 320 F. Supp. 738 (742)*.

Although Commission's transfer rules limit leases to one year except in unusual circumstances, Commission found that lease of a certificate of registration for period of 10 years where State commission had approved lease for such period should be approved. Under §206(a)(6) State commission has initial duty of determining whether public convenience and necessity support certificate of registration corresponding to intrastate authority granted.—H. C. Daniel, Houston, Tex., Transferee, 104M.C.C. 899 (909-10)*.

The purpose of the non-severability clause of §206(a)(6)(7) was to give Commission power which it had under §5 but not under §212(b) to prevent the creation, from a single underlying intrastate certificate, of two interstate operating rights without a showing of public need for such service. Commission found that the non-severability clause did not foreclose automatically consideration of every situation where there had been separation where, as herein, the parties could not control the separation due to State procedures.—Id., p. 903-4.

Case herein contains comprehensive discussion of Transfer Rules as they apply to transfers under §212 and supplemental rules governing transfers under §206(a)(6)(7) and a review of the governing precedents.—Id., p. 904-909.

Applicant's proposal to transfer its bulkhaulage operations to a non-carrier, wholly-owned subsidiary approved as such division of applicant's operating rights would not lead to duplication of service in violation of the applicable Transfer Rule, 49 CFR 1132.5(a)(3).—C F Tank Lines, Transferee, & Consolidated, Transferor, 109 M.C.C. 688 (698-701)*.

Transfer Rule 1132.5(a)(3) does not preclude the separation of a commodity class, such as commodities in bulk, from general commodity authority. It is noted that transferor herein was authorized to transfer its household goods authority under comparable circumstances to those herein. Those specified commodities retained where bulk transportation is possible modified with condition against transportation of bulk commodities.—Id., p. 701-3.

Protestants' objection to this proceeding is based on transferees' status as a public transit company enjoying taxpayer subsidy and taxation relief which protestants claim is an unfair advantage for transferees. Under Transfer Rules, 49 CFR 1132.3, applicant must show only its fitness to perform the authorized service. There is no specific provision for denial because of detrimental competitive impact. Protestants' objections do not reach transferees' fitness; application approved.—Mercer County Improvement Authority, Transferee, 109 M.C.C. 795 (798-9)*.

Though transfer of authority to transport livestock and general commodities between named Montana points was approved, and certificate issued to defendant transferree, before decision on complaint alleging unlawful operations and requesting that certificate, if transferred, be corrected to show that transportation of general commodities is not authorized between Lewistown, Great Falls, and Billings, transferee cannot contend it is an unsuspecting buyer. The complaint was filed while transfer proceeding was pending; and since transferree had full notice of issues in complaint case before the transfer was approved and certificate issued, it cannot claim to be an innocent purchaser for value. Also, as the intial certificate was patently ambiguous, due to inadvertent ministerial error of the Commission, certificate issued to transferee is subject to the infirmities present in it. Transfer Board's approval of the transfer does not signify Commission acquiescence in wording of the certificate issued; authority acquired could not exceed that previously held. Therefore, transferee's certificate should be corrected to reflect Commission findings which authorized issuance of the original certificate.—Great Norhtern v. Stendal Transp. and Elmer's Exp., 110 M.C.C. 35 (38, 40-2)*.

Transfer of rights denied, since (1) applicants' interest lay in the incidental charter operations that were conducted under the involved certificate, rather than the regular-route authority, and these routes are not severable, (2) proof of public convenience and necessity is required to obtain specific charter authority, and (3) the benefits of §208(c) do not accrue unless the carrier is actually performing interstate regular-route operations as authorized in its certificate, and these operating rights were dormant.—Estacada-Mollala Stages, Inc.—Revocation of Certif., 118 M.C.C. 115 (123).

Section 212.(c) [*§312(c) U.S.C.*] Conversion of authority.—[Unchanged. See vol. 18, p. 14523.]

Notes of Decisions

Volume 18—p. 14524; Volume 19—p. 15791; Volume 21—p. 17510.

2. Construction and interpretation.—[Vols. 19, 21].—In carrier's action to set aside Commission order denying its petition for removal of keystone-type restriction from certificate issued to it under §212(c), a finding that the Commission has authority to impose such restrictions on conversion certificates is required by both the clear meaning of 206 F. Supp. 455 and the logic of the statutes. Thus, the court's function is to determine whether restrictions actually imposed in plaintiff's certificate constitute a legitimate exercise of that Commission authority; and initial question in that determination is whether terms of the prior permit or the actual scope of carrier's pre-1957 activities are determinative of the limits on the Commission's power to restict conversion certificates.—Scott Truck Line, Inc. v. United States, 339 F. Supp. 1169 (1174-6)*.

There is logic in both approaches, since purpose of the statutory limitation is to preserve for the converted carrier his prior authority. Using the actual scope of pre-1957 activities as the measure seems to reflect a more realistic appraisal of what the carrier actually enjoys under his permit; on the other hand, however, §212(c) states that the certificate shall authorize the same transportation "as authorized in the permit," and thus the terms of the permit should be controlling. On balance, the better view appears to be that the Commission cannot restrict the certificate beyond the terms of the permit; this accords closer to language of the statute and prevents the Commission from depriving a carrier of a prior right. Of course, should it appear that the Commission sanctioned operations under the permit which it later asserts were not authorized, those operations should be permitted under the certificate.—Id., p. 1176.

Plaintiff's permit authorized operations only under contract with persons "who operate wholesale or retail establishments, the business of which is the manufacture, processing, or sale of groceries or food" and, in the Commission's view, certificate issued in lieu thereof, which is "restricted to shipments moving from, to, or between warehouses, and wholesale, retail, or chain outlets of grocery and food business houses," carries over that restriction but does not limit plaintiff in any manner not shown by the permit. Plaintiff's pre-1957 activities being limited to shipments "moving from, to, or between" the specified types of food and grocery houses, and that being the Commission's construction of its permit, then the restrictions in its §212(c) certificate do not impose any new limitations and are valid. Accordingly, as plaintiff did not object to the Commission;s findings of fact, and presented no evidence of nature or scope of its pre-1957 operations, nor of need for the grant of an unrestricted certificate, the Commission's decision is sustained.—Id., pp. 1176-8.

Although statute governing conversion of authority from contract to common carriage provides that certificate issued in lieu of a permit authorizes transportation of the same commodities as authorized in the permit, it does not bind the Commission to give effect in such certificate to the precise wording of respondent's reissued permit, including portion thereof which embraces a ministerial error; however, whatever authority is granted in the certificate should be the same generally as that contained in its underlying permits. Mere conversion should not create for a carrier new common carrier rights which are not substantially similar to those "intrinsic" in its old status.—Zuzich Truck Line, Inc., Investigation of Permit, 96 M.C.C. 160 (162)*.

The legislative history of conversion proceedings under §212(c) of the Act indicates that the converted carrier cannot be limited, as a common carrier, to a certain class of shippers and, in this respect, said converted carrier will be left in a better position than it previously enjoyed, i.e., the change from a permit authorizing transportation for limited classes of persons under contract to an operation as a common carrier to serve the general public would very probably result in an expanded scope of operations for a converted carrier under a §212(c) conversion proceeding.—J.B. Montgomery, Inc., Conversion Application, 108 M.C.C. 638 (645)*.

Petitioner's contention that under decision in 376 US 389, the Commission is without authority to impose keystone-type restrictions in certificates issued in §212(c) proceedings and, therefore, restriction in its conversion certificate (imposed in lieu of keystone restriction in its permit) should be removed, ignores the Supreme Court's holding in that case that, on remand, the Commission would be free to contest appellee's factual claim as to what service it performed under its permit and to limit the certificate to such activity. Furthermore, following that case, the district court in 263 F. Supp. 239, unanimously upheld the Commission's power under §212(c) to impose keystone-type restrictions; that court also stated that the Congressional intent underlying §212(c) requires that the Commission impose no new restrictions after conversion and that so long as carrier is permitted to enjoy the same rights it had as a contract carrier, the keystone-type restriction is lawful.—Scott Truck Line, Inc., Modification of Certificate, 108 M.C.C. 896 (898-900, 905)*.

5. Conversion of authority.—[Vols. 18, 19, 21].—There can be no doubt that omission of the comma following "supplies" in respondent's permit authorizing transportation of "packinghouse products, and supplies, restricted to ***" was a ministerial error occurring in connection with reissuance thereof for sole purpose of reflecting certain acquisitions and consolidating all its authority in a single permit; respondent's request for modification of the restriction in its authority as to both "packinghouse products" and "supplies" would have been needless had the comma not been regarded as applying to "packinghouse products." The change in punctuation in the reissuance, being a ministerial error, did not enlarge the authority originally granted; and the conversion certificate is framed in the same language as would have been used had there been no error, or had it previously been discovered and rectified. Certificate issued to respondent in lieu of its permit reflects those rights intrinsic in the permit.—Zuzich Truck Line, Inc., Investigation of Permit, 96 M.C.C. 160 (162-3)*.

To be successful in proceeding involving conversion of contract to common carrier rights applicant must present not only a detailed statement of its past lawful operations as a contract carrier, but also shipper testimony demonstrating need for its continued service as a common carrier. Therefore, only that part of application supported by shippers' evidence showing that common carrier service was required by public convenience and necessity granted; and that part of application not so supported denied.—Major Conversion Application, 100 M.C.C. 410 (417-18).

On remand to the Commission, the district court affirmed the Supreme Court decision in 376 US 389 that the Commission will be free to contest appelee's factual claims as to what service it performed under its contract carrier permit and to limit the common carrier certificate to such activity, but required the Commission to abandon the doctrine of substantial parity. This proceeding was assigned for further hearing for the purpose of receiving evidence concerning the service actually performed by applicant under its former contract carrier permit. The examiner's summary of shippers' evidence indicates that applicant, during the time it operated as a contract carrier, was engaged in an unrestricted general freight operation within in the territorial scope described in its permit. Therefore, in view of the judicial action herein, and in consideration of the broad scope of applicant's former contract carrier authority, the certificate to be issued to applicant must be without the keystone-type restrictions imposed in the prior reports. Applicant's operations will be adequately limited by the commodity descriptions without imposition of additional keystone-type restrictions.—J. B. Montgomery, Inc., Conversion Application. 108 M.C.C. 638 (639-46)*.

Contrary to carrier's argument, Supreme Court decision in 376 US 389, does not hold that the Commission has no authority to impose keystone-type restrictions in certificates issued in conversion proceedings; also, the district court later held in 263 F. Supp. 239, that the Commission could impose such restrictions provided no new restrictions are imposed after conversion and so long as carrier enjoys under the certificate the same privileges it had under its former permit. Therefore, to justify removal of keystone-type restriction in its conversion certificate, petitioner must submit evidence of the services actually provided under its former contract carrier authority; however, other than evidence admitting that 42 percent of the revenue derived from selected shipments would not have been earned had it not construed its authority as not being so restricted (following the Supreme Court's decision) and its own certificate, petitioner has submitted nothing of substance to warrant removal of the keystone-type restriction.—Scott Truck Line, Inc., Modification of Certificate, 108 M.C.C. 896 (905-6)*.

Record clearly shows, and petitioner openly admits, that services not authorized by its certificate have been provided to a substantial extent since the ruling in 376 US 389; thus its past operations are not founded upon such a reasonable question of mistaken interpretation that they could be considered as having been conducted under a color of right; in fact, such past illegal operations show a pattern of continuous violations tending to establish that carrier is unwilling and unable to conduct future operations in a lawful manner, and reflecting on its fitness to operate as a regulated carrier. More important to the central issue, however, is the fact that the record is devoid of requisite evidence respecting petitioner's operations under its permits prior to conversion, and which of those operations, if any, cannot now be conducted under the certificate in its present form. Petition for modification of certificate is denied, and carrier is admonished to adhere strictly to the limitations therein.—Id., pp. 906-7.

15. Parties; procedure.—[Vols. 19, 21].—Applicant, in a §212(c) conversion proceeding, moved that the exceptions be stricken because they are filed by parties having no valid standing in the proceeding. There is no merit in applicant's motion to strike the exceptions on the ground that they were filed by parties having no valid standing in the proceeding. The present proceeding is simply a further hearing in a matter commenced in 1958 and all of the present exceptants were parties in the original proceeding and they have remained parties throughout the administrative proceedings. As competing carriers they are parties in interest and have a right to participate in developing a record. Applicant's motion to strike is denied.—J.B. Montgomery, Inc., Conversion Application, 108 M.C.C. 638 (641, 646)*.

20. Evidence.—[Vols. 19, 21].—See also Eastern States Transp., Inc., at §206(b), n. 18; and Scott Truck Line, Inc., Modification at n. 5 supra.

It is well established that evidence which pertains to events occurring subsequent to hearing and to which opportunity to cross examine has not been afforded is inadmissible. Therefore, protestants' motion to strike granted.—Major Conversion Application, 100 M.C.C. 410 (411).

Section 213. [*§313 U.S.C.*] Validity and Perfection of Certain Security Interests in Motor Vehicles.—[Unchanged. See vol. 18, p. 14525.]

Section 214. [*§314 U.S.C.*] Issuance of securities.—[Unchanged, except by the act of Feb. 5, 1976, Pub. L. 94-210, §308, 90 Stat. 57, "That the exception" and all that follows through "*And provided further,*" is struck out. See vol. 18, p. 14256, vol. 21, p. 17514.]

Historical Note

The amendment made by Pub. L. 94-210, 90 Stat. 57, takes effect on the 60th day after the date of enactment of the act, and does not apply to any bona fide offering of a security made by the issuer, or by or through an underwriter, before the 60th day.

Notes of Decisions

Volume 10—p. 8122; Volume 11—p. 9480; Volume 12—p. 10419; Volume 13—p. 11088; Volume 14—p. 11609; Volume 15—p. 12223; Volume 16—p. 12874; Volume 17—p. 13574; Volume 18—p. 14527; Volume 19—p. 15798; Volume 21—p. 17514.

2. Construction and interpretation.—[Vols. 10-14, 16-19, 21].—See also Atlas Van Lines, Inc.—Notes, at §20a(11), n. 1 supra.

In this proceeding, Commission found that it is necessary to place restrictions on applicant, a carrier under control of a holding company, as to declaration and payment of dividends, placing liens on its assets for noncarrier purposes or any intercompany property transactions in order to preserve the financial integrity of the carrier. Proposed issuance of warrant certificates and common stock approved subject to said restrictions.—Greyhound Corporation Securities, 336 I.C.C. 575 (582-4).

It is incumbent on the Commission at the time of passing on §20a (or §214) applications to give major consideration to the use which the carriers have made of their credit arrangements which did not involve the issuance of securities, to determine whether such credit was used prudently and therefore is not inimical to the purposes of §20a (or §214) applications.—Expanded Definition of Term "Securities", 340 I.C.C. 817 (824).

Commission's exercise of §214 jurisdiction over noncarrier controller of applicant as to future securities' issuance is similar to that imposed in 338 ICC 805, wherein it was determined that our jurisdiction will be retained over such issuances to degree that they are related to the carriers under the control of the parent holding company. Accordingly, approval herein is conditioned upon consideration of such noncarrier as a carrier under §5(3) and its subjection to §20a of the Act.—Branch Motor Exp. Co.—Control—Middle Atl. Transp., 109 M.C.C. 807 (823-4).

8. Securities defined.—[Vols. 10-19, 21].—Deposit receipts issued by depository bank as a receipt for shares of acquired carrier's stock deposited with it by shareholders, and used as a mechanism for maintaining the status quo pending Commission approval of acquiring carrier's applications to issue shares of its own stock to be exchanged for that of acquired carriers in connection with proposed control transactions, are not securities within meaning of §20a and, thus, do not require Commission approval prior to issuance. Since the deposit receipts were not issued by control applicant with respect to its stock, they could scarcely be viewed as its securities, as plaintiff claims, but only as securities of the acquired carrier; moreover, they did not affect acquired carrier's capital structure, or alter terms of its stock to the disadvantage of shareholders or in violation of its corporate purpose.—Interstate Investors, Inc. v. United States, 287 F. Supp. 374 (386, 387-8)*.

9. Carriers, corporations, individuals subject to section.—[Vols. 10, 11, 13, 15, 16, 18, 19, 21].—See also Matlack, Inc.—Control—Southern & T. I. McCormack, at §5(3), n. 10.

Since §11(f) of Washington Metropolitan Area Transit Regulation Compact between the States of Virginia and Maryland and the District of Columbia, as approved by Congress, is clear that the Commission's jurisdiction over issuance of securities is not suspended when the issuing carrier does not operate exclusively in the Metropolitan District as defined by Public Law 86-794, and D.C. Transit System (DCT) by virtue of its special racetrack and charter rights, is authorized to serve points outside the Metropolitan District, the Commission has jurisdiction over DCT's proposed note issue. Although DCT argues that 99 percent of its operations are conducted within the defined district, the phrase "does not operate exclusively in the Metropolitan District" is unambiguous and not susceptible of a construction that it means "almost exclusively" within that district.—D.C. Transit System, Inc.—Control—W., V. & M., 93 M.C.C. 621 (625).

Applicant for authority to issue bonds, a bi-state development agency that holds interstate motor carrier operating rights and also operates noncarrier activities, is subject to the jurisdiction of the Commission in matters relating to securities, although it maintains maximum separability of functions and State laws are a bar to organization of separate legal entities. While similar State instrumentalities can and have avoided the Commission's jurisdiction by organizing separate transportation corporations, applicant was found to be a carrier subject to Commission jurisdiction in 93 MCC 579 and therefore it is subject to provisions of §20a and §214. Authority granted.—Bi-State Development Agency of Mo.—Ill. Met. Dist., Bonds, 97 M.C.C. 747 (748, 750).

Inasmuch as acquiring carrier's subsidiary is not authorized to operate as a common carrier and will not, as a result of Commission approval of the transaction proposed herein, become a common carrier, its secondary liability on acquiring carrier's promissory note as a guarantee of the note by the corporation which applicant seeks to acquire is not subject to prior approval under §214 since it is a noncarrier holding company which has never been subjected to the provisions of §5(3) as its acquisition of carrier subsidiaries comprised a single-established common carrier system and did not present a transaction within the scope of §5(2). Additionally, it has never filed an application for common carrier authority nor for authority under §5 of the Act.—United Buckingham Freight Lines, Inc.—Control—Nortruck, 104 M.C.C. 367 (371).

Securities issuable by the subsidiary or any of the noncarrier affiliates of vendee, a motor common carrier, would not be subject to the provisions of §214 inasmuch as said noncarrier affiliates are not in control of vendee and therefore cannot be considered as carriers under the provisions of §5(3) of the Act which provides that noncarriers controlling a regulated carrier may themselves be deemed carriers.—East Tex. Motor Frt. Lines—Purchase—Lee, 109 M.C.C. 299 (320).

10. Corporate powers considered; subsidiaries; corporate control.—[Vols. 10-13, 16, 19, 21].—See Refiners Transport & Term. Corp.—Purchase—Mitchell case, §5(3), n. 10; Schwerman Trucking Co.—Control and Merger case, §5(2), n. 52, supra; Yosemite

Park & Curry Co. Stock Dividend case, §214, n. 28, infra.

13. Assets capitalizable, generally.—[Vols. 10-19, 21].—Applicant's capitalizable assets include among its tangible property not only property used directly in the service of transportation, but also property used for storage of household goods and terminal operations. Such combination of activities is usual among household goods carriers and, considering nature of the business, capitalization of such property may properly be approved.—Beking Van & Storage Co. Stock, 93 M.C.C. 558 (561).

Stock

24. In general.—[Vols. 10-14, 16-19, 21].—Authority granted to applicant to issue not exceeding 2,500 shares of common stock of the par value of $5 each, pursuant to the provisions of an executive restricted stock plan (a recent development in the field of deferred compensation) whereby the stock awarded would be placed in escrow in the employee's name during his continued tenure. The plan is for a lawful object within applicant's corporate purposes and compatible with the public interest and will not impair its ability to perform its service to the public as a common carrier.—Bekins Van & Storage Co. Stock, 331 I.C.C. 638 (642).

In seeking authority to issue stock to provide funds for capital expenditures under a general expansion program, applicant suggests creation of a special fund from which no expenditure would be made without further authorization by the Commission, upon appropriate showing by applicant as to purposes of the proposed expenditures. Such a fund would best permit it to coordinate scheduling of building plans with cash receipts under the plan for sale of the stock and cash available from retained earnings; approval conditioned accordingly.—Bekins Van & Storage Co. Stock, 93 M.C.C. 558 (559); and since the stock is to be sold on reasonable terms to officers, employees, and contract drivers of applicant and its affiliates for the further purpose of creating incentive for them to be loyal and work efficiently for the employer, approval is further conditioned that applicant make available to any person solicited to purchase the stock a copy of the offering circular in substantially the form submitted with the application.—Id., p. 560.

Issuance by transferee of 10,000 shares of common stock of par value $100 each concurrent with consummation of transaction herein approved as consistent with the public interest since it will enable transferee to provide the transportation to the extent approved herein.—C F Tank Lines, Transferee, & Consolidated, Transferor, 109 M.C.C. 688 (692)*.

27. To finance additions and betterments; equipment.—[Vols. 10-12, 14-16, 18, 19].—Issuance of not exceeding 70,000 shares of applicant's $5 capital stock, to be sold to its officers, employees, contract drivers, and their spouses on terms outlined, the proceeds to be used to provide funds for additional expenditures as part of expansion program of applicant and its subsidiaries and controlled affiliates, authorized, subject to certain conditions. Based on its experience in recent years, applicant anticipates need to build new warehouse and truck terminal facilities in new, fast-growing urban areas, particularly in western States.—Bekins Van & Storage Co. Stock, 93 M.C.C. 558 (559, 560).

28. Stock dividends.—[Vols. 10-13, 15-19, 21].—While the Commission should not substitute its judgment for that of management as to whether fractional interests in proposed stock dividend may be paid in cash or stock, in finding that stockholders entitled to fractional interests are being fairly and justly treated it must determine whether the price to be paid therefor is reasonable and commensurate with fair market value of applicant's stock immediately or within a reasonable time prior to declaration of the proposed stock dividend.—Yosemite Park & Curry Co. Stock Dividend, 97 M.C.C. 582 (585).

29. Retirement of other negotiable instruments.—[Vol. 10].—Though holding company may properly be authorized to issue not over 500,000 shares of its common stock, par value $2.50 each, to effect conversion of debentures concurrently authorized, authority to issue additional shares as may be required from time to time for like purpose is denied. Authorization of an undefined number of shares, or a maximum of stock, which might be required by terms of the indenture for an indefinite future period, without consideration of applicant's financial condition at time of actual issuance, would not be in public interest. Authority for issuance of additional shares may be sought when it becomes evident that convertibility will be endangered.—Ryder System, Inc., Securities, 93 M.C.C. 405 (407).

30. To finance acquisitions.—[Vols. 10-19, 21].—The clearing up of a subsidiary's expenses and obligations incurred in acquisition of a pipeline company is the use to which applicant intends to apply proceeds from proposed note and stock issuance; such transportation is not the primary transportation concern of applicant motor carrier, and diversion of applicant's credit to such ends is not consistent with its welfare, since there is an inadequate showing that proposed investment would be judicious when considered in relation to the business itself and there is reason to believe that it would be damaging to applicant's traffic and revenue. Furthermore, if considered transaction were approved, applicant would be over capitalized. Denied.—Redwing Carriers, Inc., Securities, 101 M.C.C. 764 (767-9).

Notes

77. Payment for carrier properties; noncarrier properties.—[Vols. 10-12, 14-19, 21].—Authority granted vendee to issue four secured nonnegotiable promissory notes in aggregate principal amount not exceeding $643,000, covering balance of purchase price of operating rights, payable to each of vendors in 120 equal monthly installments with interest at 5 percent on all unpaid balances; also four unsecured nonnegotiable promissory notes in aggregate principal amount not exceeding $150,000 to provide for possible upwards adjustment in the purchase price, payable to each of vendors in 14 months with interest at 5 percent payable semiannually.—Glendenning Motorways, Inc.—Purchase—Moland Bros. Trucking, 93 M.C.C. 194 (195, 196, 198-9).

Authority granted D.C. Transit System (DCT) to issue secured promissory notes in aggregate principal amount not exceeding $1 million, to finance acquisition of control of Washington, V. & M. Coach Co. On basis of DCT's income statements and balance sheets of both companies, DCT should be able to generate sufficient funds to service its long-term debt, including current maturities on the notes to be issued.—D.C. Transit System, Inc.—Control—W., V & M., 93 M.C.C. 621 (626).

81. Payment of indebtedness.—[Vol. 19].—See Redwing Carriers, Inc., Securities case, §214, n. 30, supra.

Bonds

102. Payment for properties.—[Vols. 12, 14, 19].—See Bi-State Development Agency of Mo.—Ill. Met. Dist., Bonds case, §214, n. 9, supra.

Miscellaneous Securities

115. In general; authorization; terms, conditions.—[Vols. 17, 19, 21].—Applicant holding company proposes to issue $5,500,000 principal amount of convertible debentures, bearing interest at not over 6 percent per annum and subordinated as to principal and interest to all senior indebtedness, $3 million of the proceeds to be advanced to a carrier subsidiary for retirement of a like amount of vehicle debt outstanding, and the balance to be used to supplement applicant's working capital. As the subsidiary has filed application to evidence the advance by issuing its note to applicant, and ratio of applicant's capitalizable assets to capitalization would thus not be significantly changed, authority for the debentures is granted on condition that it be not exercised unless and until the subsidiary's note is authorized and issued.—Ryder System, Inc., Securities, 93 M.C.C. 405 (406, 408, 409).

Because of belief that a substantial portion of the debentures will be subscribed for by applicant's stockholders, leaving only a relatively small portion to be purchased by underwriters, applicant has not entered into a firm agreement with its underwriters, and proposes that such agreement provide for a sliding scale of fees based on amount of debentures actually purchased by them. However, the underwriters' fee should not remain an indefinite quantity; therefore, approval is further conditioned that such fee shall not exceed applicant's estimate of $80,000, or 10 percent of the face amount of debentures purchased, whichever is less.—Id., pp. 408-9.

Assumption of Obligation or Liability

125. Subsidiaries' or affiliated companies, obligations.—[Vols. 10-19, 21].—See also Schwerman Trucking Co.—Control and Merger case, §5(2), n. 52 supra.

Provision of stock-purchase agreement whereby acquiring carrier warrants that during temporary control it will pay principal and interest, according to their terms, on certain promissory notes executed by acquired carrier, on which two of the selling stockholders are endorsers or comakers, that deeds of trust securing those obligations will not be permitted to become in default, and that the stockholders will be indemnified for any loss or expense arising out of their obligations on those notes, constitutes an assumption of obligation and liability on the notes within meaning of §§20a and 214. Approval of control is therefor conditioned on cancellation of that provision, or, alternatively, on acquiring carrier's filing application for appropriate authority and deferring consummation of the transaction until it is granted.—Arkansas-Best Freight System, Inc.—Control—Delta, 93 M.C.C. 474 (478, 479).

126. Vendor's obligations.—[Vols. 19, 21].—Authority granted vendee to assume obligation and liability on unpaid balance of secured promissory notes of vendors not to exceed $40,241.—Glendenning Motorways, Inc.—Purchase—Moland Bros. Trucking, 93 M.C.C. 194 (195, 198-9).

Regulations of the Commission

37 FR 7160, Apr. 11, 1972, Part 1115: Issuance of Securities, Assumption of Obligations, and Filing of Certificates and Reports, §1151.1 Application form, Form BF-6 referred to amended, effective 60 days after publication in the Federal Register.

37 FR 9119, May 5, 1972, Part 1115: Issuance of Securities, Assumption of Obligations and Filing of Certificates and Reports, effective date of order of March 22, 1972 (37 FR 7160) postponed to July 17, 1972, effective on date of order.

38 FR 25686, Sept. 14, 1973, Part 1115: Issuance of Securities, Assumption of Obligations, and Filing of Certificates and Reports, Regulations prescribing form for offering circulars published for public sale of securities, effective Nov. 13, 1973.

Section 215. *[§315 U.S.C.]* Security for protection of public.—[Unchanged. See vol. 10, p. 8134, vol. 17, p. 13577.]

Historical notes, see vol. 10, p. 8134, vol. 11, p. 9483, vol. 12 p. 10422.

Historical Note

On July 10, 1973, the Commission recommended to Congress legislation (S. 2249) which would authorize the Commission to prescribe security standards for protection of the public for loss or damage to property transported by carriers subject to parts I and III of the Interstate Commerce Act.—Annual Report, 1974, p. 83.

Notes of Decisions

Volume 10—p. 8134; Volume 11—p. 9483; Volume 12—p. 10423; Volume 13—p. 11091; Volume 14—p. 11612; Volume 15—p. 12225; Volume 16—p. 12878; Volume 17—p. 13577; Volume 18—p. 14533; Volume 19—p. 15811; Volume 21—p. 17525.

Regulations of the Commission

33 FR 10572, July 25, 1968, Part 1043: Surety Bonds and Policies of Insurance, §1043.2 Insurance, minimum amounts (b) *Motor common carriers; cargo liability*, amended, effective Jan. 1, 1969.

34 FR 3628, Feb. 28, 1969, Part 1043: Surety Bonds and Policies of Insurance, §1043.1 Surety bond, certificate of insurance, or other securities (b) *Common carriers—cargo insurance; exempt commodities*, amended, effective upon publication in Federal Register.

35 FR 2829, Feb. 11, 1970, Part 1043: Surety Bonds and Policies of Insurance, §1043.7 Forms and procedure *** (3) *Termination by replacement*, amended, effective upon publication in the Federal Register.

39 FR 10254, Mar. 19, 1974, Part 1043: Surety Bonds and Policies of Insurance. Amendment of 49 CFR §1043.2(a) regarding limits of liability, effective July 1, 1974.

39 FR 11891, April 1, 1974, Part 1003: List of Forms. Regulations promulgated for freight forwarder liability forms, effective July 1, 1974.

39 FR 13159, April 11, 1974, Part 1043: Surety Bonds and Policies of Insurance. Correction of order of Mar. 27, 1974 (39 FR 11891).

Section 216. [§*316 U.S.C.*] Rates, fares and charges—(a) Duty to establish reasonable rates; etc.; service and equipment; rules and regulations; reasonable divisions of joint fares.—[Unchanged. See vol. 10, p. 8142.]

Historical note, see vol. 11, p. 9487.

Historical Note

The Commission recommends that §216 be amended so as to enable the Commission to order the establishment of through routes and joint rates between motor common carriers of property, and between those carriers and carriers subject to parts I and III of the Act.—Annual Report, 1973, p. 86.

Notes of Decisions

Volume 10—p. 8142; Volume 11—p. 9487; Volume 12—p. 10425; Volume 13—p. 11092; Volume 14—p. 11614; Volume 15—p. 12227; Volume 16—p. 12880; Volume 17—p. 13579; Volume 19—p. 15811; Volume 21—p. 17527.

1. Construction and interpretation.—[Vols. 11-17, 19].—See also Loss and Damage Claims case, §1(6), n. 731, supra.

The Commission's determination as to whether charges resulting from the detention of motor common carrier equipment are just and reasonable does not exceed the indicated jurisdictional bounds even though questions of agency and contract law may be involved.—Payment for Detention Charges, Eastern Central States, 335 I.C.C. 537 (539)*.

10. Duty to furnish service.—[Vol. 21].—Applicant's petition to alter its existing authority by increasing the number of passengers it can carry and by acquiring round trip authority was denied when Commission found evidence lacking to establish either an economic or a public need for the service. Neither is proof of operating economy or improved service alone sufficient to sustain applicant's burden of proof re public convenience and necessity; proof of both is necessary is the absence of public support. See also dissent.—D & M Taxi Co., Inc., Extension—More Passengers, 115 M.C.C. 294 (297-298)*.

Shippers have some duty to seek out existing carriers for their transportation requirements, especially when shippers' available traffic amounts to only one or two truckloads a month.—Graham Extension—Port Huron, Mich., 117 M.C.C. 412 (417)*.

Within fairly wide limits, carriers are free to conduct operations as large or as small as their resources and business judgment may dictate. However, certificates are issued with the expectation that the holder will provide a service substantially conforming in scope to the rights described therein. When a carrier has ceased operations, or has curtailed service to a level tantamount to a cessation of operations, it is in violation of the statute and the conditions pursuant to which the certificate was issued, and the carrier may be directed to resume a reasonably continuous and adequate service or face the loss of its certificate.—Estacada-Mollala Stages, Inc.—Revocation of Certificate, 118 M.C.C. 115 (121).

101. Through routes.—[Vols. 12, 19].—Motor carriers of passengers have a statutory duty to establish reasonable through routes and just and reasonable fares, charges, regulations, and practices relating to passenger transportation. While Commission initiative is not assumed, if it appears that the public interest will otherwise suffer, the Commission may undertake to prescribe terms and conditions under which such through routes shall operate. Legislation dealing with interchange problems is in general terms, with meaning of the terms in particular cases left to administrative or judicial decision. Accordingly, though no language in the Act specifically commands the carriers to interchange buses with each other, respondent Greyhound's argument that through-bus arrangements are wholly voluntary and bus interchanges cannot be required, on just and reasonable terms, is rejected. Greyhound should promptly agree with petitioner for restoration of through bus service (using latter's route) in effect on date of earlier §5(2) case in which it obtained authority encircling petitioner; and should they fail to agree on acceptable terms, a §5(9) supplemental order will require restoration of practices and traffic patterns then existing.—Mt. Hood Stages, Inc.—Petition for Modification, 104 M.C.C. 449 (458-9, 462)*.

Through-bus regulations (i.e., §§5 and 6 under the passenger carrier superhighway rules) are designed to enable certificated regular-route motor carriers of passengers to utilize the new superhighways on a joint basis for safety, convenience, efficiency, or economy in continuing the interline services which they conduct over other highways by combining their operations at common points of service. A through-bus service could be considered either a mutual relocation of existing interline points or a jointly operated alternate route.—Motor Service on Interstate Highways—Passengers, 110 M.C.C. 514 (542-43); joint requests for certificates encompassing through-bus operations will be entertained and considered on a case-by-case basis. The carriers will be required to supply such information as the point on the superhighway at which the interline and change of control of the operation would be brought about, and should state whether an actual change of vehicles would take place at the point of interline or whether the operation would be performed in the same vehicle in a through movement under a leasing arrangement. These bus operators also must bear in mind that the actual control of the operation must pass to that carrier under whose authority the vehicle is moving.—Id., p. 543; in the light of the type of authority involved under the through-bus regulations, and consistent with the other passenger carrier superhighway regulations, it will be appropriate to incorporate into the through-bus regulations adopted in the instant proceeding an added requirement that the applicant carriers must demonstrate that the proposed operations will not materially change the competitive situation between themselves and any other carrier or carriers.—Id., pp. 543-544.

Section 216. (b) [§*316(b) U.S.C.*] Rates, facilities for carriers of property.—[Unchanged. See vol. 10, p. 8145.]

Notes of Decisions

Volume 10—p. 8145; Volume 11—p. 9489; Volume 12—p. 10427; Volume 13—p. 11092; Volume 14—p. 11614; Volume 15—p. 12228; Volume 16—p. 12882; Volume 17—p. 13581; Volume 18—p. 14534; Volume 19—p. 15813; Volume 21—p. 17527.

2. Construction and interpretation.—[Vol. 12].—Commission in dealing with the entire spectrum of freight shipments rather than fixing or approving commodity rates, may not lawfully sanction complete elimination of classification without sufficient reason, and once the Commission has recognized certain classifications to be fair and reasonable it cannot sanction significant departures from them without adequate record support and reasoned explication. Evidence was insufficient to support Commission's determination that rates and charges under new tariff which abandoned all classification factors on shipments under class 100 in the 101-200 pound range for small shipments were just and reasonable.—National Small Ship. Traf. Conf. v. United States, 321 F. Supp. 500 (501)*.

4. Safe and adequate equipment to be furnished.—[Vols. 10, 11, 19].—See Loading, Unloading by Winch, Oil Field Haulers case, §216 (g), n. 26, infra.

Tests of Reasonableness

25. Competition considered.—[Vols. 10-13, 16-19, 21].—See Motor Vehicles, Kansas City, Mo., to Southwest case, §1(5), n. 289, supra.

Weight as Factor

60. Weight basis.—[Vols. 10-12, 14, 16, 18, 19, 21].—See also Assembling Rates to Atlanta, Charlotte, Greensboro case, §408, n. 2, infra.

The rule prescribed herein (49 CFR 1056.6) clarifies procedures for determining the loaded weight, tare weight, and net weight of vehicles engaged in transportation of household goods by specified modifications of the language of the former rule fixing for such determinations. Use of constructive weights should be strictly limited to shipments moving between points where scales are not available or to those instances where the entire movement occurs when scales are not open. Carrier shall obtain a weight ticket, signed by weighmaster or carrier's driver, for each weighing. Such ticket shall show number of bill of lading accompanying the shipment. Copy of such ticket shall be retained in carrier's file and a copy given to shipper. Carriers shall reweigh shipments upon request of shipper made prior to the delivery date. Gross, tare, and net weights on reweigh shall be recorded on bill of lading and the vehicle-load manifest and a copy given to shipper. The lower of the 2 net scale weights is determinative of applicable reweigh charges, which are to be paid by shipper requesting such reweighing.—Practices of Motor Common Carriers of Household Goods, 111 M.C.C. 427 (439-44)*.

Comparison of Rates

78. Value dependent upon similarity of circumstances.—[Vols. 12, 14, 17-19, 21].—Part I, §1(5), n. 222.—Comparison of assailed rates on salt with higher rates of other carriers does not establish that they are unreasonably low, when circumstances surrounding establishment of the compared rates are not shown.—Midwest Emery Freight System, Inc. v. Lee Bros., Inc., 322 I.C.C. 701 (704)*.

Cost of Service

100. Costs considered; truck capacity; truck capacity.—[Vols. 10, 11, 19, 21].—We have generally considered line-haul costs as being jointly incurred by the outbound and inbound movements. Accordingly, in computing costs for truckload shipments, a round-trip load factor has been developed by adding the proposed minimum weight of the rate in question to the load, if known, in the reverse direction, or if not known to the system average load, and dividing the result by two. However, certain exceptions thereto have been recognized which apply here.—Atchison, T. & S. F. Ry. v. Morris, 340 I.C.C. 51 (58).*

101. Terminal services.—[Vols. 10-19, 21].—Respondent's cost data are not sufficiently accurate to reflect its out-of-pocket costs for 37 t.l. shipments on which helper service was furnished; though it claims overall profits of $30.48 to $122.60 per truckload on those shipments, rates applicable thereon are not shown. Its computations fail to take into consideration pickup and delivery costs other than "the cost of the road driver" and amount paid the helper, and manner in which it developed those costs is not indicated. Other evidence intended to show that use of a helper results in maximum use of equipment has little probative value in determining compensativeness; its proposed rule providing for free helper service for loading and unloading t.l. freight is not shown to be compensatory.—Free Helper Service in Middle Atlantic Territory, 323 I.C.C. 709 (711).

102. System average costs.—[Vols. 10-19, 21].—Part I, §1(5), n. 95.—See also §216(g), n. 66.

In suit to set aside Commission orders holding certain motor carrier rates on clay and drilling mud to be noncompensatory and, therefore, unreasonable, the court agrees with the Commission that regional average cost studies have been and can be used in determining whether rates assailed in a complaint proceeding are just and reasonable; however, the carriers' actual costs, if ascertainable, are a better guide than regional average costs. In instant case, the examiner erred in not permitting plaintiffs (defendants) to introduce actual motor-carrier costs, probably on the theory that, since he found complainants' regional average cost studies had not established a prima facie case, such evidence was not proper. When the Commission reversed the examiner, however, and determined that a prima facie case had been made, it should have seen to it that the record was supplemented before it acted. Plaintiffs' evidence was available; and when the ultimate decision is best based on costs of carrier against whom complaint is made those costs, when available, should be considered.—United Buckingham Freight Lines v. United States, 288 F. Supp 883 (885)*.

Evidence supporting the prima facie case on which the Commission relied was subject to being rebutted if actual costs had been available; plaintiff motor carrier was denied opportunity to present its actual costs by the examiner's erroneous application of a rule of procedure; therefore, since the Commission must see to it that the record is complete, it is manifestly unfair for it to reverse the examiner's conclusions and decide the case on the record presented to him, which was obviously incomplete due to his ruling. Record before the court is not convincing that the Commission would find considered rates unreasonable on a complete record showing actual costs of motor carriers who originate the traffic; accordingly, the Commission's report and orders are vacated and annulled and the case is returned for a full hearing as to whether the rates in issue are noncompensatory.—Id., pp. 886, 887.

As a general rule a carrier's system average expense is considered of little value in determining lawfulness of rates for particular traffic movements. However, as an exception, system average expense of a specialized carrier, engaged in hauling a single commodity or group in a particular area, may be regarded as a fairly reliable measure of that carrier's cost of operations in absence of evidence to the contrary. Contract-carrier defendant being a specialized carrier of salt, its system average costs are an acceptable measure of cost of considered service; and as the common-carrier defendant handles salt as a separate operation, such handling is tantamount to operations of a specialized carrier. The common carrier's data, pertaining only to salt traffic, are therefore entitled to more weight than complainant's cost evidence, which reflects system and regional averages, the former including that defendant's perishable traffic, which manifestly entails higher costs than salt. As the common-carrier defendant's costs parallel the contract carrier's, latter's latest system average costs of record fairly represent the cost to both of handling the involved salt traffic.—Midwest Emery Freight System, Inc. v. Lee Bros., Inc., 322 I.C.C. 701 (703)*.

On reconsideration, protestants' evidence based on regional average cost fails to show that respondent's proposed initial rates are below a minimum reasonable level, and will not support a finding that the proposed rates are non-compensatory since regional average costs are based on the costs of carriers of general commodities and are not representative of respondent's costs as an irregular route carrier of specified commodities.—Foodstuffs & Agricultural Commodities, California & Arizona, to West and South, 329 I.C.C. 321 (324).

The round trip movement is an indivisible unit of production resulting in a joint cost and, whether an empty movement occurs in the line-haul, the cost therefor is borne by all of the revenue freight for the entire round trip.—Composition Roofing, Stroud, Okla. to St. Louis, Mo., 329 I.C.C. 612 (618)*.

104. Ascertaining cost.—[Vols. 12, 14, 18, 19, 21].—Respondent motor carriers' cost study is deficient to the extent it is based on regular-route, general-commodity carriers with 6 percent additive for circuity inapplicable herein as operations involved are irregularly routed and specialized. Commission examiner adjusted study by elimination of 6 percent additive, restatement of out-of-pocket costs as 95 percent of total cost rather than 90 percent, and reduced terminal costs. As adjusted, study is acceptable approximation of out-of-pocket costs on instant traffic and as basis for prescribed minimum rates.—Rates on Formerly Exempt Commodities, 329 I.C.C. 61 (64-5).

The Commission has consistently held that where regional average costs are based on the costs of carriers whose operations differ from those of the respondent, those costs are not necessarily representative of that carrier's costs. Since the regional average costs submitted by protestants are based on the costs of carriers of general commodities and reflect a regional line-haul cost of 38.99 cents per vehicle-mile, whereas respondent is an irregular-route carrier of specified commodities, and has shown that its total system average expense per vehicle-mile was only 30.4 cents, the general cost evidence adduced by the protestants cannot be accepted as representative of the respondent's operating expenses.—Foodstuffs & Agricultural Com., Calif. & Ariz. to West, 329 I.C.C. 321 (324)*.

Protestant compared rates of a specialized motor common carrier with the average costs of class I and class II general-commodity carriers in an effort to show that the proposed initial rates are noncompensatory. However, where regional average costs are based on operations different from those of a particular respondent, such costs are not necessarily representative of the latter's operations. This principle is especially pertinent here since the regional average figures include both truckload and more costly less-than-truckload traffic, while respondent's traffic is in truckload movements. Also, the operations of the compared carriers are not otherwise shown to be similar to those of the respondent. Proposed rates not shown to be unjust or unreasonable.—Meats & Packinghouse Products, Midwest to Far West, 329 I.C.C. 604 (609).

When respondents' cost data on shipments of chemicals, drugs, and related articles from New Jersey and New York to Chicago by owner-operators cannot be accepted as reliable owing to deficiencies indicated, then protestant motor carrier associations' regional average cost computations may be accepted as basis for cost of such service subject to rebuttal by competent evidence that an individual carrier's costs are different.—Chemicals, Drugs, and Related Articles, 335 I.C.C. 601 (603-05).

112. —Out-of-pocket costs, with margin over, as basis.—[Vols. 10-12, 16, 18, 19, 21].—Upon investigation, rates of respondent motor carriers on commodities formerly exempted from economic regulation by §203(b)(6) were shown just and reasonable and not otherwise unlawful, with certain indicated exceptions, as cost evidence submitted by respondents and adjusted by hearing examiner reasonably approximate respondents' out-of-pocket costs and prove such currently effective rates generally exceed costs and are compensatory.—Rates on Formerly Exempt Commodities, 329 I.C.C. 61 (70).

Assailed rates on shipments of chemicals, drugs, and related articles from New Jersey and New York to Chicago were found to be below respondents' out-of-pocket costs for such service. Since out-of-pocket costs represent the floor below which rates should not be allowed to gravitate, the assailed rates are noncompensatory and so are unjust and unreasonable to the extent they are lower than 129 cents, minimum 35,000 pounds, and 120 cents, minimum 40,000 pounds.—Chemicals, Drugs, and Related Articles, 335 I.C.C. 601 (606-7).

Rates by Commodities

125. Commodities; rates prescribed or approved.—[Vols. 10-19, 21].—Part I, §1(5), n. 350; Part III, §305(a), n. 125; Part IV, §404(a), n. 125.

Aluminum; articles, scrap: [Vols. 10. 11, 14, 16-19, 21].—Reduced t.l. rates of $1.35, minimum 38,000 pounds on aluminum extrusions from Miami to Chicago, approved for respondent only.—Aluminum Extrusions from Miami to Chicago, 325 I.C.C. 188 (188).

Building materials; roofing: [Vols. 10-12, 14, 17-19].—Proposed reduced truckload commodity rate of 41 cents, minimum 88,000 pounds, on composition or prepared roofing from Stroud, Okla., to St. Louis, Mo., found just and reasonable for proponent only. Rate applies only when a shipment is loaded on not more than two trucks by the shipper, and unloaded by consignee.—Composition Roofing, Stroud, Okla., to St. Louis, Mo., 329 I.C.C. 612 (612)*.

Proposed reduced t.l. commodity rate of 80 cents, minimum 44,000 pounds, on gypsum and plaster from Southard, Okla., to Chicago, Ill., not shown just and reasonable. Such rate is not compensatory on a round-trip cost basis and one-way costing is not herein applicable.—Gypsum and Plaster, Southard, Okla. to Chicago, 332 I.C.C. 48 (52).

Candy, confectionery: [Vols. 10-13, 16-19].—Proposed t.l. commodity rate of 93 cents, minimum 40,000 pounds on candy and related articles from Hackettstown, N.J., and New York, N.Y., to Chicago found not compensatory and not otherwise lawful. Other proposed rates on such traffic considered herein found just and reasonable.—Candy & Confectionery, New Jersey & New York to Chicago, 332 I.C.C. 43 (44-5).

Carbon black: [Vols. 11, 18].—Proposed rate of 127 cents per hundredweight for carbon black approved for applicant, based on added-traffic theory.—Carbon Blacks from the Southwest to Ind., Ohio & Mo., 325 I.C.C. 138 (146).

Chemicals: [Vols. 10-12, 16-19].—Assailed rates on chemicals, drugs, and related articles of 101 cents, minimum 40,000 pounds, and 109 cents, minimum 35,000 pounds, from points in New Jersey and New York to Chicago, Ill., found unjust and unreasonable to extent they are lower than 129 cents, minimum 35,000 pounds, and 120 cents, minimum 40,000 pounds.—Chemicals, Drugs, and Related Articles, 335 I.C.C. 601 (607).

Clay; fullers' earth; shale; products: [Vols. 11, 12, 18, 19].—Assailed rates on clay and drilling mud from points in South Dakota and Wyoming to destinations in midwestern states found unjust and unreasonable in certain instances and not unjust and unreasonable in other instances.—Atchison, T. & S. F. Ry. v. Morris, 340 I.C.C. 51 (61)*.

Feeds, animal, poultry: [Vols. 10, 11, 13, 14, 18, 19, 21].—Proposed motor common carrier rate of 45 cents, minimum 40,000 pounds, on prepared animal feed, other than frozen, from Kansas City, Mo., to Chicago, Ill., and points taking the same rates, found just and reasonable, and otherwise lawful, for one respondent only.—Animal Feed from Kansas City, Mo., to Chicago, 325 I.C.C. 147 (147).

Household goods: [Vols. 12, 16-18].—49 CFR 1056 was amended by addition of a regulation requiring that no motor common carrier of household goods shall have in effect for its account more than one level of rates, whether local or joint, for the same transportation service in interstate or foreign commerce between the same two points in the same direction (49 CFR 1056.21).—Practices of Motor Common Carriers of Household Goods, 118 M.C.C. 762 (769-770).

Iron and steel articles: [Vols. 10-12, 14, 16-19,21].—Reduced rate of 36 cents, minimum 36,000 pounds, on sheet steel, Sparrows Points, Md., to Scranton and Carbondale, Pa., found just and reasonable.—Sheet Steel, Sparrows Point to Scranton and Carbondale, 323 I.C.C. 554 (556)*.

Petroleum, petroleum products: [Vols. 10-12, 14, 16-19, 21].—Weekly rates on gasoline and distillate fuel oil from Sparks, Nev., to points within 200 miles thereof, the same as corresponding intrastate rates and applicable when minimum quantities of 120,000, 180,000, 240,000, or 300,000 gallons (including intrastate as well as interstate gallonage) are tendered by shipper for transportation by one carrier in a single unit of equipment in 7 consecutive days, approved as just, reasonable, and otherwise lawful. The rates are subject to a weekly minimum charge of $900 per vehicle unit, and are based on separate scales, somewhat lower for gasoline than for oil, stated in amounts per gallon shown in appendix, for distances not over 20 miles, progressing by approximately 10-mile blocks to 200 miles, except that the 300,000-gallon rates do not apply beyond 130 miles.—Weekly Rates on Petroleum Products—from Sparks, Nev., 332 I.C.C. 541.

Particular Descriptions of Freight Rates

160. Loading and unloading.—[Vols. 10-12, 14, 15, 19, 21].—Proposed rule in tariff naming rates on oilfield commodities, providing that carrier may for its convenience substitute vehicles not equipped with winches for the line-haul transportation and at its expense obtain a winch for loading or unloading commodities not requiring additional lift equipment, does not violate orders entered in 300 ICC 409 and subsequent reports prescribing minimum rate scales on those commodities in the Southwest. When the minimum-rate order was entered, loading and unloading services were included in the line-haul rates, and the order did not alter those tariff provisions. Moreover, in that proceeding the Commission stated that if a carrier holds out to perform pickup and delivery services at line-haul rates it may elect to have them performed by others and absorb the cost thereof; thus the service contemplated by the new rule—which merely clarifies services offered at present rates under a widespread and longstanding practice—is not prohibited by that proceeding. And since the proposal relates to manner of performing service already included in line-haul rates, it will not affect the existing rate structure.—Loading, Unloading by Winch, Oil Field Haulers, U.S.A., 323 I.C.C. 359 (361-2, 367-8).

Although respondent will be expected to comply with outstanding order in 321 ICC 406, to which proceeding it was a party, and which prescribed a rule governing furnishing of helper service for loading and unloading t.l. freight moving between middle Atlantic territory and Pittsburgh-Wheeling area, it would be improper to use that proceeding as a basis for prescribing that rule for future application by respondent in connection with all intraterritorial traffic in middle Atlantic territory outside the Pittsburgh-Wheeling area; record in instant suspension proceeding is too meager to warrant prescription of such a rule for respondent.—Free Helper Service in Middle Atlantic Territory, 323 I.C.C. 709 (711-2).

Respondents' practice of furnishing more than one man to load and unload shipments without specific tariff authority or charge therefor violates §216. Such practices were found, in 321 ICC 406, to be unduly preferential of consignors and consignees receiving such services, and prejudicial to those who do not receive them. The proposed "one man" rules requiring carrier to furnish only one man to load, be he driver or helper, not shown just and reasonable as the rules are indefinite as to conditions under which carrier's employee would not load, and consignor must load due to bulk or weight of a unit of a shipment. Proposed "extra-labor" rules authorizing carrier to furnish labor when requested by consignor or consignee at a specific hourly wage are, however, not ambiguous and are shown just and reasonable.—Tennessee Carolina Transp., Inc.—Investigation, 337 I.C.C. 542 (548-50).

The Commission held various sorting rules in issue not to conform with the tariff filing requirements of 325 ICC 631. Moreover, an evidentiary deficiency precluded any determination of the reasonableness of the proposed charges for sorted delivery of shipments which are not presorted or which for other reasons are not within the "no-charge" provisions of the rules in issue. The evidence submitted was inadequate to establish the reasonableness of the "no-charge" provisions under the various rules, which finding was premised on the failure of the proponents to make a convincing showing that a sorted delivery of presorted shipments actually results in no additional expense to the carriers.—Segregation of Freight, New Eng. & Mid Atl. States, 340 I.C.C. 306 (318)*; permitting only truckload traffic to engage in reverse sequence unloading would not result in violation of §216 and §217, since the circumstances and conditions attending truckload and LTL traffic vary substantially and, therefore, the preference and prejudice complained of may not be properly condemned as being *undue*. Moreover, the economic benefits that normally can be derived from the practice of reverse sequence unloading would not normally accure when that practice is applied to smaller LTL and AQ shipments.—Id., p. 323.

180. Proportional rates.—[Vols. 10-12, 16-19, 21].—Part I, §1(5), n. 402.—Proposed motor-water-motor multiple-trailer proportional rates on canned foodstuffs shown just and reasonable on such movements from Oakland and Long Beach, Calif., to indicated eastern destinations but not just and reasonable on shipments from other points on the Pacific coast as these rates neither are compensatory nor cover respondent's out-of-pocket costs.—Canned Foodstuffs, Pacific Coast to the East, 335 I.C.C. 612 (629).

190. Weekly minimum quantity rates.—Respondents' weekly rates on gasoline and fuel oil tendered in stated minimum gallonages for transportation by one carrier in one equipment unit in round-the-clock movement over a period of 7 consecutive days, in interstate or interstate-and-intrastate commerce, from Sparks, Nev., to points within 200 miles thereof, based on mileage scales stated in cents per gallon, somewhat lower for gasoline than for oil, and subject to a minimum weekly charge of $900 per unit, found just, reasonable, and not competitively destructive or otherwise unlawful. Considered rates are adequately compensatory when for only carrier handling traffic thereunder prior to hearing they have produced a better record of equipment utilization and a better ratio of vehicle-mile earnings and expenses than its systemwide bulk commodity operations. Operations under the involved rates will substantially reduce operating costs and enable the carriers to regain traffic now moving in private carriage; approved.—Weekly Rates on Petroleum Products—from Sparks, Nev., 322 I.C.C. 541 (542-3, 545, 551).

The weekly rates are not unlawful on ground that they are essentially contractual. Decision in 313 ICC 247, condemning contract rates based on a percentage of shipper's traffic, is not controlling because, first, a contract which ties up traffic for only a week is hardly comparable to one which removes traffic from competitive bidding for 6 months to a year, and second, no regulated carrier has contended that it would be injured by the so-called contract rates in issue.—Id., pp. 548-9.

201. Classifications; rules, exceptions.—[Vols. 10-16, 17, 19].—Evidence was insufficient to support the Commission's determination that rates and charges under the new tariff which abandoned all classification factors on shipments under class 100 in the 101 to 200 pound range and all except density in the 201 to 499 pound range for small shipments were just and reasonable.—National Small Ship. Traf. Conf. v. United States, 321 F. Supp. 500 (501)*.

Normally, if a rating in the general classification is too low, the carriers should correct it by changing the general classification and not by providing exceptions ratings or commodity rates higher than the classification basis. This does not mean that an exceptions rating or commodity rate may not be established if (1) the transportation characteristics of the excepted article moving between certain points differ substantially from the common characteristics of similar articles generally, or where (2) special circumstances peculiar to a particular area warrant it. However, it has been held that, once the complainant has shown that the defendants' exceptions rating exceeds the classification rating on the commodity under consideration, the defendants than have the burden of going forward with evidence to establish the reasonableness of the higher exceptions rating.—Feather & Down Assoc., Inc. v. Middlewest M. Frt. Bur., 340 I.C.C. 76 (78-79).

Commission determined the applicable classification ratings on shipments of plastic packaging containers prior to March 5, 1971, but held that issues regarding applicability and reasonableness on future shipments, due to changes in classification effective on above date, are moot.—Mammoth Plastics v. National Classification Board, 341 I.C.C. 15 (18-19).

230. Any-quantity rates.—[Vols. 11-13, 18, 19, 21].—Any-quantity exceptions ratings maintained by motor common carriers on shipments of pillows and cushions between points in the midwest found to be unreasonable to the extent that they exceed ratings in the National Motor Freight Classification. Exceptions ratings required to be cancelled.—Feather & Down Assoc., Inc. v. Middlewest M. Frt. Bur., 340 I.C.C. 76 (76).

275. Minimum rates; minimum charges.—[Vols. 10-15, 18, 19, 21].—Part I, §1(5), n. 14.—Minimum charge of $900 per unit of equipment per week, published in connection with weekly rates on gasoline and fuel oils, based on stated aggregate minimum gallonages of shipments tendered for round-the-clock movement in a single vehicle over a period of 7 days, which minimum charge applies when the total volume is less than the lowest stated minimum (as may occur when shipper makes deletions in the composite tender of shipments), is necessary to justify economically the dedication of particular equipment for 7 days; approved.—Weekly Rates on Petroleum Products—from Sparks, Nev., 322 I.C.C. 541 (543, 550).

Evidence supports finding that the lowest t.l. revenue consistent with cost of transporting salt from Marysville and St. Clair, Mich., to Chicago would be about $120. On this basis defendant's rate of 35 cents, minimum 80,000 pounds, is not shown to be unreasonable; but its rates of 43 cents, minimum 20,000 pounds, and 38 cents, minimum 30,000 pounds, earn less than cost of handling the traffic and are therefore unreasonably low. While finding that a reasonable minimum rate for the future must yield not less than $120 a truckload will require defendant to publish a rate of 60 cents, minimum 20,000 pounds, or 8 cents higher than present rates of complainant and other carriers, lawfulness of the compared rates is not in issue.—Midwest Emery Freight System, Inc. v. Lee Bros., Inc., 322 I.C.C. 701 (704)*.

In seeking to justify a need for proposed minimum charges, the respondents relied in part on a comparison of the revenue per vehicle-mile with the regional average cost per vehicle-mile on one shipment of aircraft wings. The record does not contain any other revenue-cost comparisons based on actual movements. Assuming, but without deciding, that revenue-cost comparisons of the nature described would be of probative value, there is no reasonable basis for concluding that movement establishes a need for minimum charges with such widespread application as proposed.—Minimum Charge for Capacity Loads, Transcon. Terr., 329 I.C.C. 706 (709-710).

Commission determined that exemption of all nonoilfield commodities on a territorial basis would destroy beneficial results achieved by the minimum-rate order prescribed in the original report, 300 ICC 407, as later modified. In recognition of circumstances peculiar to oil industry rate structure, the respondent carriers were permitted separately to establish rates on nonoilfield commodities included in pipe and machinery groups, without regard to minimum rate order, if tariff applicable thereto provides shipper certification that involved articles are not intended for ultimate use in the oil industry.—Oilfield Equipment To and Between the Southwest, 332 I.C.C. 688 (691-4).

Although on further hearing there is some suggestion that the minimum rate order be vacated in its entirety, no evidence warrants such a finding; nor is there any basis for concluding that the scope of these proceedings and the minimum rate order are limited to movements of oilfield machinery, equipment, materials, and supplies only when transported by Mercer-type carriers and that other common carriers transporting these commodities are exempt from complying with the order. Furthermore, while the record does not warrant granting all the relief requested, it does warrant further modification of considered order to relieve respondent motor common carriers from maintaining the prescribed minimum rates on movements of (1) standard or merchants pipe (less than 2 inches in diameter and 24 feet in length) and (2) asbestos-cement pipe and conduit and related articles between points in considered States.—Oilfield Equipment to and between the Southwest, 106 M.C.C. 298 (305-10)*.

Rates for Special Classes of Service; Practices

400. Pickup and delivery; split pickup, delivery.—[Vols. 10-19, 21].—Separate minimum charges on each l.t.l. shipment of imported bulbs tendered as one lot to defendant motor carriers at piers in New York City area for movement to defendants' terminals in same area found unjust and unreasonable as the amount of service performed in picking up multiple l.t.l. shipments does not vary with the number of consignees. Tariff provisions prescribed for such services.—Holland Bulb Exporters Assn. v. A.A.A. Trucking Corp., 329 I.C.C. 152 (157).

Proposed charge for pickup or delivery to and from points in Greene Co., Pa., based on alleged additional expenses incurred in servicing these points denied, since (1) no amount for billing and collecting had been included in computing regional average costs, (2) no underlying data were furnished to support any of the factors which were used to arrive at the cost per trip to and from the points in question, and (3) no evidence was offered to support the proposed minimum charge of $1 per shipment.—Pickup & Delivery at Pennsylvania Points, 340 I.C.C. 46 (49)*.

A motor common carrier of household goods shall notify shipper of delays in pickup or delivery of such shipments and reason therefor, as soon as it is apparent that it cannot meet the date or time specified on the order for service or bill of lading. Carrier is to pay the cost of such notification. Except upon request or concurrence of shipper, a shipment shall not be tendered for delivery prior to the agreed delivery date or period or time specified in the bill of lading. Carrier may, in indicated circumstances, place a shipment in storage near its destination, at the expense of carrier, and with notification of such action to shipper.—Practices of Motor Common Carriers of Household Goods, 111 M.C.C. 427 (459, 482-84)*.

412. Line-haul rates and accessorial services included.—[Vols. 18, 19].—Pursuant to respondent's holding out under its rates on imported shipments of frozen meats which are loaded direct from piers and wharves and its pickup and delivery rule, it is required to bear the costs of loading of vehicles. Pickup service contemplated by respondent's tariff embraces both calling for and loading at origin; and, there being no specific provision in the tariff for loading by the shipper, the loading is an integral part of the transportation service offered. Fact that labor contracts require that loading of vehicles at piers be done by terminal operators does not change, in any way, nature of the service to be rendered by carrier; moreover, the record shows that terminal operators perform considered loading as agents of respondent. Proposed tariff provision for absorption of considered pier loading charges, in order to clarify services offered under present rates, will eliminate existing uncertainty regarding respondent's payment of loading charges to the terminal companies; approved.—Frozen Foods—Southern, Middle Atl. & New England States, 323 I.C.C. 143 (146-8).

Respondent's proposed rule providing that, unless otherwise specified, its intraterritorial line-haul rates on t.l. traffic in middle Atlantic territory include service of two men for loading and unloading conflicts with findings in 321 ICC 406 insofar as it would apply to traffic moving between points in that territory and Pittsburgh-Wheeling area and is to that extent unlawful; and respondent's cost data fail to show that rates including such free helper service on traffic moving intraterritorially between points outside the Pittsburgh-Wheeling area would be compensatory. Not approved.—Free Helper Service in Middle Atlantic Territory, 323 I.C.C. 709 (711).

415. Handling; terminal charges.—[Vol. 21].—Commission herein modified 49 CFR 1056.4 (formerly numbered 276.4) regarding charges for accessorial or terminal charges so that all such charges for terminal services on line-haul movements, including those by freight forwarders exempt under §402(b)(2) of the Act, must be charged for separately and on a per unit basis.—Amendment of Pt. 276.4 General Rules & Regulations, 335 I.C.C. 698 (704-5).

450. Routing; misrouting.—[Vols. 12-14, 16-19, 21].—Part I, §1(6), n. 574; §15(8), notes.—Although a haul between two points in same State, but over a route partially through another State, is an interstate movement, the principle underlying the charging of intrastate rates in such situations is that the character of commerce is determined by shipper's intention and latter's continuing intention is that it shall be intrastate. See 17 MCC 661. Charging of higher interstate rate on such movement subjects carrier to liability for misrouting as an unreasonable practice. See 302 ICC 173.—Applicable Rates on Intrastate Shipments, 332 I.C.C. 887 (890-91).

Any carrier who, for his own convenience, converts a less-than-truckload shipment from an intrastate to an interstate character by moving such shipments over an interstate route may be liable for misrouting. Shipments so converted in character must be charged by the applicable interstate rate.—Applicable Rates on Intrastate Shipments, 335 I.C.C. 472 (475)*.

460. Demurage.— [Vols. 13, 21].—See also Payment of Detention Charges, Eastern Central States case, §223, n. 25, infra.

District court upheld Commission's order prohibiting carriers from specifying in their tariffs that certain wharehousemen, steamship agencies, and others similarly situated, who were neither consignors nor consignees, are liable under certain circumstances for detention charges on trucks loaded or unloaded at their premises.—Middle Atlantic Conference v. United States, 353 F. Supp. 1109 (1122-23)*.

Proposed tariff provisions, requiring that liability for charges resulting from detention of motor common carrier equipment be placed solely on the person causing the delay, were found unlawful because such provisions attempt to place liability for detention charges upon a person not a party to the contract for transportation.—Payment for Detention Charges, Eastern Central Rates, 335 I.C.C. 537 (542)*.

Carriers to Provide and Furnish Transportation

550. Duty to furnish transportation.—[Vols. 12, 13, 16-19, 21].—See also Associated Truck Lines, Inc. v. United States case, §216(d), n. 35; Bilyeu Refrigerated Transp. Corp. Extension case, §220(a), n. 15; Feraco, Inc. v. Georgia Pacific Corp. case, §217(b), n. 40; Restrictions on service by Motor Common Carriers case, §217(a), n. 1, infra; Mt. Hood Stages, Inc.—Petition for Modification case, §216(a), n. 101, supra.

In "excluding service on the less profitable traffic", a carrier violates the duty of common carriers under §216(b) to accept and transport all shipments within the scope of their certificated authorities. [111 MCC 151].—Towne Services Household Goods Transp. Co. v. United States, 329 F. Supp. 815 (818, note)*.

Assailed tariff rule providing that defendant maintains no through routes, joint rates, or interchange on shipments of furniture found unlawful. Defendant has a duty, under its certificate, to provide adequate service to all shippers of general commodities, including furniture, and for defendants selectively to offer greater service to general commodities other than furniture is contrary to its duty under §216(b).—National Furniture Conf. v. Assoc. Truck, 332 I.C.C. 802 (811-12); and proposed tariff restriction under which respondent motor carrier will handle only traffic moving at joint rates in which it participates as intermediate or delivering carrier not shown just and reasonable as carrier's arbitrary refusal to accept shipments within the scope of its authority violates §216(b), except in extraordinary situations, not shown present herein, and is unlawful.—Restrictions on Interchange Arrangements, 335 I.C.C. 356 (359).

It is undisputed that the defendants are crucial carriers in transporting less-than-truckload shipments into a sparsely populated area. While recognizing the difficulties in providing such service, we have expressed our determination on a number of occasions that all communities be furnished reasonable service. We cannot insist on the one hand that carriers provide service to outlying areas, and on the other hand frustrate their managerial efforts to make such operations feasible, in the absence of any showing of injury to other carriers or to shippers.—Atchison, T. & S. F. Ry. v. Morris, 340 I.C.C. 51 (60)*.

Complete cessation of all physical operations, except for occasional movements of truckload traffic, is not consonant with service required under respondent's regular-route certificates. Although there is a paucity of traffic generated at considered points, and economies of the situation would not permit establishing three major competitive terminals at the same point, that is not the only choice. Holding out to perform a complete service, advertising in the area, entering into agency relations with local carriers to accept and deliver freight, including l.t.l. freight, the habitual use of certain routes, and a marked or constant regularity of service are all part of a certificated regular-route common carrier's duty to the shipping public.—Pacific Intermountain Exp. Co.—Investigation, 96 M.C.C. 604 (608).

Respondents' claim that amount of traffic does not warrant continuance of physical operations for l.t.l. shipments by one of them, much less by all three, is no more than pleading that operations have proved unprofitable, and that they have discontinued the unprofitable, while retaining the profitable, portions of such operations; however, as set forth in 91 MCC 513, if need for respondents' service no longer exists, it would logically follow that their pertinent authority should be revoked. Record as to its virtual cessation of operations in the past warrants an order requiring one respondent to continue to provide reasonably continuous and adequate service (though it presently maintains such service) pursuant to its certificate. And since evidence shows that the other two respondents have not been maintaining reasonably continuous and adequate service within terms and conditions of their certificates, order entered will require them to institute, within 60 days, such service at the named points on their authorized routes.—Id., pp. 608-10.

Defendant's discontinuance of l.t.l. service, and closing its terminal, at St. Joseph, Mo., an authorized intermediate point on its general-commodity regular route, constitutes a voluntary or willful cessation notwithstanding the substantial operating deficit it had incurred during preceding year at that point. The Commission does not say that defendant necessarily must continue to provide service of the type and to extent heretofore proved unprofitable; since quantum of service required and facilities needed therefor depend on the traffic involved and are matters within carrier's managerial discretion, a reduction therein might be justified in appropriate circumstances; however, total cessation of l.t.l. operations is neither within its discretion nor consistent with its common carrier responsibility. Defendant found not to be rendering reasonably adequate and continuous service at St. Joseph as requried by its certificate; ordered to institute and thereafter maintain such service.—Cham. of Com. of St. Joseph, Mo. v. Arkansas Best Frt., 98 M.C.C. 166 (167-9).

Although respondent carrier established a separate corporate division to transport steel, it has not failed to render reasonably continuous and adequate service to the public in violation of §216(b), since in light of the "substance" test it, and not the division, is in actuality performing considered steel transportation. Decentralization of operations is not unusual and Gateway's delegation to division manager of authority to implement his supervisory responsibilities has a sound economic basis. Also evidence is not convincing that Gateway would not, and could not under arrangements with the steel division, overrule the division manager; while the manager assumes most of the variable costs, the cost of leasing equipment and compensating the owner-operators is neither controlled nor assumed by manager, although they consume bulk of division's gross revenues. Furthermore, the record indicates neither shipper dissatisfaction nor violation of Commission rules and regulations.—Gateway Transp. Co., Inc., Investigation and Revocation, 106 M.C.C. 61 (66-69).

Common carrier authority to serve necessarily implies a corresponding duty to serve, but only a reasonable demand for service and only to extent of the carrier's reasonable ability; thus, objection that removal of "truckload lot" restrictions from existing certificates would impose on carriers, without their consent, an obligation to supply services wchich they may not wish to, or cannot, provide, is more theoretical than factual. So far as practicable, a common carrier is bound to hold itself out to the public generally and such availability is thwarted by carriers laboring under a truckload restriction because they can neither provide service on l.t.l. traffic, nor serve shippers who have only that type shipments. Hence, a norm has been established which in terms of common-carrier duty is irrational since, as commonly interpreted, it uses the size of truck or trailer to determine nature of the shipment and type of shipper that can be served. Removal of that onerous restriction—on a national scale—would enable the affected carriers to provide service in compliance with their statutory obligation and, also, would be in the public interest.—Removal of Truckload Lot Restrictions, 106 M.C.C. 455 (485, 491-3)*.

Commission's continued concern for maintenance of adequate service to points not located along superhighway routes resulted in affirmation of adoption of a stronger approach in revocation and abandonment proceedings where a carrier seeks to retain its service route over a superhighway, and affirmation of principles outlines in 107 MCC 95: "[I]t must be made absolutely clear that any authority emanating from these proceedings *** will be made not serverable from the carriers' underlying regular service routes, and will be subject to the further condition (1) that the carriers must continue to provide adequate and reasonable service over their present service routes, and (2) that upon establishment by interested persons that a motor carrier's service at a point on its underlying service route has been discontinued or curtailed, the carrier will have the burden of showing that the discontinuance or curtailment is reasonable".—Motor Service on Interstate Highways—Passengers, 110 M.C.C. 514 (542).

A motor common carrier is obliged to transport all goods offered for transportation and to serve all shippers without discrimination. When respondent, even though it was in dire financial condition, refused to interline and to accept small shipments, it acted clearly contrary to that obligation. Respondent ordered to cease and desist from these discriminatory practices.—A.C.E. Freight, Inc.—Investigation and Revocation, 115 M.C.C. 96 (103).

Motor common carriers of property are not now obligated but rather are permitted, under §216(c), to establish through routes and joint rates with each other covering the provision of interline service. However, once such interline arrangements or concurrences are established and published in tariffs pursuant to §217(a), the concurring carriers are under a legal duty to provide the interline service described in their tariffs. A motor common carrier has the obligation to accept and transport all freight (including interline freight) tendered in accordance with the provisions of its published tariffs. This obligation has been characterized as an almost absolute duty, and, for the adequate protection of the public, motor common carriers of property are held strictly accountable for its performance. The observance of this duty is excused only if performance is prevented by such intervening occurances as acts of God or the public enemy.—Braswell Motor Frt. Lines, Inc., Investigation, 118 M.C.C. 392 (411).

Carrier found to have committed 3 distinct violations: (1) refusal to accept a freight consignment at a point it is authorized to serve, (2) discontinuance of service at certain points it has authority to serve, and (3) refusal to accept for continuing transportation in interline operation shipments tendered to it by two other motor common carriers, despite the fact that it hold appropriate authority for such transportation and had appropriate published interline arrangements in its tariffs covering the involved joint-line service. Cease and desist order issued.—Id., p. 409.

Classification of property; rules, regulations

694. Purpose of classification, generally.—[Vols. 18, 21].—Generally, the purpose of freight classification is to make certain that all items moving in commerce bear their fair share of costs of transportation. This is accomplished by assigning each article to a class according to well-known classification principles or elements which recognize distinctions from a transportation standpoint, along fairly broad lines, in order to meet needs of commerce. A classification rate is used to ascertain proper revenue levels for carriers.—Dutton-Lainson Company v. United States, 371 F. Supp. 1352 (1354)*.

704. Density of commodity.—[Vols. 16, 18, 19, 21].—Relatively low density has long been an accepted basis for charging higher than normal class rates, and Commission has approved this factor as a justification for maintaining commodity or exception rates which were higher than the classification rating on the traffic in question. Therefore, in view of the importance in determining rate on certain traffic, there is nothing unreasonable in defendants' tariff provisions whereby the shipper has the alternative of stating the shipment density on the bill of lading or paying the rates higher than the classification basis when no such notation is made.—Glama Dress Co. v. Mid-South Transports, 335 I.C.C. 586 (594).

Proposed increased l.t.l. classification ratings on boxes or crates or materials for same shown just and reasonable as average density of such commodity compares favorably with that of commodities taking ratings even higher than that proposed herein; average value of commodity herein is lower than that of higher-rated commodities; and commodity herein sustains few loss or damage claims.—Classification Ratings, Boxes or Crates, 335 I.C.C. 754 (757-8)*; proposed increase in t.l. classification rating and minimum weight found just and reasonable as availability of such rating and minimum weights is amply justified by wide range in density of traffic herein considered and as proposed minimum weight gives shippers an incentive to ship in higher density range.—Id., p. 759.

Subdivision of an appropriate class rating for a particular commodity by density brackets is permissible but use of density regardless of other transportation characteristics to determine the classification of a commodity is clearly not warranted. Proposed increased ratings on blankets, whose dominant transportation characteristic is density, shown just and reasonable but schedules ordered canceled and proceeding held open until proponent adduces evidence that such increases are justified under regulations of the Economic Stabilization Program.—Increased Classification Ratings on Blankets, 341 I.C.C. 760 (764-69).

735. Household goods.—[Vols. 14-18, 21].—As more fully discussed in the prior report, 95 MCC 138, shippers of household goods expect an outstanding service free from trouble when moving their personal possessions to a new place of abode, and the motor carrier industry has, as it should, encouraged the public to entertain such confidence; however, complaints to the Commission against household goods carriers outnumber those against all other carriers combined. The Commission is the guardian of the public interest in the matter, and that interest encompasses not only the public shipper but also the industry. Therefore, new and amended rules adopted to govern practices of household goods carriers are intended to assist the public shipper in obtaining more efficient and expeditious movement of his possessions, while at the same time not imposing any punitive measures on the industry.—Practices of Motor Common Carriers of Household Goods, 96 M.C.C. 196 (197, 201)*.

Commission herein revised rules governing practices of motor common carriers of household goods and prescribed additional rules designed to improve mover-customer relations through full disclosure of their respective obligations. Involved rules were rearranged and renumbered, but are completely set forth in appendix to this report (pp. 525-50), including cross reference between former and revised rules.—Practices of Motor Common Carriers of Household Goods, 111 M.C.C. 427 (436-7)*; household goods carriers shall, prior to receipt of shipment, prepare an order for service containing the information required by 49 CFR 1056.9, herein prescribed, including amount of estimated charges and amount needed by shipper to require delivery of a C.O.D. shipment.—Id., pp. 450-3; carriers hereby required to furnish shippers an estimate, upon shipper's request, of cost of considered movement and amount carrier requires to relinquish a C.O.D. shipment without full payment of tariff charges. A standard form for estimates is herein prescribed. Carriers must also report all overestimates and underestimates to Commission at quarterly intervals.—Id., pp. 462-74; carriers shall give every prospective shipper the Summary of Information set forth in form BOp103 (as reproduced in appendix herein) and obtain a receipt therefor which is to be preserved as part of the record of any shipment subsequently accepted by carrier.—Id., pp. 477-8.

Term "reasonable dispatch" is defined as transportation performed on the dates or during the period of time agreed upon by carrier and shipper and shown on the order for service and recorded on the bill of lading.—Id., pp. 437-9.

Proposed new rule which would exclude from 49 CFR 1056 the application of the requirements of §§1056.1 and 1056.7 through 1056.13 on described shipments of equipment which because of its unusual nature or value requires special handling usually employed by household goods carriers, rejected because of absence of information concerning the prevailing practices in the movement of these commodities or the impact of current regulation upon those practices.—Modification of Pt. 1056 General Rules & Regulations, 113 M.C.C. 687 (704-6).

Commission modified its reweigh regulations for household goods carriers by making the publication of reweighing charge permissive rather than mandatory and stating conditions under which such charges are inapplicable inasmuch as previous regulations did not accomplish the purpose for which they were intended.—Practices of Motor Common Carriers of Household Goods, 114 M.C.C. 279 (292-4)*.

Estimates and charges based on space reservation for a portion of a vehicle prohibited. Carrier estimates and charges in compliance with regulations adopted shall not be based upon specific reservation by a shipper of a portion of the capacity of a vehicle. Quarterly reports of split loads weighing less than 10,000 pounds, required.—Practices of Motor Common Carriers of Household Goods, 115 M.C.C. 49 (66).

Commission herein prescribed regulations governing relationships between household goods carriers and their agents in regard to the filing of agency agreements and indicated reports with Commission; standards of selecting and retaining agents; the liability of carriers for acts and omissions of their agents; and carriers with independent operating authority which also operate as agents.—Household Goods-Agency Relationships, 115 M.C.C. 628 (649-55).

Due to conflicts arising in the implementation of the regulation requiring that the release value be entered by the shipper signing the bill of lading, in his own handwriting [49 CFR1307.201(c)], in relations between carriers and national account shippers of household goods, the regulation was amended to permit the shipper to instruct the carrier in writing regarding the released value of a shipment, and the carrier to incorporate the instructions by reference into the bill of lading.—Practices of Motor Common Carriers of Household Goods, 118 M.C.C. 35 (41).

In an interim report, the Commission proposed rules requiring household goods carriers to supply every prospective shipper with (1) the summary of information set forth in form BOp103, (2) a copy of the Commission's Public Advisory Number 4 (dealing with loss and damage claims), and (3) a summary of the carrier's last past quarterly performance report which contains information regarding underestimates, late deliveries, and settlement of claims. Interested persons were invited to comment on proposed rules.—Practices of Motor Carriers of Household Goods, 118 M.C.C. 178 (190-8).

Commission herein adopted a regulation (49 CFR1056.21) permitting the use of credit card systems by motor common carriers of household goods. The credit card has become an American economic institution, and Commission believes that use of credit card programs will benefit the American public. This regulation requires approval of credit card systems by this Commission, but purposely omits cumbersome filing requirements and formalized procedures which would, in our opinion, influence carriers not to seek such systems. No formal filing requirements are prescribed and notice only of approval of disapproval will be given in the Federal Register, but carriers participating in an approved plan must file a quarterly report. Because the Commission believes that credit card systems should be offered to all carriers on an equal basis, we will not approve plans offered by a financial institution to a single carrier or limited group of carriers except in unusual circumstances and on an experimental basis.—Practices of Motor Common Carriers of Household Goods, 118 M.C.C. 746 (751-54).

Receipts, Freight Bills, Bills of Lading

975. Bills of lading.—[Vols. 17, 18].—The density of a commodity is of such importance in making rates that tariff provisions requring notation of density on the bill of lading as a condition precedent to use of a rate are not unreasonable. Failure of a shipper to comply with such provisions is not sufficient basis for declaring a higher rate unreasonable.—Glama Dress Co. v. Mid-South Transports, 335 I.C.C. 586 (594-5).

Motor common carriers of household goods are hereby required to show on their bills of lading all information required by the regulations prescribed in 49 CFR 1056.10 including the agreed dates or time periods required for reasonable dispatch (as defined herein) of such shipments; an estimate of total charges; maximum amount required for delivery of C.O.D. shipments; and the tare weight of such shipments.—Practices of Motor Common Carriers of Household Goods, 111 M.C.C. 427 (454-6)*.

Regulations of the Commission

34 FR 18041, Nov. 7, 1969, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.3 Determination of weights. No exceptions having been filed, recommended new paragraph (d) became effective Oct. 13, 1969.

35 FR 4758, Mar. 19, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, entire Part, §1056.1 - §1056.18, revised, effective May 1, 1970.

35 FR 5551, Apr. 3, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, miscellaneous corrections of revised regulations (35 FR 4754).

35 FR 7123, May 6, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.6 Determination of weights, new subparagraph (e) *Exception*, added, effective June 1, 1970.

35 FR 8890, June 9, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.1(c) and §1056.12(a) modified, effective June 1, 1970.

35 FR 16935, Nov. 3, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.4 Accessorial or terminal services, etc., order of Dec. 5, 1969 (335 ICC 698) reinstated and modified so as to become effective Dec. 1, 1970.

35 FR 19077, Dec. 17, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.11 Vehicle-load manifest; information required, new paragraph (b)(13) added, effective November 1970 [sic].

36 FR 158, Jan. 6, 1971, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.4 Accessorial or terminal services, etc., order served Oct. 29, 1970 (35 FR 16935) modified so as to become effective on Feb. 1, 1971.

36 FR 21358, Nov. 6, 1971, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.6 Determinations of weights, paragraphs (b) and (e) modified, effective 30 days after date of publication in Federal Register.

36 FR 22579, Nov. 25, 1971, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.6(d) and §1056.7 amended, effective Jan. 1, 1972.

37 FR 7159, Apr. 11, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.3 amended by adding paragraph (d), §1056.7 summary amended, and §1056.12(b) amended by adding a new last sentence, effective April 28, 1972.

37 FR 12324, June 22, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.10 Receipt or bill of lading; information thereon, revised, and §1056.20 Responsibilities and liabilities of principal carriers, added, effective July 31, 1972.

37 FR 14589, July 21, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce; reservation of vehicle space by shippers. Proceeding reopened for further consideration of rule prohibiting carriers from making estimates and/or charges based on vehicle space reservation, but solely with respect to shipments of the particular type of articles defined in §1056.1(a)(2) and (3); orders of Feb. 28, 1971, and Apr. 27, 1971, remain in full force and effect as to other shipments. Effective on date of order.

37 FR 14308, July 19, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.19(a) corrected.

37 FR 17838, Sept. 1, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.9(c) *Waiver of order for service*, added, effective Oct. 5, 1972.

38 FR 6392, March 9, 1973, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.6(d) *Reweighing of shipment*, corrected by amending first sentence.

38 FR 18253, July 9, 1973, Part 1056: Transportation of Household Goods, §1056.9 amended to allow waiver of the required order of service on shipments requiring special handling because of unusual nature or value upon written request.

38 FR 26608, Sept 24, 1973, Part 1056: Transportation of Household Goods §1056.21 requires common carriers of household goods to use uniform rates for identical services, effective Jan. 1, 1974.

38 FR 26608, Sept. 24, 1973, Part 1056: Transportation of Household Goods, §1056.25 prescribes procedures for common carriers of household goods desiring to participate in credit card plans, including filing of quarterly reports, effective Nov. 2, 1973.

38 FR 31428, Nov. 14, 1973, Part 1056: Transportation of Household Goods (Participation in Rates at Different Levels; Correction) Correction of rule published at 38 FR 26608.

39 FR 11191, Mar. 26, 1974, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce. Correction of regulation published at 37 FR 12325.

39 FR 14596, April 25, 1974, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce. Amendments of 49 CFR 1056.3 and 1056.12(b) as to estimates.

Section 216.(c) [*§316(c) U.S.C.*] Through routes and joint rates.—[Unchanged. See vol. 21, p. 17572].

Historical note, see vol. 21, p. 17573.

Historical Note

The Commission recommends that §216 be amended to authorize the Commission to require joint rates and through routes between motor carriers and between motor carriers and rail and water carriers, in order to foster a more energy-efficient means of transportation at a lower overall cost.—Annual Report, 1975, p. 77.

Notes of Decisions

Volume 10—p. 8195; Volume 11—p. 9546; Volume 12—p. 10451; Volume 13—p. 11105; Volume 14—p. 11628; Volume 15—p. 12238; Volume 16—p. 12899; Volume 17—p. 13603; Volume 18—p. 14592; Volume 19—p. 15856; Volume 21—p. 17573.

3. Construction and interpretation.—[Vols. 10, 12-14, 16, 21].—See also Substitution of Motor for Rail Serv. case, §217(b), n. 20.

In amending §216(c) and §305(b), to authorize establishment of through routes and joint rates to and from Alaska or Hawaii between motor carriers regulated by the Commission and water carriers subject to jurisdiction of Federal Maritime Commission, Congress gave jurisdiction over such rates and routes to the Commission. Thus, while the Maritime Commission has regulatory jurisdiction over water carriage to and from Alaska, when such water transport is combined with motor carriage, in through-route and joint-rate arrangements, jurisdiction over rates lies with the Commission. While the Maritime Commission contends that "through route" (as used by Congress) should be interpreted as not encompassing motor carriage that can qualify as pickup and delivery, Congress did not apportion jurisdiction between the agencies on that basis. The jurisdictional line was not drawn between line haul and pickup, but at through routes which, historically, cover pickup and short-haul connections as well as connections between line-haul carriers.—Alaska Steamship Co. v. Federal Maritime Commission, 399 F. 2d 623 (624, 626).

In water carrier's action for review of report and order of Federal Maritime Commission asserting jurisdiction over through water and motor services and rates between Seattle, Wash., and Anchorage, Alaska, areas, the Commission (not FMC) has jurisdiction over through rates and routes in issue. Congress, by 1962 amendment of §216(c) and §305(b), gave the Commission jurisdiction over through routes and joint rates to and from Alaska or Hawaii established by interstate motor carriers and water carriers subject to Federal Maritime Commission regulation; and there is no mileage limitation on that authority vested in the Commission. The statute makes no distinction between motor carrier participation of line-haul dimensions and motor carrier pickup and delivery in port areas; no distinction between a thousand miles and a few blocks, so long as both motor and water carriers are performing a joint through service.—Sea-Land Service, Inc. v. Federal Maritime Commission, 404 F. 2d 824 (825-7).

Respondent FMC argues that, since motor portion of considered services is minimal, Congress intends it to be regulated as part of the dominant water transportation; however, motor carriers engaged in terminal area pickup and delivery services are not exempt under §202(c) where the dominant line-haul service is supplied by water carriers subject to Shipping Act of 1916, and legislative history of the 1962 amendment does not evidence an intent on the part of Congress, having given the Commission exclusive jurisdiction over motor-water through route service, to withdraw that jurisdiction because the water haul is dominant. Accordingly, since water-carrier petitioner and a motor carrier participate in a joint through route endeavor, regardless of extent of the motor carriage (and even if it is confined to pickup and delivery service within the port areas), appropriate jurisdiction rests in the Commission. Reversed and remanded with instructions that Federal Maritime Commission order be vacated.—Id., pp. 827-8.

Section 216 (c) does not denote the particular type of through routes and joint rates therein authorized to be established, and nowhere else in the Act are the terms "through routes" and "joint rates" specifically defined. The section must not be read in conjunction with the provisions of §217(a) in that a lawful through route and joint rate arrangement must represent a joint undertaking by two or more connecting carriers to transport property from a point on the line of the originating carrier to a point on the line of the delivery carrier.—Substituted Service—Piggyback, 322 I.C.C. 301 (344)*.

The only authority given to motor common carriers under §216(c) is to establish reasonable through routes and joint rates, charges, and classifications with other such carriers. No unfettered license is given to pick and choose the through service which will be provided, and nothing in the legislative history of leading cases supports such license. The assailed tariff rule prohibiting through route and joint rates on shipments of furniture is unlawful.—National Furniture Conf. v. Assoc. Truck, 332 I.C.C. 802 (812-13).

Commission concluded that §216(c) accords us authority over tariffs of joint international rates involving motor carriers subject to our jurisdiction. Under §216(c), we have power over joint rate itself and fact that Commission cannot regulate one of the participants—the ocean carrier—in the joint rate is inconclusive. Fact that Commission can issue orders affecting only motor carrier participants to such rates is immaterial.—International Joint Rates and Through Routes, 337 I.C.C. 625 (630-1).

4. Interchange and transfer.—[Vols. 11, 12, 14-18, 21].—See also Tex.- Ariz. Motor Frt. and Phelps Dodge—Investigation case, §217(b), n. 125.

Eastern railroads' contention that proposed rule 4(d) stating that "carriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service" is unnecessary, is without merit. Facts of record in instant proceeding do not warrant any departure from the long-established practice of the Commission prohibiting a motor carrier from interchanging traffic at points other than its authorized service points (citing 72 MCC 204).—Substituted Service—Piggyback, 332 I.C.C. 301 (355)*.

While connecting carriers have a right to establish joint rates for traffic movements over their lines and to interchange equipment under mutually satisfactory rental terms, in that event rates must be charged and divided, if necessary, and revenues must be collected and accounted for in precisely the same manner as if there had been no interchange. Furthermore, the carrier under whose rights the interchanged equipment is operated must assume full responsibility for the direction, control. condition, and operation of such equipment while in its possession; an agreement between them providing for such control is not enough. When operations are conducted in such a manner that responsibility for the equipment is retained by owner thereof even while it is being driven over another's routes, such operations are unlawful.—Caroline Scenic Stages—Investigation and Revocation, 96 M.C.C. 566 (569-70).

Operations of respondent bus lines, conducted under a lease of equipment agreement between them which established a mileage rate for the rental of buses of one carrier while passing over authorized routes of the others, do not conform to requirements of the Act or the Commission's rules and regulations. Admittedly, receipts were not divided according to mileage traveled over each carrier's routes; and when revenues are not divided, the effect is to create confusion as to responsibility of each carrier for equipment operated under its authority. Moreover, from the manner in which the drivers made their reports to respondents, it is evident that responsibility for the leased equipment has not been uniformly vested in the carrier over whose routes it was being operated. Effect of respondents' agreement is to give each permission to conduct operations in its own behalf over routes of the other, a permission which canot lawfully be given; cease and desist order entered.—Id., pp. 570-71.

10. Through routes and joint rates.—[Vols. 10-19, 21].—Existence of a through route depends not on length of the respective hauls of participating carriers but on the nature of the arrangements between them and their commitments to their shippers. An arrangement between carriers whereby one employs the other for terminal pickup and delivery service, paying that carrier the tariff rate for such terminal service, does not entail a joint rate; does not entail obligations to the shipper such as are found in through routes; nor does it present regulatory problems presented in through-route and joint-rate arrangements. However, when carriers enter into agreements that do in fact constitute through-route and joint-rate arrangements for motor-water service to and from Alaska, Congress has left their regulation with the Commission.—Alaska Steamship

Co. v. Federal Maritime Commission, 399 F. 2d 623 (625-7).

Interstate Commerce Commission lacks power to compel motor and rail carriers to provide coordinated service, and this is what justifies permitting railroads to provide motor carrier service incidental and supplemental to rail transportation.—Atchison, T. & S. F. Ry. Co. v. United States, 244 F. Supp. 955 (955)*.

It is well established that what is a through route is a matter of fact, and that a through route may be found to exist in the absence of a joint rate or any other express arrrangement between the carriers involved.—Substituted Service—Piggyback, 322 I.C.C. 301 (334)*.

Under a TOFC plan I arrangement, the motor carrier and railroad agree to transport at a single through rate any given shipment of freight falling within the scope of their tariff publication, and no rates are charged or tariffs published with respect to such plan I operations on any other basis. The arrangement between the railroad and the motor carriers, under which the railroad is to be compensated for its portion of the through service, is thus a division agreement specifically authorized by §216(c), and not a separate rate or charge.—Id., p. 345.

Freight forwarders' contention that plan I TOFC operations allow motor carriers to depart from their statutory role as highway carriers and to function in a manner reserved for freight forwarders is without merit. The equivalent of plan I service was first approved in 1936 in 219 ICC 245 and the directory form of tariff publication received Commission sanction in 1939 in 232 ICC 683, approximately 6 and 3 years, respectively, prior to the advent of Federal regulation of the freight forwarder industry. What the forwarders here seek to eliminate, then, is a coordinated service, the lawfulness of which had been confirmed prior to congressional recognition of their own activities. There is nothing in part IV or its legislative history which suggests that Congress intended to curtail existing coordinated transportation services.—Id., p. 347.

When a motor common carrier participates in plan I TOFC operations, paying the railroad compensation other than that set forth in the railroad's regularly published tariff, the motor carrier's status is that of a connecting carrier in a joint service provided voluntarily by the participating rail and motor common carriers; and that plan I TOFC operations thus constitute a valid through-route and joint-rate arrangement within the contemplation of §216(c). Plan I and plan V, however, share in common the important features of a through-route and joint-rate arrangement: both involve the payment by the shipper of a single through rate which is divided among the carrier participants on a negotiated basis; and both may involve the rendition of joint service between points the motor carrier is authorized to serve in all-highway service. The fundamental distinction between plan I and plan V operations is that rail and motor carriers serving different areas may combine their service in plan V operations to perform a through service between origin and destination. Another difference is that the tariff rules covering the rendition of plan I service specifically embrace a holding out by the motor carrier to perform an all-highway service at the election of the shipper, whereas the rates provided in plan V joint tariffs are applicable only over the joint intermodal route.—Id., p. 349.

Joint through rates between rail and motor common carriers may be established only by virtue of §216(c) and this section contains no provision for the participation in such rates by carriers not subject to the Commission's economic jurisdiction. To hold otherwise and to permit the publication of rates for the performance of exempt transportation would be to contravene the intent of Congress to exclude such transportation from the rate provisions of the Act.—Id., p. 354.

Commission will not disturb State policy insofar as it affects interstate commerce unless such policy is inconsistent with other provisions of the Act. Instant policy is against participation in joint rates by irregular-route carriers in intrastate commerce, and carriers operating in interstate commerce by virtue of registered Ohio authority cannot exceed scope of that authority. Therefore, respondents herein may not participate in joint rates but may interchange traffic under combination rates. Respondents, without participating in joint rates, could continue to handle interstate traffic as they do now, but the traffic would move at combination rates with the likely result being increased rates borne by the shippers since combination rates are ordinarily higher than through rates. Therefore, Commission found Ohio regulations an interference with carriers' managerial discretion and inconsistent with §216(c). Petition to strike or cancel tariffs naming joint rates for interstate motor common carriers and Ohio intrastate irregular-route carriers, whose certificates are registered under §206(a)(7) authorizing them to engage to interstate commerce, denied.—Braddock Motor Freight, Inc., Petition, 329 I.C.C. 342 (346).

Mere fact that authorization for establishment of joint rail-motor rates is found in part II of the Act, rather than in part I, does not exempt rail carriers that join in such rates from any provisions of part I which would otherwise apply; thus, regardless of obligations assumed by motor carriers voluntarily entering into joint rail-motor rates, the rail participants must continue to comply with provisions of §3(4) and §4. Even if §3(4) and §4 do not apply to motor-carrier participants, the Commission still has complete jurisdiction over rail participants in joint rail-motor rates established under §216(c); and since the statute merely permits establishment of such joint rates, the Commission would be remiss in its responsibilities if it permitted railroads to use §216(c) as an escape from provisions of §3(4) and §4.—Oil Country Iron or Steel Pipe, Midwest to Okla. & Tex., 332 I.C.C. 540 (541-2, 543-4)*.

Proposed joint through rail-motor commodity rates on agricultural implements, particularly farm tractors, were found unlawful inasmuch as respondent's authority to transport "machinery" does not cover transportation of farm tractors. Schedules ordered canceled.—Agricultural Implements, Midwest to Oreg. & Wash., 337 I.C.C. 611 (621-2).

12. Application of §4 of part I.—[Vols. 10-13, 17-19, 21].—The fact that rail carriers voluntarily establish joint rates with motor carriers under §216(c) does not relieve them from their duty to comply with §4; and when considered joint rail-motor rates result, in some instances, in higher charges for a shorter than a longer movement over the same route, in the same direction, and shorter movement is included in the longer, that is precisely what is prohibited under §4(1). Accordingly, even though the §4 departures occur on the motor segment of the service, rail carrier participants in joint rail-motor rates involved are in violation of §4 unless they make out a special case for relief therefrom; prior finding that such special case has been made out, affirmed.—Oil Country Iron or Steel Pipe, Midwest to Okla. & Tex., 332 I.C.C. 540 (540, 543-5)*.

Commission herein interpreted its 85 percent circuity limitations provision, 49 CFR 1090.5, on TOFC or piggyback service by defining the words "origin" and "destination" as the points on the authorized route of the motor carrier using TOFC service where a shipment begins or ends its journey. Similarly, phrases relating to "distance" between "origin" and "destination" as affected by circuity. Petitioner's request for relief from the circuity limitation dismissed.—Interpretation of Piggyback Service Regulations, 337 I.C.C. 813 (821-25).

Contrary to the finding of the review board, minimal circuity in applicant's operations would not preclude it from making timed deliveries.—Pre-Fab Transit Co. Ext.—Fencing, 118 M.C.C. 68 (71)*.

13. Alaska, Hawaii, to and from.—When plaintiff, a water carrier operating between Seattle, Wash., and points in Alaska under Federal Maritime Commission regulation, entered into arrangements with motor carriers regulated by the Commission for motor-water service between continental United States points and points in Alaska, whereby the motor carrier picks up shipper's cargo and delivers it to plaintiff's pier for movement to Alaska ports, issues its own through bill of lading covering the entire journey to final destination, and charges for the full journey (with similar arrangements for shipments from Alaska), such arrangements constitute through routes and joint rates which are subject to Commission jurisdiction. Though some movements in Alaska are performed by Alaska State Ferry (in typical "fishyback" operation), ferries do replace roads in that State and courts have recognized a ferry as a continuous part of a road or highway and that transport of a motor vehicle over a ferry is transportation by motor carrier; thus, movement of the trailers on the ferry constitutes motor transportation and, as such, can form part of the through motor-water route, and tariffs covering such service are properly filed with the Commission.—Alaska Steamship Co. v. Federal Maritime Commission, 339 F. 2d 623 (626-8).

When water carrier, that had been operating port-to-port service (including local motor pickup and delivery) between Seattle, Wash., and Anchorage, Alaska, under Federal Maritime Commission regulation, became a participant with motor common carrier in a joint effort to provide through water-motor service and rates on Seattle-Anchorage traffic, their joint endeavor constituted through routes and joint rates which are subject to exclusive jurisdiction of the Commission rather than FMC jurisdiction. By the 1962 amendment of §216(c) and §305(b), Congress vested jurisdictional authority over such through routes and joint rates with the Commission; and language of that law contains no mileage limitation upon the Commission's authority, nor does it make distinction between motor carrier participation of line-haul dimensions and motor carrier pickup and delivery in port areas, so long as both motor and water carriers are performing a joint through service.—Sea-Land Service, Inc. v. Federal Maritime Commission, 404 F. 2d 824 (825-7).

Though terminal area motor pickup and delivery may be incidental to the line-haul water transportation, as respondent FMC argues, extent of motor participation is not the determining factor as to existence of a valid through route; what is required is that both motor and water carriers hold themselves out as participants in a joint transportation endeavor and file appropriate tariffs reflecting the joint rates and through service. Therefore, in water carrier's action seeking review of Federal Maritime Commission report and order asserting jurisdiction over its activities in question, the court concludes that Congress did not intend the motor portion thereof to be regulated as part of the dominant water transportation. It follows that where petitioner and a motor carrier participate in a through route endeavor, regardless of extent of motor carrier's service, appropriate jurisdiction rests in the Commission. Reversed and remanded with instructions that FMC order in issue be vacated.—Id., pp. 827-8.

20. Divisions; reasonableness.—[Vols. 10-15, 19].—Hearing examiners properly rejected proposed rules B-4 and B-5 which attempted to achieve the end that TOFC service be made available to all at equal charges and took the approach which would have required that the divisions received by a rail carrier providing joint intermodal service could not exceed any all-rail TOFC rate maintained by the rail carrier for like service. Latter rule would have required any rail carrier providing joint intermodal TOFC service with any motor or water carrier to do so indiscriminately with other such carriers. It would not be practical to attempt to control by a rule of general applicability the level of compensation to be received under division agreements which are, by nature, private contracts negotiated by individual carriers.—Substituted Service—Piggyback, 322 I.C.C. 301 (328)*.

Section 216(c) requires only that the carriers, parties to the joint rates, establish "just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers." The question of what constitutues just, reasonable, and equitable divisions necessarily involves many considerations, both factual and legal, but plainly the maintenance of divisions computed on exactly the same basis as is the overall joint rate, to the exclusion of all other factors and considerations, is not required by the statute and may, in fact, be in violation thereof. Freight forwarders' argument that "it is highly probable that in some instances the 'division' is greater than the whole", is not supported by the record.—Id., p. 345.

The Commission has the authority to require the filing by common carriers subject to parts I, II, and III of all contracts with other common carriers related to regulated traffic, and the filing of such contracts has been called in only a few special instances. Since the Commission has recently made efforts to reduce and condense the amount of necessary information which must be filed in an attempt to relieve the carriers, as well as the Commission's staff, of heavy administrative burdens and the fact that there has been no showing here that the division arrangements established by railroads and other common carriers engaging in joint intermodal TOFC service have been in any way unlawful or unduly prejudicial to any other carrier, no rule will be promulgated requiring such filing. However, should the Commission be informed in the future that the unpublished divisions are being used as a shield for improper activities by any carrier, it will then be time enough to make the determination whether a general rule is needed.—Id., p. 350.

Section 216. (d) [*§316(d) U.S.C.*] Undue preferences or prejudices prohibited.—[Unchanged. See vol. 11, p. 9548.]

Notes of Decisions

Volume 10—p. 8200; Volume 11—p. 9549; Volume 12—p. 10453; Volume 13—p. 11107; Volume 14—p. 11629; Volume 15—p. 12239; Volume 16—p. 12900; Volume 17-p. 13605; Volume 18—p. 14593; Volume 19—p. 15858; Volume 21—p. 17576.

1. Construction and interpretation.—[Vols. 10-13, 17, 19, 21].—See also Increased Rates and Minimum Charges, South case, §204(c), n. 27, supra.

Complainant has not proved that tariff provisions requiring a notation of density on the bill of lading as a condition precedent to use of a lower rate on shipments of dresses constitute a disadvantage in purchasing or marketing dresses. There is no basis for finding such higher rates to be an undue preference and prejudice.—Glama Dress Co. v. Mid-South Transports, 335 I.C.C. 586 (596).

Protestant shippers' contention that proposed increased l.t.l. and t.l. classification ratings and minimum weights on wirebound box materials are unjustly discriminatory and prejudicial to shippers of other box materials found not proven as no substantial evidence indicates that defendant carriers provide same service for these commodities or that substantially similar transportation circumstances exist.—Classification Ratings, Boxes or Crates, 335 I.C.C. 754 (758-9)*.

Applicant has failed to prove that protestant motor carrier's affiliation with a shipper creates such discrimination against shippers supporting applicant as would require the grant of authority sought herein. The power of common control must exist to create such discrimination and that power is not disclosed by evidence of record or by a showing that protestant has in fact favored its affiliated shipper over the supporting shippers.—Cobo, Inc., Common Carrier Application, 111 M.C.C. 200 (210-1)*

Although the possibility for discrimination between shippers exists due to common control of applicant and a supporting shipper, applicant's past performance, and support by nonaffiliated shippers, who have knowledge of the affiliation, demonstrate that this situation has not resulted in discrimination or favoritism prohibited by Commission. However, issuance of certificate is conditioned upon applicant's conformity with §5(2) of the Act as to the matter of common control.—Federal Transfer Co., Inc., Extension—Seattle, Wash., 111 M.C.C. 559 (565-8)*.

15. Differences in and comparisons of rates.—[Vols. 10, 12-14, 16, 18, 19, 21].—Although respondents' weekly rates on gasoline and fuel oils from Sparks, Nev., to points within 200 miles thereof are lower than their normal interstate rates, circumstances and conditions surrounding movement at the latter rates differ substantially from those at the weekly rates, and substantial reductions in costs experienced in operations at the weekly rates justify the difference in treatment.—Weekly Rates on Petroleum Products—from Sparks, Nev., 322 I.C.C. 541 (551); and though the weekly rates are on same level as comparable intrastate rates, which are not regulated by the State of Nevada, they are not fraught with potential discrimination because of possibility of changes in the intrastate rates should the State choose to regulate them.—Id., pp. 542, 546, 547.

The Commission found the assailed level of rates as applied to New Mexico to be unjust and unreasonable to the extent that it exceeded the general level of class rates applicable throughout the southwestern territory. Defendants' attempts to justify the disparity by reference to light volume of movement and sparce population were rejected, and the rates were found to be unduly prejudicial to points in New Mexico and unduly preferential to points in southwestern territory, excluding New Mexico.—State Corp. Comm. of N. Mex. v. Southwestern Motor Frt., 329 I.C.C. 803 (807-808).

Proposed reductions in l.t.l. and any-quantity class rates on commodities in specified density requirements when aggregated by shippers and tendered for pickup in lots of not less than 4,000 pounds are not shown to be lawful inasmuch as respondents have not established a reasonable relationship between the proposed discounts, which are based in part on distance, and the savings which, so far as appears, are the result only of reducing pickup costs through the aggregation of shipments. Such disparity in possible discounts are not justified by any facts and are inherently discriminatory. See 308 ICC 793, 794.—Aggregate Class Rates, 332 I.C.C. 524 (527-32).

20. Localities.—[Vols. 10-13, 16, 18, 19, 21].—Part I, §1(4), n. 106.—Assailed multiple minimum charges on single pickup of imported bulbs not shown unduly preferential or prejudicial although similar charges are not assessed at other ports. Complainant New York Port Authority has produced no evidence to show diversion of such traffic to indicated competing ports, and evidence also indicates operating conditions differ at the various ports.—Holland Bulb Exporters Assn. v. A.A.A. Trucking Corp., 329 I.C.C. 152 (158-9).

25. Shippers.—[Vols. 10-14, 16-19, 21].—See also Frozen Foods—Southern, Middle Atl. & New England States case, §216(g), n. 26, infra; National Trailer Convoy, Inc., Ext. case, §207(a), n. 25 *Fitness*, supra.

Provision in tariff and freight bill of carrier engaged in driveaway transportation of privately owned automobiles, which permits carrier to recover from shipper (owner) proceeds of owner's insurance in the event of loss or damage in transit, if it reimburses owner for that part of his premium attributed to carrier's custody of the car, does not violate §216(d). There is no showing that "benefit of insurance" clause in the bill of lading provides for unjust and unreasonable charges or undue preference in which car owners with insurance are charged more than owners without insurance. Wording of the clause grants no preference to car owners without insurance; the clause does not require that owners carry insurance; also, it presupposes the customary liability insurance that an owner would carry to cover his use, not shipping, of the car. Thus, since record does not show that that part of owner's insurance premium attributable to carrier's custody of the car amounts to an unlawful preference or charge, the trial court erred in ruling that tariff "benefit of insurance" clause violates the statute.—United States v. Auto Driveaway Co., 464 F. 2d 1380 (1383-5).

Mere possibilities of discrimination do not establish that carriers are demanding or receiving greater or less compensation for like and contemporaneous service under the same tariff provisions. Respondents' weekly rates on gasoline and fuel oils from Sparks, Nev., are supported by four petroleum companies, and neither those nor any other shipper has indicated fear of discriminatory treatment. As the interests most directly affected by the considered tariff provisions have not complained, a finding of discrimination would not be warranted on basis of the remote possibilities suggested.—Weekly Rates on Petroleum Products—from Sparks, Nev., 322 I.C.C. 541 (547).

Proposed rule providing that, under line-haul rates on oilfield commodities which include loading and unloading with winches, carrier may for its own convenience substitute vehicles not equipped with winches for the line-haul transportation, and at its expense obtain a winch for loading and unloading of shipments not requiring additional lift equipment, is not potentially discriminatory. Every shipper receives the service for the same price, whether the winch used is on the transporting vehicle or another; and many carriers now render the identical service covered by the clarifying amendment, without objection from shippers. Findings of unjust discrimination cannot be predicated on the remote possibility that violations may occur.—Loading, Unloading by Winch, Oil Field Haulers, U.S.A., 323 I.C.C. 359 (366).

Provisions of tariff publishing proposed assembling rates on l.t.l. shipments of textile products moving to freight consolidators for t.l. movement beyond in common or private carriage, defining "truckload", in case of common carriers, as a unit for which ordinarily a t.l. rate is provided in filed tariffs and which is subject to a truck minimum weight, and, in case of private carriers, as a consolidated shipment weighing 10,000 pounds or more, are unjustly discriminatory. Although respondent's operational handling of the traffic is identical whether subsequent reshipment is by common or private carrier, consolidated shipments moving beyond assembly points in units of 10,000 pounds in private carriage would be entitled to the assembling rates, while the same amount moving beyond by a motor common carrier might not qualify as a t.l. shipment. No justification is shown for according one consolidator or shipper the benefit of the lower assembling rates, while denying them to another for like and contemporaneous service; the subsequent "truckload" condition should apply equally to all traffic.—Assembling Rates to Atlanta, Charlotte, Greensboro, 323 I.C.C. 543 (544, 548-9).

Use of credit card plans by motor common carriers of household goods my resemble, from surface appearance, rebates or concessions; but it is the opinion of the Commission that unfair, discriminatory practices will not necessarily arise under such systems, since all shippers would be eligible to apply for use of the involved credit card.—Practices of Motor Common Carriers of Household Goods, 118 M.C.C. 97 (104).

35. Participation in through routes, joint rates.—[Vols. 12, 14, 15].—District court held that evidence shows that cancellation of all through routes and joint tariff arrangements on shipments of furniture between central and southern states would subject furniture shippers to complications and higher rates, would restrict movement of furniture to areas where single-line service was available and would prejudice such shippers relative to other general commodity shippers. Commission's finding that such cancellation was unlawful, though carrier had voluntarily entered the through route and joint rate agreements, was therefore affirmed.—Associated Truck Lines, Inc. v. United States, 304 F. Supp. 1094 (1095-6)*.

The assailed tariff rule by which defendant, a common carrier holding general commodity authority, provides that it maintains no through routes and joint rates on furniture shipments constitutes a selective holding out of service placing furniture in a disadvantaged position relative to other general commodities in violation of §216(d).—National Furniture Conf. v. Assoc. Truck, 332 I.C.C. 802 (812-14).

40. Preference within carrier's control.—[Vols. 19, 21].—The practice of furnishing mobile storage bins to some shippers and not to others, at the option of the carrier, was found to result in unjust discrimination and undue preference and prejudice, and is therefore unlawful. Cease and desist order issued.—Chemical Leaman, Matlack, and M. & M.—Investigation, 118 M.C.C. 238 (246).

Rules, Regulations, Practices

50. Transit; stopping to load or unload partially.—[Vols. 10-12].—Petitioner's contentions that the considered rules were unduly preferential and prejudicial and unjustly discriminatory were based in part on the fact that the considered rules differ in many respects. This fact standing alone does not warrant a finding of unlawfulness. More specifically, petitioner refers to the fact that the rules of certain respondents provide for partial loading and unloading of the same shipment. The record did not warrant a finding that the furnishing of such service is unlawful but that the potential for evasion of such rules is so apparent that the present rules should be revised. Previous decisions by the Commission do not warrant the finding that the furnishing of dual service on the same shipment is necessarily unlawful.—Stopping-in-Transit Rules & Charges Btw. Southern Terr., 329 I.C.C. 353 (361).

In 69 MCC 77, 309 ICC 437, a restriction against dual service on the same shipment was imposed, predicated on the conclusion that there was no commercial necessity for dual service. It was also concluded that to provide such service would open the door to potential discriminations and unfair competitive practices in rendering l.t.l. service at t.l. rates. In the instant proceeding, a commercial necessity was shown where the dual service is provided, but the potential for evasion of certain of the proposed rules is so apparent as to permit l.t.l. service at t.l. rates. Thus, they are unjustly discriminatory. This unlawfulness could be eliminated by providing that when dual service is performed partial unloading will be permitted only at the points beyond that at which the last stop for partial loading is made and further loading of a shipment will be prohibited after it has been partially unloaded.—Id., p. 362.

60. Moving household goods.—[Vols, 10, 14, 19].—Proposed amendment to 49 CFR §1056.4 which would make all charges for accessorial and terminal services on household goods be determined on basis of shipment's total weight not shown to be justified as weight is an arbitrary factor wholly unrelated to the services performed and would result in unreasonably higher or lower charges to shippers depending on amount of services required.—Amendment of Pt. 276.4 General Rules & Regulations, 335 I.C.C. 698 (702-3).

Respondent's tariff provision providing lower rates to apply in its "slack season" (Oct. 1 through May 31) conditioned upon shipper having tendered during slack season of prior year at least 60 percent of its traffic moved by respondents found unjustly discriminatory. Present shippers would tender peak season shipments to other carriers but obtain slack season discount by varying relative tender of traffic to respondent. Thus, there is no difference in service performed for off-season shipper who qualifies for lower rate and one who does not. Ordered canceled.—Reduced Seasonal Household Goods Rates, 337 I.C.C. 430 (433-4)*.

Section 216(e) [*§316(e) U.S.C.]* Complaints to and investigation by Commission; power of Commission to fix reasonable rates, regulations, etc.—[Unchanged. See vol. 10, p. 8204.]

Notes of Decisions

Volume 10—p. 8204; Volume 11—p. 9551; Volume 12—p. 10455; Volume 13—p. 11108; Volume 14—p. 11630; Volume 16—p. 12901; Volume 17—p. 13606; Volume 18—p. 14595; Volume 19—p. 15863; Volume 21—p. 17582.

2. Construction and interpretation.—[Vols. 10, 12, 13, 16, 17, 21].—See also Notice of Increases in Frt. Rates and Pass. Fares case, §204(c), n. 27, supra.

Commission's power to prescribe minimum rates is used sparingly and on evidence of record we are unable to conclude that rates on commodities formerly exempt under §203(b)(6) are so depressed or so unstable in structure as to justify issuance of a minimum rate order with the exception of specified rates on coffee beans for which a minimum reasonable rate is herein prescribed.—Rates on Formerly Exempt Commodities, 329 I.C.C. 61 (70-1).

3. Complaints to, and jurisdiction of Commission.—[Vols. 10-12, 14, 17-19, 21].—Under §216(e), plaintiffs could have filed a formal complaint with the Commission attacking the justness and reasonableness of the rates in issue when, after bureaus' schedules originally proposed and suspended had been cancelled and the suspension proceedings had been discontinued, the Commission decided not to suspend rate bureaus' new schedules proposing rate increases identical to those originally proposed. Instead they filed two court suits, each seeking enforcement of original suspension order, reestablishment of the lower rates effective prior to date of that order, and that the Commission be directed to strike from its files the schedules containing the republished rates. However, Commission decision not to suspend the new proposed rates was only a preliminary determination and, since plaintiffs did not challenge lawfulness of those rates, they failed to exhaust statutory remedies afforded them. Therefore, since plaintiffs obtained no final agency action subject to judicial review before filing the instant suits, the complaints are dismissed. —National Industrial Traffic League v. United States, 287 F. Supp. 129 (131-2)*.

Commission order in investigation proceeding disapproving increases in rates and charges and directing carriers to make refunds to shippers to extent that such increases are not approved, which order was issued incident to respondent carriers' request for an extension of time, held valid and not subject to a judgment of annulment when, though the refund provision was challenged, respondents (including plaintiffs) tacitly or impliedly accepted the order by withdrawal of their objection. In addition, applying the doctrine of equitable estoppel, the Commission relied on carriers' withdrawal of their jurisdictional objection to the refund provision; and such withdrawal was a positive act evidencing their willingness to go along with the condition imposed. The Commission granted the request for extension of time in good faith and, as plaintiffs accepted benefits of such extension order, their present posture appears grossly inequitable and not deserving of court intervention. Therefore, while the procedure is not commended, peculiar facts of instant case do not justify granting the relief sought and approval of carriers' conduct. Complaint dismissed.—Admiral-Merchants Motor Freight, Inc. v. United States, 321 F. Supp. 353 (356, 358-60)*.

In determining whether a freight classification is just and reasonable, Commission is required to act in a rational manner; its action cannot be arbitrary, capricious or an abuse of discretion or otherwise not in accordance with the law.—Dutton-Lainson Company v. United States, 371 F. Supp. 1352 (1355)*.

Rates on shipments of chemicals, drugs, and related articles from New Jersey and New York to Chicago were found not to cover respondents' out-of-pocket costs and were thus noncompensatory. The Commission prescribed lawful minimum rates for such service as empowered by §216(e) and found the assailed rates unlawful to the extent they violate the prescribed minimum rates.—Chemicals, Drugs, and Related Articles, 335 I.C.C. 601 (606-7).

Petition requesting investigation of practices in handling valuation of baggage transported on interstate buses denied as petitioner fails to set forth sufficient allegations, materials, or evidence upon which an adequate determination of the involved issue under §216(e) could be made.—Limitation of Free Baggage Allowance—Greyhound, 114 M.C.C. 56 (60).

Section 216. (f) [§*316(f) U.S.C.*] Commission empowered to establish just division of joint rates.—[Unchanged, See vol. 10, p. 8207.]

Notes of Decisions

Volume 12—p. 10457; Volume 13—p. 11109; Volume 15—p. 12240; Volume 19—p. 15864.

Section 216.(g) *[§316(g) U.S.C.]* New rates; determination of fairness by commission; suspension.—[Unchanged. See vol. 11, p. 9552.]

Amendments, see footnotes, vol. 10, p. 8208, vol. 11, p. 9552.

Notes of Decisions

Volume 10—p. 8208; Volume 11—p. 9553; Volume 12—p. 10457; Volume 13—p. 11109; Volume 14—p. 11630; Volume 15—p. 12240; Volume 16—p. 12901; Volume 17—p. 13607; Volume 18—p. 14596; Volume 19—p. 15864; Volume 21—p. 17582.

4. Reasonable rates required by statute.—[Vols. 10-15, 17, 21].—See Canned or Preserved Foodstuffs from Fla. to N.Y. & N.J. case, §307(g), n. 27, infra.

5. Burden of proof.—[Vols. 10-19, 21].—See also New Procedures in Motor Carrier Rev. Proc. case, §204(c), n. 27, supra; Stopping-in-Transit Rules & Charges Btw. Southern Terr. case, §216(g), n. 26, infra.

District court held that shipper challenging freight classification of its winches had the burden of proving reasonableness of classification which had been in existence with no change or challenge since 1952. Shipper was not required to present representative data for all winches shipped in the United States but could present evidence of all relevant transportation characteristics for its winches.—Dutton-Lainson Compny v. United States, 371 F. Supp. 1352 (1356-7)*.

Respondent motor carrier has not met the statutory burden of proving the proposed changed t.l. commodity rate on candy and related articles from Hackettstown, N.J., and New York, N.Y., to Chicago, Ill., to be just and reasonable as respondent's cost data has not met the minimum requirement of proving such assailed rate compensatory.—Candy & Confectionery, New Jersey & New York to Chicago, 332 I.C.C. 43 (46).

On reconsideration, the Commission found proposed commodity rates on animal food from middlewest to western destinations are changed rates, both increased and reduced, but not initial rates. Therefore, respondent bears the burden of proving that such changed rates to be just and reasonable.—Animal Food, Middlewest to Calif., Idaho, & Utah, 332 I.C.C. 87 (88)*.

On investigation, the burden of proving proposed reduced t.l. commodity rates on plastic material from 10 points in Texas to Palatine, Ill., to be just and reasonable is upon respondent motor carrier, but respondent has no burden to prove the reasonableness of effective rates introduced herein for comparison purposes.—Plastic Materials, Texas to Palatine, Ill., 332 I.C.C. 403 (404).

Under §216(g), the burden of proof is upon the proponents of a changed charge to show that such charge is just and reasonable.—Charges on LTL Shipments to Points in Florida, 332 I.C.C. 892 (895).

Respondent motor carriers have met their statutory burden of proving proposed increased rates and charges on l.t.l. and any-quantity shipments under 1000 pounds just and reasonable by expert testimony showing respondents' financial condition is precarious, that respondents have difficulty attracting investment capital, and that proposed rates would reduce respondents' operating ratios on such traffic.—Rate Increases and Charges, Southwestern States, 335 I.C.C. 361 (382-83).

Commission investigation orders, entered prior to the effective date of proposed tariff rules eliminating the unloading of loose and carcass meats by motor carriers and placing responsibility for such unloading on the consignee, place the burden of proof on respondents to show the proposed tariff rules to be just and reasonable.—Unloading Restrictions on Meats & PHP, 335 I.C.C. 391 (394)*.

Initial rates: There is no statutory burden upon respondent to show that proposed initial rates are just and reasonable.—Foodstuffs & Agricultural Com., Calif. & Ariz. to West, 329 I.C.C. 321 (322)*.

Justification for increases: Respondents failed to establish that study carriers were representative when financial condition study did not (1) distinguish between class I and II carriers, (2) indicate percentage of traffic handled by study carriers and non-study carriers, or (3) disclose percentage of operations relating to extra-territorial movements. In addition the Commission held that representativeness is not assured in the territorial cost study merely because that study includes the same carriers as used by Commission's Cost Finding Section in a territorial cost and traffic study.—Increased Rates, New England Territory, 329 I.C.C. 244 (248, 252).

Establishment of a need for increased revenues does not, ipso facto, justify an increased delivery charge.—Charges on LTL Shipments to Points in Florida, 332 I.C.C. 892 (895).

Although respondents have statutory burden of showing proposed rates to be just and reasonable, the sole justification they offer for proposed increased class and commodity rates and charges is their alleged need for additional revenues to meet increased expenses resulting from new higher wage rates. However, effect of such wage increases on carriers' total expenses and unit costs is not measurable without more information than the mere fact of the new wage rates; a reliable restatement of expenses is essential to any cost justification for increased rates, but such a restatement has not been presented. Respondents have failed to justify their proposals in whole or in part.—Increased Rates and Charges, Middlewest Territory, 335 I.C.C. 142 (144-5)*.

Upon protest, burden of proving increased rates on shipments weighing 201 to 499 pounds to be just and reasonable is upon the respondent motor carriers and has been met by evidence of costs-revenue relationships proving a revenue need exists for such increases.—Small Shipment Rate Revision—Eastern Central, 335 I.C.C. 547 (550-56).

Upon investigation, respondent has met the burden of proving proposed increased rates and minimum charges on shipments of less than 5000 pounds to be reasonable by introduction of data which fairly represent the motor common carriers involved, show a revenue need, and prove that such increases would not be excessive.—Increased Rates & Charges, C. & S. Territories, 335 I.C.C. 676 (679-89).

Justification for reductions: Respondents have the burden under the statute of showing that the changed rates are just and reasonable. As a minimum requirement, they should make a convincing showing that such rates would exceed the out-of-pocket costs of performing the service. Proponents' showing herein cannot be accepted for the benefit of the other respondents.—Carbon Blacks from the Southwest to Ind., Ohio & Mo., 325 I.C.C. 138 (143).

The Commission approved a rate for animal feed from Kansas City, Mo., to Chicago, despite respondent's failure to apply the joint cost burden equally over each unit of traffic in establishing the rate. Readjustments of the recognized, though not formally approved, "Highway Form B" must be made to meet the reasonable exigencies of carrier needs with respect to the particular operation.—Animal Feed from Kansas City, Mo., to Chicago, 325 I.C.C. 147 (154); the shipper here desires faster service than the railroads are providing, and to cease its private carriage. The proposed rate would accomplish these purposes, allowing the respondent to participate in the traffic, and increasing the amount of traffic available for common carriage. The proposed rate is the highest which will produce those results.—Id., p. 155.

Respondent's cost evidence, wherein empty capacity was charged against the traffic occasioning the need for a return movement, as utilized in the Highway B formula, was the best adapted to the particular circumstances. Furthermore, the revenue under the proposed rates compares favorably with that from other traffic, such as hides, insulating materials, and iron and steel articles, currently being handled from Kansas City to Chicago by Mid-American. The proposed rate was found to be reasonably compensatory for that carrier. However, in the absence of evidence introduced by the other respondents of the lawfulness of the proposal, or that their operations thereunder would be comparable to those of Mid American, they have not sustained their statutory burden of proving the lawfulness of the proposed rate, and it is therefore just and reasonable for Mid-American only.—Id., p. 155.

Although the Commission generally recognizes the jointness of line-haul expense in round trip movements, and requires compensativeness of a particular rate to be shown by considering the reverse movement, its position with respect to the treatment of costs is not absolutely inflexible, in disregard of the specific factual situation. Therefore, since respondent would continue to suffer a traffic imbalance if the rate considered in the instant proceeding were disapproved, the traffic sought would continue to move in private carriage, and the rate would not adversely affect any regulated carrier and would improve respondent's relative revenue position, the rate was approved for respondent.—Aluminum Extrusions from Miami to Chicago, 325 I.C.C. 188 (191-192).

Although the term "heavy and chronic imbalance of traffic" is not susceptible of precise definition or application, the Commission found that for the principles expressed in 325 ICC 138 to apply, a showing must be made that the proposed rate will alleviate an imbalance in operations which involves a substantial volume of traffic over a sufficient period of time to establish a definite pattern of unbalanced operations. Some traffic imbalance is inherent in all motor-carrier operations depending on seasonal variations and the needs of commerce at a particular time. Such a showing was not made in the instant proceeding. An average monthly imbalance of 13.4 percent does not, standing alone, establish a heavy operational imbalance.—Composition Roofing, Stroud, Okla, to St. Louis, Mo., 329 I.C.C. 612 (617)*.

Respondent's evidence failed to apportion the jointness of its round trip operation, resulting in decreased costs. However, restatement of costs reflecting empty movement on return resulted in out-of-pocket costs which permitted the proposed rate to be found adequately compensatory. Approved, for proponent only.—Id., p. 618-9.

Upon investigation, respondent motor carriers have the burden of proving proposed reduced t.l. commodity rate on gypsum and plaster from Southard, Okla., to Chicago, Ill., to be lawful by introduction of cost data sufficient to prove such rate compensatory.—Gypsum and Plaster, Southard, Okla., to Chicago, 332 I.C.C. 48 (52).

Upon protest, burden of proving reduced rates on small shipments weighing in excess of 1,000 pounds to be just and reasonable is upon the respondent motor carriers and has been met by evidence of cost revenue relationships proving need for such reductions to offset the upward adjustments on shipments weighing less than 500 pounds.—Small Shipment Rate Revision—Eastern Central. 335 I.C.C. 547 (551-6).

6. Issues in the investigation.—[Vols. 12-19, 21].—See also Admiral-Merchants Motor Freight, Inc. v. United States case, §216(e), n. 3. supra.

Approval of new rate for aluminum extrusions granted to respondent, in order to divert traffic from private carriage. The evidence was found to be convincing that the new rate would improve respondent's relative revenue position.—Aluminum Extrusions from Miami to Chicago, 325 I.C.C. 188 (189, 191).

10. Evidence, in general.—[Vols. 10-19, 21].—see also New Procedures in Motor Carrier Rev. Proc. case, §204(c), n. 27, supra.

Commission's approval of carriers' allocation of constant costs on a dollar basis was justified inasmuch as such a matter is peculiarly for the Commission to determine and since there is nothing in the nature of things or in economic or accounting principles which requires that such costs be distributed on basis of physical units rather than expenses directly attributable to handling them.—National Small Ship. Traf. Conf. v. United States, 321 F. Supp. 500 (500)*; however, an error in cost studies due to exclusion of nonstudy carriers' single-line traffic, while including interline traffic and attendant interchange costs, thus producing an upward bias in cost sample and distortion in respect to small shipments which are charged with a higher proportion on line-haul costs, required this court to vacate Commission's findings that rates under the tariffs considered were just and reasonable.—Id., p. 500.

For purposes of justifying proposed reduced rate on sheet steel respondent separated its cost and mileage figures of heavy hauling from transportation of iron and steel articles to reflect only the operations of its steel division. Such cost evidence is of little value, since respondent fails to explain how it selected the expense accounts used and how it apportioned them to reflect only steel traffic costs: furthermore, none of those accounts includes costs which vary with miles operated, yet its presentation of costs per vehicle-mile assumes that they do.—Sheet Steel, Sparrows Point to Scranton and Carbondale, 323 I.C.C. 554 (555).*

Motion to strike testimony on basis of "double hearsay", i.e., dubious qualifications of witness and refusal of same to identify the consumers to whom he referred, denied, since witness established his qualifications and movant is not entitled to the identity of the consumers.—Carbon Blacks from the Southwest to Ind., Ohio & Mo., 325 I.C.C. 138 (139).

Traffic and cost data are not representative where carriers are not selected by a random sample method, but merely on the willingness of 20 of the 106 carriers of the association to compile the necessary data.—LTL COR Rates—Between East and Territories West, 326 I.C.C. 174 (186, 197).

Where respondents, in view of the numerous changes which have taken place in the motor carrier industry, were requested to supply extra detailed substantiation of operating ratios in order to test their accuracy, cost study was found to lack representativeness since no reasonable sampling principles were followed to assure a group of carriers which would be truly representative of all respondents. Respondents presented certain evidence regarding the relationship of expenses to revenues developed for the 22 cost carriers drawn from the 29 carriers which conducted the traffic survey out of the entire group encompassing approximately 230 respondents. No specific tests or statistical analyses were made to determine whether the results of such a survey would by typical for a full year's operation.—Increased Rates, Southwest, Colorado, Wyoming, 326 I.C.C. 216 (232, 236-8).

Cost and revenue comparisons submitted by non-system motor carriers are inadequate to justify proposed increased rates and minimum charge as they represent total traffic, interstate and intrastate, instead of being restricted to traffic moving under the proposed rates and charge; contain other inadequacies as specified; and are not representative of all respondents.—Increased LTL Class & Commodity Rates, Pacific Northwest, 329 I.C.C. 1 (11-2); and respondent system motor carriers' evidence in support of increased rates and minimum charge on shipments of less than 1,000 pounds is inadequate. Cost studies submitted were for too small a sampling of respondents; studies were outdated; traffic studies were made at different times, none reasonably current; and statistical standards were not followed to show representativeness of selected carriers.—Id., p. 11.

Respondents failed to establish that the carriers used in a study offered in evidence are fairly representative of New England carriers as a whole and, therefore, the various comparisons purporting to show the conditions prevailing in the New England motor industry are of little probative value. Since the assumption that the carriers whose data were used in the studies were reasonably representative of New England carriers is basic to all of the respondents' cost studies of representative territorial costs and the impact of wage and other cost increases on those costs, unless this assumption is supported by evidence of record, the contention that these cost studies establish that the proposed increases are just and reasonable is untenable.—Increased Rates, New England Territory, 329 I.C.C. 244 (248-9).

On reconsideration, Commission held that judgment sampling of traffic and costs is probative evidence in a general increase case provided that such sampling is supported by objective tests and not mere opinion. However, the quantum of proof required to support judgment sampling has been changed and made heavier by procedural order issued August 3, 1964, herein cited, and subsequent orders and proceedings since then and including order notifying parties of such increased requirements in instant case.—Increased Class & Commodity Rates, Transcontinental, 329 I.C.C. 420 (427)*.

It may be that changed conditions, such as the packaging of commodities, presented the respondents with difficult problems concerning capacity loads. However, approval of minimum charges to correct such situations necessarily requires justification based upon convincing evidence such as the experience of representative carriers in moving such traffic. No such evidence was introduced. Therefore, the proposed minimum charges and provisions for the application thereof were not found to be just and reasonable.—Minimum Charges for Capacity Loads, Transcon. Terr., 329 I.C.C. 706 (711).

Respondent motor carrier's cost data in support of proposed changed t.l. commodity rate are of little value as there is no specific proof of their applicability herein and respondent's method of computing current cost levels by a 6-percent increase of previously accepted costs has not been shown to be a proper or correct method.—Candy & Confectionery, New Jersey & New York to Chicago, 332 I.C.C. 43 (45).

Respondent motor carrier's evidence in support of proposed changed commodity rates on animal food from Middlewest to western destinations are regional costs per vehicle mile from Commission's public statement No. 6506, which evidence incorrectly assumes that all expenses vary with the miles traveled and is not acceptable by itself.—Animal Food, Middlewest to Calif., Idaho, & Utah, 332 I.C.C. 87 (88-89)*.

Proposed increased delivery charge would be applicable on all shipments weighing 1,000 pounds and under destined for delivery in Florida, regardless of the length of haul. Thus, it has no relation to line-haul, interchange, or pickup costs and can be justified only on basis of increased delivery costs. See 306 ICC 539, 544. Respondents have not submitted such cost evidence but only evidence reflecting their overall transportation costs and thus have failed to carry their burden of proof; proposed charge not shown just and reasonable and schedules ordered canceled.—Charges on LTL Shipments to Points in Florida, 332 I.C.C. 892 (895).

Hearing examiners' refusal to exclude from the record certain exhibits of respondents which were served on the parties by fourth-class mail, instead of first-class mail as required by Rule 22 of the Rules of Practice, affirmed; Rule 22 is not necessarily exclusionary in purpose or effect; and furthermore, appropriate relief for any delay caused by use of fourth-class mail, such as a grant of time to prepare their cross-examination, was not requested by protestants. However, respondents are admonished that such evasion of the service requirements will not be tolerated in the future.—Increased Rates and Charges, Middlewest Territory, 335 I.C.C. 142 (143)*.

Respondents evidence for proposed tariff rules placing responsibility for unloading loose and carcass meats on the consignee relate mainly to respondents' motivation for such restrictions on unloading. Such restriction constitutes a reduction in service and proposed tariffs include no corresponding adjustment of carriers' line-haul rates. Proof of motivation, alone, without economic justification is insufficient evidence to show proposed tariffs just and reasonable.—Unloading Restrictions on Meats & PHP, 335 I.C.C. 391 (398-401)*.

Protestants' contention that traffic and cost studies introduced by respondent motor carriers in support of restructured rates on l.t.l. and any-quantity shipments are invalid found not proven. Traffic study followed standard statistical procedures, provided for control of errors, and is reasonably representative of the entire traffic under consideration. Cost study used the proper through traffic basis for cost computation and acceptably used quarterly reports to the Commission as basis for increased service-unit costs.—Small Shipment Rate Revision—Eastern Central, 335 I.C.C. 547 (565-70).

Respondent's data on cost, traffic, and revenue of selected carriers found representative evidence of all respondents operating between central and southern territories as it accurately reflects data ascertained by the Commission's cost finding section in preparation of statements No. 3-66 published as a guide for the formulation of rates. Protestant's evidence is not persuasive as it fails to consider the characteristics of central and southern territorial traffic.—Increased Rates & Charges, C & S. Territories, 335 I.C.C. 676 (681-92).

Commission found that respondent motor carriers' traffic and costs of service studies are reliable and relevant to the issues considered herein as they are consistent with Commission's order of April 10, 1969, dealing with these matters. Although all data are not as current as might be, Commission recognizes that continuous mergers and acquisitions within the motor carrier industry prohibit a static situation.—Small Shipment Rate Revision, Central & Southern, 337 I.C.C. 158 (163-9).

Commission has previously used the "carried basis" as the criterion for measuring revenue-cost relationships, and respondents have not convinced us that we should change that criterion. Use of that each-to-each basis provides a more accurate comparison of revenues and costs for carriers involved. The introduction of only a portion of nonstudy carriers' revenues for comparison with territorial costs applied for such carriers introduces a bias that has not been corrected. Suggestion to remove such bias by inclusion of the nonstudy carriers' costs would be difficult and would unduly broaden territorial scope being considered.—General Increase, East-South Territory, 341 I.C.C. 735 (755-58).

Commission found that all proof of commodity transportation characteristics need not be established through probability sampling. Whether such sampling is necessary depends on the complexity and magnitude of the data to be developed. Evidence of record shows that proponent's study was adequate and no probability sampling was required.—Increased Classification Ratings on Blankets, 341 I.C.C. 760 (762-64).

15. Order as to suspended rates.—[Vols. 10-14, 16-19, 21].—Although Commission order suspended motor carrier tariff bureaus' proposed rate increases of 3 percent on t.l., and 5 percent on l.t.l., shipments until a specified date, unless otherwise ordered by the Commission, those schedules were subsequently cancelled by proponents with the Commission's permission, and, following the cancellation, the suspension proceedings were ordered discontinued; therefore, plaintiffs' claim that the suspension order is outstanding and should be "enforced", in connection with tariff bureaus' new proposed schedules republishing identical percentage rate increases, is without merit. Furthermore, the Commission's action in a new proceeding, declining to suspend bureaus' proposed tariffs republishing the same rates on basis of a new and more comprehensive record, was within its discretion under the Act; thus, its refusal to suspend those rates is not judicially reviewable. Complaints seeking enforcement of the suspension order (and a court order that tariffs containing the republished rates be stricken) are dismissed.—National Industrial Traffic League v. United States, 287 F. Supp. 129 (131-2)*.

20. Comparisons of rates.—[Vols. 10, 12-19, 21].—While neither party submitted cost data adequate to measure reasonableness of proposed rate, such evidence is not the sole possible standard. Comparison with other rates in effect on similar traffic under similar transportation conditions may, where not rebutted by more specific evidence, establish reasonableness of a proposal. Based on comparison with 20 rates maintained by a number of other motor carriers on the same or similar traffic between similarly situated points, proposed rate is not a departure from the general level of rates on this kind of traffic for similar distances; and, because of higher minimum proposed, revenues apparently will exceed those earned at any of the compared rates. Such unrebutted evidence indicates that proposed rate is just and reasonable; approved.—Sheet Steel, Sparrows Point to Scranton and Carbondale, 323 I.C.C. 554 (556)*.

Proposed initial rates are only slightly below the adjustment approved by the Commission in the "38,000-pound" case (319 ICC 667), which retained the origin and distance relationship of the "Cudahy" scale but reduced the rates by 30 cents on fresh meats and packinghouse products other than hanging and by 20 cents on hanging meats. Accordingly, it does not appear that the proposed rates will result in the disruption of the existing rate structure, as feared by the protestants. Moreover, while the Commission has approved rates based on the "Cudahy" scale, it has not been prescribed as a minimum reasonable level. Proposed rates found not shown to be unjust or unreasonable.—Meats & Packinghouse Products, Midwest to Far West, 329 I.C.C. 604 (608).

On investigation, respondent motor carrier's comparison of proposed rates with effective rates on the same commodity from and to similar points is of greater value than protestant railroad's cost evidence based on system average truck-mile expenses as system average method assumes that all expenses are caused by miles operated, which is not true.—Plastic Materials, Texas to Palatine, Ill., 332 I.C.C. 403 (404-5).

25. Classifications; comparisons; exceptions.—[Vols, 10, 12-16, 18, 19, 21].—Respondent motor carriers sought to establish a class 100 rating in truck-loads and class 150 in less than truckloads on paper and plastic drinking straws. These ratings are higher than present rating on paper straws but lower than present ratings on plastic straws. Commission decided that both types of straws should have the same rating because their transportation characteristics are similar but the proposed ratings are too high inasmuch as the characteristics of straws differ from those of compared commodities shown on this record currently so rated. Schedules ordered canceled.—Classification Ratings, Drinking Straws, 335 I.C.C. 1 (5-6).

Suspended schedules restructuring rates on l.t.l. and any-quantity shipments found just and reasonable. The assailed departure from classification principles is justified as transportation characteristics generally have become irrelevant insofar as small shipments are concerned and such charges are not rates but shipment charges and need not be stated in rates per 100 pounds.—Small Shipment Rate Revision—Eastern Central, 335 I.C.C. 547 (563-4).

Proposed rate and minimum charge increases in flat amounts on shipments of less than 5000 pounds between the central and southern territories approved as respondent proved that flat amount increases correct disparities in cost-revenue relationships caused by previous percentage increases which did not consider the relative importance of classification to size of shipment and length of haul.—Increased Rates & Charges, C. & S. Territories, 335 I.C.C. 676 (692-3).

26. Reasonableness of regulations and practices.—[Vols. 10, 11, 16, 18, 19, 21].—In considering proposed tariff rule for absorption of pier loading charges under present rates on frozen meat shipments imported from foreign countries and loaded direct from piers or wharves, the first issue presented is whether respondent's current absorption of such charges under its rates and pickup and delivery rule is legal. Pickup service contemplated by respondent's tariff embraces both calling for and loading at point of origin (in accordance with generally accepted interpretation of motor carrier's tariffs where pickup service is provided) and, there being no provision in the tariff expressly providing for loading of vehicle by the shipper, the loading is an integral part of the transportation service offered by respondent. Fact that labor contracts require that loading of vehicles at the piers be done by a third party does not in any way change the nature of the carrier's service; moreover, terminal operators perform the loading as agents of respondent. Under its tariff rates and pickup and delivery rule, respondent is required to bear the costs for loading of vehicle.—Frozen Foods—Southern, Middle Atl. & New England States, 323 I.C.C. 143 (146-7).

Proposed tariff provision, intended to clarify the services respondent offers under considered rates, is reasonably necessary to eliminate shippers' existing uncertainty regarding respondent's practice of paying pier loading charges to the terminal companies, especially in view of provisions in governing terminal tariff which place contingent liability on shipper for pier loading charges and in view of fact that other carriers' tariffs specifically provide for payment of such charges either by shipper or carrier. Furthermore, proposed provision would be in conformity with the Commission's requirement that tariffs clearly set forth rules and regulations affecting measure of services performed in connection with published rates; also it would eliminate a possible source of discrimination between various shippers. There being no change in the level of respondent's rates, no cost showing need be made; proposed rule found just and reasonable.—Id., pp. 145-6, 147-8.

Proposed rule providing that carrier may for its convenience substitute vehicles not equipped with winches for line-haul transportation of oilfield commodities and at its expense obtain a winch for loading or unloading of shipments not requiring additional lift equipment, approved subject to indicated clarifying amendments. A winch truck is more expensive, costs more to operate, and wears out much sooner than one not so equipped; as weight of winches limits permissible weight of cargo under State laws, freight requiring two winch trucks may be loaded on one longer winchless vehicle; and, as less than 10 percent of respondent's oilfield traffic requires winches for loading and unloading and they are not normally used during over-the-road hauls, it has become impractical to maintain only winch equipment. Operating economies from proposed substitution are thus obvious, and it is reasonable to conclude that respondent will not use facilities of others when it would incur greater cost by so doing.—Loading, Unloading by Winch, Oil Field Haulers, U.S.A., 323 I.C.C. 359 (362, 363, 367).

As line-haul rates now include winch loading and unloading, charges incurred for obtaining winches at origin and destination will not be passed on to shippers; thus proposed rule will not affect the existing rate structure. Considered practice is widespread and of long standing, its practicality and economic soundness are demonstrated by experience, and the new rule will merely remove any uncertainty as to its propriety and allow use of equipment in a manner consonant with respondent's managerial discretion. Moreover, its enforcement presents no foreseeable difficulties; there is no more likelihood of additional service being performed without charge if a hired vehicle is used than if the transporting vehicle performs the unloading, since, if shipment cannot be unloaded by a winch truck and driver, loading and unloading are not included in the line-haul rate and accessorial charges apply.—Id., pp. 362, 366, 368.

Complaining petitioner's proposed rules cannot be adopted for they are not based on representative cost evidence, nor do they meet the needs or have the support of the majority of carriers and shippers. Thus they are shown not to be just and reasonable.—Stopping-In-Transit Rules & Charges Btw. Southern Terr., 329 I.C.C. 353 (363).

Proposed tariff rules eliminating the unloading of loose and carcass meats by motor carriers but not adjusting line-haul rates to reflect such elimination constitute reduced service without reduced rates and so have not been shown to be just and reasonable. Proposed tariffs permitting a carrier to arrange such unloading services without specifying a precise charge for such services ruled unlawful.—Unloading Restrictions on Meats & PHP, 335 I.C.C. 391 (398-401)*.

Respondent's proposed schedule cancelling joint rates, through routes, and interchange arrangements with another carrier at Philadelphia, Pa., on grounds that such cancellation would relieve congestion at respondent's terminal, is not supported by any evidence that such congestion exists. As this cancellation would cause a reduction in the quality and quantity of service offered shippers, it is the type of rate publication and practice condemned in 111 MCC 151, and is therefore not shown to be just and reasonable and is hereby ordered cancelled.—Interchange Between Daniels & Tri-State Trans. Co., 337 I.C.C. 295 (296-7).

65. Reasonableness of proposed rates.—[Vols. 14-19, 21].—Where proposed tariff was suspended for the full statutory period and the Commission found, on basis of an inadequate report, that carriers had shown the involved rates to be just and reasonable, the district court set aside the finding and directed the Commission to resume the investigation into the reasonableness of such rates.—National Small Ship. Traf. Conf. v. United States, 321 F. Supp. 500 (501)*.

Although respondent failed to follow the method set out in 318 ICC 567 for showing costs that may be used to show compensativeness of a rate when owner-operators are employed, since it did not separate payments to owner-operators and show that remaining costs would be covered by division of revenue it would retain, cost evidence is not determinative in instant proceeding; thus, there is no occasion to apply the criteria of the cited decision.—Sheet Steel, Sparrows Point to Scranton and Carbondale, 323 I.C.C. 554 (556-7)*.

Public interest precludes proposed increase in l.t.l. and any-quantity class and commodity rates, despite increased labor costs, where operating ratio on such shipments is less than 90 percent. This interest is not properly served when, automatically and without sufficient justification, carriers are permitted to pass on to shipper through higher rates, and eventually to consumer through higher prices, this rise in operating expenses, thus further increasing inflationary pressures affecting the national economy.—Increase Rates, Southwest, Colorado, Wyoming, 326 I.C.C. 216 (240-1).

When selected carriers are used as basis for showing revenue needs of all respondents, competent evidence must prove them typical of the entire group. Respondent motor carriers' evidence fails this requirement as respondents chose carriers previously presenting such evidence to state regulatory bodies which is not representative herein for reasons specified.—Increased LTL Class & Commodity Rates, Pacific Northwest, 329 I.C.C. 1 (12).

On reconsideration, a 3-percent general increase in transcontinental rates by respondent motor carriers not shown just and reasonable as respondents' judgment samples of traffic and costs did not comply with quantum of proof specifically required by order of August, 3, 1964, cited herein. Failure results from unrepresentativeness of selected carriers who do not participate in short-haul movements, also applicable herein, and the use of study periods not typical or statistically sound.—Increased Class & Commodity Rates, Transcontinental, 329 I.C.C. 420 (427)*.

Proposed changed t.l. commodity rate on candy and related articles from Hackettstown, N. J., and New York, N.Y., to Chicago, Ill., not shown just and reasonable to the extent respondent's cost evidence is insufficient to prove such rate is compensatory.—Candy & Confectionery, New Jersey & New York to Chicago., 332 I.C.C. 43 (46-47).

Respondent motor carriers' evidence to prove that proposed reduced t.l. commodity rate on gypsum and plaster from Southand, Okla., to Chicago, Ill., should be based on one-way costing found insufficient. One-way costing is applicable only where a heavy or chronic traffic imbalance exists. One month duration of respondents' cost study and comparison of tonnage in each direction standing alone are insufficient proof of such an imbalance.—Gypsum and Plaster, Southand, Okla., to Chicago, 332 I.C.C. 48 (52).

Proposed intercoastal containership rates on canned goods from Pacific coast to eastern destinations found unjust and unreasonable to extent they exceed protestant-respondent motor carrier's costs but just and reasonable in all other respects.—Canned Goods, Between Pacific Coast and the East, 332 I.C.C. 55 (67).

Proposed changed commodity rates by respondent motor carrier on animal food from the Middlewest to western destinations not shown just and reasonable because respondent's cost evidence is insufficient to prove such rates will return sufficient revenues to cover out-of-pocket costs.—Animal Food, Middlewest to Calif., Idaho, & Utah, 332 I.C.C. 87 (89)*.

On reconsideration, proposed reduced commodity rates on window glass from Charleston and Owens, W. Va., to indicated destinations found just and reasonable because such rates are compensatory with costs computed on regional averages set forth in a public statement issued by the Commission as an aid in ratemaking procedure.—Window Glass, W. Va. to Md., Pa., and Va., 332 I.C.C. 382 (386-87)*.

On investigation, proposed reduced t.l. commodity rates on plastic materials from 10 points in Texas to Palatine, Ill., shown to be just and reasonable as respondent-proponent motor carrier has shown that proposed rate compares favorably with similar rates and applies to a point intermediate on the route of compared rate and amounts to a prima facie showing of reasonableness which protestant railroad's cost evidence fails to rebut.—Plastic Materials, Texas to Palatine, Ill., 332 I.C.C. 403 (405).

Respondent motor carrier has failed to bear its burden of proving tariff provisions restricting its acceptance of interlined traffic to be just and reasonable. Respondent's contention that such provisions are needed to eliminate problems in their collection of local rates on such traffic is not supported by any specific evidence but rather protestant shippers indicate that they desired continuation of services at either joint or combination rates.—Restrictions on Interchange Arrangements, 335 I.C.C. 356 (358-59).

Respondent motor carriers' proposed increases of minimum charges and rates on l.t.l. and any-quantity shipments under 1000 pounds found just and reasonable as respondents' cost revenue comparisons show the precarious financial condition of the carriers and that proposed increases would not be excessive in comparison with substantially higher rate levels in adjacent territories and are required to maintain adequate service in this area.—Rate Increases and Charges, Southwestern States, 335 I.C.C. 361 (363-377).

Proposed new rates and charges on l.t.l. and any-quantity shipments, to apply between points in New England and Middle Atlantic territories, on the one hand, and, on the other points in Central, Northwest, Middle West and Southwestern territories found just and reasonable as such rates would bear their fair share of carriers' costs as applied to the respective weight brackets.—Small Shipment Rate Revision—Eastern Central, 335 I.C.C. 547 (575).

The Commision concludes that the data submitted by respondent in support of increased rates and minimum charges on shipments of less than 5000 pounds fairly represent the carriers operating between the central and southern territories, show a revenue need, and prove such increases are not excessive. The increased rates and charges are approved as just and reasonable.—Increased Rates & Charges, C. & S. Territories, 335 I.C.C. 676 (692).

Proposed reduced commodity rate not shown just and reasonable as proponent motor carrier's cost data fails to bear statutory burden of proving such rate compensatory. Protestant's cost study uses correct methods of computation and is probative evidence that proposed rate is below proponent's out-of-pocket costs and is not compensatory.—Copper and Lead Scrap, Denver to Kansas City, 335 I.C.C. 792 (796-7).

Proposed rate revisions on shipments weighing less than 500 pounds shown to be just and reasonable as such revision results in a more equitable revenue contribution among all weight brackets than at present. Such rates will guarantee that respondent motor carriers are able to continue to provide adequate service on small shipments, which have long been a transportation problem, and for which such carriers now provide the only transportation mode available.—Small Shipment Rate Revision, Central & Southern, 337 I.C.C. 158 (172-3).

Evidence shows that respondent had a substantial net operating loss in 1971, and that without any fare increase its net operating loss will exceed $304,000 in 1972, even without consideration of additional losses resulting from the recent employee strike. Commission concludes that respondent has clearly shown a need for additional revenues to continue its existing operations and that proposed increases are shown just and reasonable.—Passenger Fares Between New York & New Jersey, 341 I.C.C. 50 (53-54).

Commission found proposed increases in rates and minimum charges not shown just and reasonable because respondents did not use the "carried basis" criterion, established in 339 ICC 324 and 340 ICC 1, for measuring revenue-cost relationships and have not convinced us that we should change that criterion. Respondents' introduction of nonstudy carriers' revenues introduces a bias that has not been corrected. Therefore, we are unable to conclude the proposal is cost-justified or necessary to meet future needs or provide good service.—General Increase, East-South Territory, 341 I.C.C. 735 (755-8).

Cost evidence herein (appendixes D, E, and F) clearly shows that the 1971 annual report data for the involved Rocky Mountain region carriers demonstrates an insufficient revenue need on the carriers' part. Financial health of this group is better than any other sector in the country. Respondents' correct portrayal of the unfavorable declining economic trend for years 1965 to 1970 and their pessimistic conclusions are strongly counterbalanced or neutralized by sizable improvement in 1971 earnings. Record does not establish a revenue need for all proposed increases.—General Increase-Rocky Mountain Territories, 341 I.C.C. 821 (839-42); however, evidence is clear that a revenue need exists in shipments under 1,000 pounds as these shipments are not carrying their fair share of cost burden. Although granting an increase on the issue traffic cannot be made with mathematical certainty, the Commission is convinced that a 1 percent increase in charges on these shipments is reasonable. Proposed schedules not shown just and reasonable and ordered canceled without prejudice to the filing of new schedules in conformity with foregoing conclusions.—Id., p. 842.

66. Cost of service.—[Vols. 19, 21].—Since the purpose of the proposed rate change was to correct a traffic imbalance from the point of origin to the destination territory, proponents utilized the added traffic theory, by which line-haul costs were computed by assigning a one-way vehicle-mile cost equally to each hundred-weight transported in a single vehicle. Approved.—Carbon Blacks from the Southwest to Ind., Ohio & Mo., 325 I.C.C. 138 (140).

The Highway Form B cost formula assigns to each movement a cost for the return of a vehicle to point of origin. This theory of joint costs assumes a reasonably balanced operation between the termini involved. Where, as here, the record shows a heavy and chronic imbalance of traffic, it is obvious that traffic moving in the same direction as that of the empty vehicle movement does not in fact create empty vehicle miles and should not bear the cost responsibility for such miles which Highway Form B purports to assign.—Id., p. 142.

The average running costs resulting under Highway Form B reflect the average of both single-trip and double-trip pickup and delivery. Thus, the doubling of running costs would result in overstating such costs even if it were assumed that a round trip was required in every instance. Since it is common knowledge that carriers often drop off empties when making pickups, or vice versa, it is unreasonable to assume that this particular traffic will generate more deadheading of equipment than is already provided for by the formula.— Aluminum Ingots, Kansas City, Mo., to Fort Wayne, Ind., 326 I.C.C. 1 (4)*.

Operating ratio of 91.3 percent on total l.t.l. and any-quantity traffic is very favorable, and precludes finding of need for additional revenue in this category.— LTL COR Rates—Between East and Territories West 326 I.C.C. 174 (203).

Increase in labor costs must be weighed along with other circumstances in determining reasonableness of proposed increase in rates. Public interest precludes approval of proposed increase in l.t.l. and any-quantity class and commodity rates, despite increased labor costs, where operating ratio on such shipments is less than 90 percent. This interest is not properly served when, automatically and without sufficient justification, carriers are permitted to pass on to shippers, through higher rates—and, eventually, to consumers, through higher prices—this rise in operating expenses, thus further increasing inflationary pressures affecting the national economy.—Increased Rates, Southwest, Colorado, Wyoming, 326 I.C.C. 216 (240-1).

Respondents have the burden of proving that their proposed increased l.t.l. and t.l. class and commodity rates and minimum accessorial charges in the New England Territory would be just and reasonable. This burden is not met if the cost and revenue data offered does not fairly represent the New England carriers as a whole; and no evidence is offered to show that efforts have been made to offset cost increase by increasing efficiency.—Increased Rates, New England Territory, 329 I.C.C. 244 (252).

Regional average costs used by protestant railroads and set forth in a public statement by the Commission do provide an appropriate method for determining if proposed reduced commodity rates on window glass are compensatory on a cost basis. Respondent's cost computations based on Highway Form B are inappropriate because expenses reported by carriers using owner-operators when applied for a single carrier do not yield meaningful cost results.—Window Glass, W. Va. to Md., Pa., and Va., 332 I.C.C. 382 (386)*.

Proposed increases in rates and charges, 5 percent on shipments weighing less than 5,000 pounds and 3 percent on those weighing 5,000 pounds and more, found not justified by evidence purporting to show respondents' need for additional revenues to meet anticipated increased costs due to higher wage rates and to improve their general financial condition. Effect of the wage increases on carriers' total expenses and unit costs cannot be measured by the mere fact of new wage rates; and, since a reliable restatement of expenses (essential to any cost justification for rate increases) was not presented, it is impossible to say what effect the wage increases will have on carriers' profit margins. Moreover, the order setting the hearing called for certain information, and, clearly, respondents have not complied therewith to extent that "anticipated expense and revenue data to show the effect of proposed increase" was called for. Respondents' showing as to effect of the wage increases on their expenses and costs is not sufficient; and they failed to show increased costs sufficient to justify their proposal.—Increased Rates and Charges, Middlewest Territory, 335 I.C.C. 142 (144-5, 150-1)*.

Proponent motor carrier's cost evidence in support of a reduced commodity rate is inadequate as it is an improper mixture of proponent's own costs and regional average costs and as proponent's method of computing line-haul costs on a one-way basis, rather than generally accepted round-trip basis, is unacceptable absent proof that a chronic and heavy traffic imbalance exists..—Copper and Lead Scrap, Denver to Kansas City, 335 I.C.C. 792 (795-6).

Our general refusal to approve or permit rates which fail to cover the usual apportionment of joint line-haul costs is based on the recognition that any benefits that might accrue to the carrier proposing or maintaining such rates would be detrimental to other regulated carriers, and thus contrary to our responsibility for developing sound economic conditions in the national transportation system. Accordingly, where it has appeared that traffic would be attracted from private carriage as in 325 ICC 188, rates have been permitted under relaxed standards of proof.—Atchison, T. & S. F. Ry. v. Morris, 340 I.C.C. 51 (59)*.

Commission, following 239 F. Supp. 591 and 251 F. Supp. 483, found that cost evidence, in order to show that rates are compensatory, should show cost of service rather than compensation paid to owner-operators and that, to avoid discrimination among carriers, the same principle should apply to all carriers. Also, while actual cost data is available, regional cost (properly adjusted) should be accorded prima facie validity absent any effective rebuttal. However, specific cost formulae according prima facie validity to formula-based costs are not necessary or desirable.—Motor Carrier Rates—Owner-Operator, 341 I.C.C. 28 (35-38).

Regulations of the Commission

36 FR 7134, Apr. 15, 1971, Part 1104: Procedures to be Followed in Motor Carrier Revenue Proceedings, new part 1104 (§1104.1 - §1104.8) added, effective 30 days after publication in the Federal Register.

36 FR 9022, May 18, 1971, Part 1104: Procedures to be Followed in Motor Carrier Revenue Proceedings, tariff publishing bureaus' petitions for postponement of effective date of the new procedures prescribed in Ex Parte No. MC-82 (36 FR 7134) denied; extension of the compliance date is not shown to be justified.

36 FR 18309, Sept. 11, 1971, Part 1104: Procedures to be Followed in Motor Carrier Revenue Proceedings, §1104.1 - §1104.8 modified; and prescribed procedures, as modified, take effect 30 days after publication in Federal Register.

Section 216. (h) [§*316(h) U.S.C.*] Good Will, earning power or certificate inadmissible in proceedings to determine rates.—[Unchanged. See vol. 10, p. 8214]

Notes of Decisions

Volume 10—p. 8214; Volume 12—p. 10459.

Section 216. (i) [§*316(i) U.S.C.*] Transportation needs and fair return considered in determining rates, etc.—[Unchanged. See vol. 11, p. 9554.]

Historical notes, vol. 11, p. 9555, vol. 13, p. 11112, vol. 14, p. 11633.

Notes of Decisions

Volume 10—p. 8216; Volume 11—p. 9555; Volume 12—p. 10460; Volume 13—p. 11112; Volume 14—p. 11633; Volume 15—p. 12243; Volume 16—p. 12906; Volume 17—p. 13613; Volume 18—p. 14623; Volume 19—p. 15896.

5. Honest, economical, and efficient management.—[Vols. 15-17].—Record shows that respondents have made a substantial investment in new and improved equipment and business methods to improve efficiency of operations but record also shows, as required in 332 ICC 820, that despite such savings an increase in net expenses or unit costs will result from new wage rates and cost levels.—Increased Rates and Minimum Charges, South, 335 I.C.C. 77 (99-101).

15. Fair return.—[Vols. 10-12, 14-19].—Commission's duty under §216(i) would not be performed should we deny carriers the opportunity to attempt to earn adequate revenues. However, we are not persuaded that the amount of needed revenues should be based upon artificial net worth figures which represent arbitrary application of a turnover ratio to actual earnings especially when greater turnover ratios are being accomplished.—Increased Rates and Minimum Charges, South, 335 I.C.C. 77 (96-7).

Regulations of the Commission

36 FR 7134, Apr. 15, 1971, Part 1104: Procedures to be Followed in Motor Carrier Revenue Proceedings, new part 1104 (§1104.1 - §1104.8) added, effective 30 days after publication in the Federal Register.

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36 FR 18309, Sept. 11, 1971, Part 1104: Procedures to be Followed in Motor Carrier Revenue Proceedings, §1104.1 - §1104.8 modified; and prescibed procedures, as modified, take effect 30 days after publication in Federal Register.

Section 216. (j) [§*316(j) U.S.C.*] Effect on remedy or right of action.—[Unchanged. See vol. 10, p. 8218.]

Section 217. (a) [§*317(a) U.S.C.*] Tariffs of common carriers by motor vehicle—(a) Filing, posting, and publication.—[Unchanged. See vol. 10, p. 8218.]

Historical notes, see vol. 11, p. 9558, vol. 13, p. 11105, vol. 14, p. 11634.

Notes of Decisions

Volume 10—p. 8218; Volume 11—p. 9558; Volume 12—p. 10461; Volume 13—p. 11112; Volume 14—p. 11634; Volume 15—p. 12244; Volume 16—p. 12908; Volume 17—p. 13615; Volume 18—p. 14624; Volume 19—p. 15896; Volume 21—p. 17631.

1. Construction and interpretation.—[Vols. 10-12, 14, 19].—See also Loss and Damage Claims case, §6(1), n. 84, supra.

Proposed tariff, insofar as it attempted to impose liability for demurrage charges upon an agent who was not a party to the contract of transportation, was unlawful. Before such assessments as detention charges can be imposed on a party on a prescribed basis there must be some legal foundation for such liability outside mere fact of handling the goods shipped.—Middle Atlantic Conference v. United States, 353 F. Supp. 1109 (1116-9)*; since persons liable for demurrage charges are to be determined by ordinary rules of common law, parties to a contract of carriage are free among themselves to contract with respect to payment of demurrage; but where they have not become contractually obligated to pay demurrage because common-law principles exonerate them from liability, and they are not liable by statute or custom, liability cannot be imposed through device of a tariff.—Id., pp. 1119-20; although warehousemen are free to assume liability for detention charges by contractual undertaking, absent any custom or statutory or contractual basis, it would be unlawful to impose such liability on a party outside transportation contract by means of a tariff as a tariff is an inappropriate instrument to legislate liability with respect to a nonconsenting party.—Id., pp. 1121-22.

Where tariff provisions require the making of a notation on the bill of lading stating the density of the commodity shipped as a condition precedent to the use of a rate, the shipper is bound by such provisions. Such notations must be made prior to movement of the shipment or they are not in compliance with the provision.—Glama Dress Co. v. Mid-South Transport, 335 I.C.C. 589 (593).

Due to absence of delegated congressional authority to regulate advertising by carriers and delegation thereof to Federal Trade Commission, the Interstate Commerce Commission is without jurisdiction to prohibit use of the "Good Housekeeping Consumer's Guaranty", as evidenced by a seal, in the advertising of regulated carriers. Use of said guarantee does not violate §217(b).—Wheaton Van Lines— Petition for Declaratory Order, 339 I.C.C. 1 (6-7); although it is unnecessary for Commission to determine whether use of the "Good Housekeeping" seal is "misleading" to the public, it is noted that said magazine's program is well accepted and understood by general public and any potential violation of law does not constitute probable cause to believe such exists.—Id., p. 7.

Section 217 of the Act provides that tariffs must be filed with the Commission and makes unlawful the transportation of property "unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part." A carrier may not lawfully perform transportation under a grant of temporary authority unless and until compliance has been made with the rate and other requirements of §217 of the Act in the case of common carriers. The fact that applicant never had rates in effect governing the transportaion of its commodities under its temporary authority indicates that applicant was conducting operations, in interstate commerce, without appropriate authority.—Ewen Brothers, Inc., Common Carrier Application, 108 M.C.C. 878 (880, 886).

In this rulemaking proceeding, Commission adopted a rule (49 CFR 1307.27(k)) prohibiting tariffs of motor common carriers filed pursuant to §217 from containing any provisions which result in restricting service to less than carrier's full operating authority or which exceeds such authority, as public convenience and necessity require all carriers to maintain service coextensive with full scope of their authorities in order to provide a safe and adequate transportation system for property.—Restrictions on Service by Motor Common Carriers, 111 M.C.C. 151 (167-73).

On reconsideration the Commission determined that a 40,000 pound minimum weight provision in applicant's current tariff, not being related either to its existing authority or to that proposed, constituted a "service embargo" within the meaning of 111 MCC 151, notwithstanding the fact that applicant indicated that it was willing to handle its shipper's individual l.t.l. shipments but had never been tendered any. Applicant's receipt of authority was conditioned upon its taking whatever steps might be necessary to bring about compliance with respect to both its present and new tariffs. Applicant was granted a three year term certificate and required to file performance reports.—Midwestern Express, Inc., Extension—Paper Products, 114 M.C.C. 834 (838). [See also dissent]

3. Purpose.—[Vols. 10, 18].—That part of §217(a) reading "between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad *** when a through route and joint rate shall have been established" was not intended to be, and is not, a limitation upon the general permission which §216(c) grants to motor common carriers to establish through routes and joint rates with rail carriers. Instead, such language is a necessary adjunct to the statutory requirement that motor common carriers shall file tariffs showing their rates and charges between points on own routes, and but for the inclusion of that language in the statute tariffs providing for joint rates and through routes would not be required to be filed. Because it is not lawful for a motor common carrier individually to publish rates to or from points it is not authorized to serve, tariffs containing such rates must be predicated upon previously established through routes and joint rates.—Substituted Service—Piggyback, 322 I.C.C. 301 (344)*.

5. Duplicating or conflicting rates.—[Vols. 10-13, 19, 21].—Proposed rule under which carrier may for its convenience substitute vehicles not equipped with winches for line-haul transportation of oilfield commodities, and at its expense obtain a winch for loading and unloading, does not conflict with item governing pickup and delivery services by providing that loading and unloading are included in the line-haul rate even though another vehicle is used. Item referred to includes loading and unloading in the line-haul rate unless the commodity cannot be handled by a winch-equipped truck and its driver, and legally obligates carrier to render the loading and unloading service; proposed clarifying rule merely permits it to do so by obtaining outside equipment and absorbing cost therefor when its own winch equipment is not available. Similar practice in performance of this limited loading and unloading service has been followed for years by numerous carriers.—Loading, Unloading by Winch, Oil Field Haulers, U.S.A., 323 I.C.C. 359 (365).

6. Territory, routes, joints, "between", direction of movement, commodities.—[Vols. 11-16, 18, 19, 21].—Mere fact that plaintiff held a certificate authorizing operations (1) between certain New Jersey counties and parts of New York, including Peekskill, and (2) between the same New Jersey counties and parts of Connecticut, including Bridgeport, did not automatically entitle it to take advantage of increased rate filed with the Commission (by its rate publishing bureau) on shipments which, admittedly, it transported directly from Peekskill to Bridgeport. Plaintiff's certificate did not authorize direct operation between the named points and, lacking necessary authority, it was not operating legally when it performed the transportation. Therefore, the lower court properly ruled that plaintiff could not recover undercharges based on the published rate, since it was operating illegally, and granted judgment in favor of defendant; affirmed.—Mars Express, Inc. v. David Masnik, Inc., 401 F. 2d 891 (892-3, 894).

New order of the Commission requiring plaintiff to cancel proposed rates on single-unit mobile homes, on ground that its operating rights did not authorize transportation of mobile homes, is founded on substantial evidence of record. After the decision in 262 F. Supp. 1009, which set aside its earlier order requiring cancellation of those rates, the Commission held extensive further hearings which produced voluminous additional testimony and exhibits; and the prior three-judge court having left to the Commission any appropriate further action, that procedure was proper. A new record is now presented for judicial review; and, while testimony of expert and industry witnesses disagrees as to proper classification of the single-unit mobile home, there is substantial evidence to support the Commission's finding that there is a valid distinction between the terms "mobile home" and "prefabricated building" as used in commodity description of the authority granted. Commission order under review, sustained.—Pre-Fab Transit Co. v. United States, 321 F. Supp. 1147 (1149-50, 1152)*.

If examination of carrier's operating authority on whose behalf proposed new rates are published does not reveal an ambiguity when interpreted by the ordinary rules of grammar, the Commission will not go behind the certificate in search of extrinsic matters. Since the modifying heavy-hauling restriction follows the last antecedent "boats", and is not preceded by a comma, it applies solely to "boats". Therefore, opposition to the rates based solely on the ground that respondent's entire authority is subject to the heavy-hauling restriction is without merit.—Road Paving Materials Between Points in New England, 329 I.C.C. 199 (203-4)*.

10. Plain and definite statement required.—[Vols. 10-19, 21].—See also Frozen Foods—Southern, Middle Atl. & New England States case, §216(g), n. 26, supra.

Tariff provisions publishing weekly rates on gasoline and fuel oils, applicable on stated minimum gallonages tendered for transportation in round-the-clock movements over a period of 7 days, which apply on a composite tender of numerous prospective individual shipments, do not violate §217 because the freight charges cannot be determined until all shipments in a given week have been tendered. There is substantial compliance with §217 where carriers file schedules open for public inspection, showing all rates and charges for transportation they are authorized to perform. Shipper using the weekly rates is in position to know with reasonable certainty the quantity intended to be transported, prior to actual movement thereof; considered tariff provisions are reasonably clear and definite in every material respect.—Weekly Rates on Petroleum Products—from Sparks, Nev., 322 I.C.C. 541 (549, 550).

Proposed rule providing that carrier may at its convenience substitute vehicles not equipped with winches for line-haul transportation of oilfield commodities, and obtain at its expense a winch for loading or unloading, is ambiguous in being restricted not to apply if additional lift equipment as defined in item governing special services is required, since latter item defines "additional lift equipment" as that operated by a vehicle or power unit other than the transporting vehicle, thus per se rendering the proposed rule inapplicable in the very circumstances for which it is designed. Proposed rule should be reworded so as not to apply to shipments which, due to size or shape, cannot be unloaded by a winch-equipped truck and its driver but require additional lift equipment; and the special-services item should be amended to define "additional lift equipment" as that operated by a vehicle or power unit other than the transporting vehicle or the substituted winch-equipped vehicle provided for by the new rule.—Loading, Unloading by Winch, Oil Field Haulers, U.S.A., 323 I.C.C. 359 (365).

Respondent motor carriers' schedules which fail to state separately charges for all accessorial services or provide for inclusion of such services in their line-haul rates on commodities formerly exempt from regulation under §203(b)(6) are in violation of rule 11(a) of Tariff Circular MF No. 3. Respondents are hereby ordered to eliminate such violations.—Rates on Formerly Exempt Commodities, 329 I.C.C. 61 (71-2).

While the Commission's Tariff Circular No. 20 requires that tariffs shall be clear and explicit, complexity of itself does not necessarily render the tariff unlawful. Although complexity may tend to give rise to ambiguity, the two terms are not synonymous.—Stopping-in-Transit Rules & Charges Btw. Southern Terr., 329 I.C.C. 353 (360).

Proposed tariff provisions, placing liability for payment of charges resulting from detention of motor common carrier equipment, are in violation of §217 of the Act to the extent that such provisions contain the phrase "party causing the delay", or similar wording, which phrases are indefinite and unclear.—Payment for Detention Charges, Eastern Central Rates, 335 I.C.C. 537 (542)*.

20. Joint rates.—[Vols. 12, 14, 17, 19, 21].—See International Joint Rates and Through Routes case, §6(1), n. 81, supra.

Rules and Regulations

36. Truckloads; equipment; weight.—[Vols. 10, 12, 19].—Tariff provisions publishing weekly rates on gasoline and fuel oils, applicable on stated minimum gallonages tendered by shipper for transportation by one carrier in one unit of equipment in round-the-clock movements over a period of 7 days, based on mileage scales stated in cents per gallon and subject to a weekly minimum charge, do not violate prohibition of rule 4(a) of Tariff Circular MF-No. 3 against publication of rates for other than terminal services based solely on units of time. Considered rates are based on a combination of time, mileage, and volume, with the weekly minimum charge (which is necessary to justify economically the dedication of particular equipment for 7 days) to be applied on any total volume less than the lowest stated minimum gallonage.—Weekly Rates on Petroleum Products—from Sparks, Nev., 322 I.C.C. 541 (550).

As respondent's present tariff rules governing line-haul rates on oilfield commodities provide that they will include loading and unloading which can be performed with a winch, and contemplate use of a winch equipped truck and one driver, there is nothing objectionable in placing proposed rule, allowing carrier at its convenience to substitute vehicles not equipped with winches for the line-haul transportation and at its own expense to obtain a winch for loading and unloading, under the heading "Substitution of Equipment". The pickup and delivery provisions, which include loading and unloading, contain a reference to the substitution provisions and are not misleading in any way. Proposed item, amended as indicated for clarification, does not violate Tariff Circular MF No. 3.—Loading, Unloading by Winch, Oil Field Haulers, U.S.A., 323 I.C.C. 359 (361, 366).

Respondent motor carrier's proposal to change excess weight rules providing a charge on the overflow portion of t.l. shipments of commodities between indicated points now shown just and reasonable. Respondent's cost evidence was based on overflow portions only but respondent has the burden of proving whether charges on the entire shipment are compensatory and so has not sustained his statutory burden.—Capacity Load Provisions, Mid. Atl. & New Eng. States, 332 I.C.C. 428 (431).

39. Transit.—[Vols. 12, 13, 15, 18].—See Railroad Comm. of Texas v. Oil Field Haulers Assn. case, §203(a)(10), n. 5 *Between*, supra.

40. Containers; returned containers.—[Vols. 16, 18].—Furnishing by carriers of mobile storage bins at jobsites without specific tariff rule or charge therefor, was found to be in violation of §217. Cease and desist order issued.—Chemical Leaman, Matlack, and M & M.—Investigation, 118 M.C.C. 238 (246).

Charges other than Rates and Fares

66. Special services.—[Vols. 10, 11, 14, 17, 21].—Respondents' practice of furnishing more than one man to load and unload shipments without specific tariff authority or charge therefor violates §217 inasmuch as the statute requires publication of all rates and charges. Respondents' contention that such practices are within their managerial discretion is invalid as statutory duty supersedes the right to use managerial discretion.—Tennessee Carolina Transp., Inc.—Investigation, 337 I.C.C. 542 (549).

Tariffs of common carriers of household goods are hereby required separately to state each terminal or accessorial service to be rendered and the charge therefor. Containerization, packing, and unpacking services are to be considered as separate services and subject to separate charges. All such charges are to be established in compliance with regulations prescribed in the instant case. Tariffs shall state rates for transportation of household goods in amounts per hundred pounds only. Rates stated on any other basis shall be canceled and superseded by rates stated in this manner.—Practices of Motor Common Carriers of Household Goods, 111 M.C.C. 427 (459-60, 526)*.

See also Household Goods cases, §216(b), n. 735, supra.

Regulations of the Commission

34 FR 12343, July 26, 1969, Part 1037: Freight Rate Tariffs, Schedules, and Classifications of Motor Carriers, §1037.22 Application of regulations, revised, effective upon publication in the Federal Register.

34 FR 12593, Aug. 1, 1969, Part 1037: Freight Rate Tariffs, Schedules and Classifications of Motor Carriers, §1037.22 Application of regulations, effectiveness of order of July 15, 1969 (34 FR 12343), stayed pending further order of the Commission.

35 FR 4261, March 7, 1970, Part 1307: Freight Rate Tariffs, Schedules, and Classifications of Motor Carriers, Subpart B—Common Carrier Freight Tariffs and Classifications, §1037.27 Contents of tariffs, amended by adding new paragraph (k) *Operating authority*, effective Apr. 17, 1970.

35 FR 4553, Mar. 14, 1970, Part 1307: Freight Rate Tariffs, Schedules, and Classifications of Motor Carriers, Subpart C—Special Permissions, §1307.100 Motor common carriers of property; establishment of rates, etc., covering emergency movements of property, revised, effective on date of order.

35 FR 4754, Mar. 19, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, entire Part, §1056.1 - §1056.18, revised, effective May 1, 1970.

35 FR 5551, Apr. 3, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, miscellaneous corrections of revised regulations (35 FR 4754).

35 FR 7123, May 6, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.6 Determination of weights, new subparagraph (e) *Exception*, added, effective June 1, 1970.

35 FR 8282, May 27, 1970, Part 1307: Freight Rate Tariffs, Schedules, and Classifications of Motor Carriers, Subpart C—Special Permission, §1307.90 Suspension supplements and postponement notices, paragraph (f) amended, for purpose of changing the expiration date, effective on date of order.

35 FR 8736, June 5, 1970, Part 1307: Freight Rate Tariffs, Schedules, and Classifications of Motor Carriers, Subpart B—Common Carrier Freight Tariffs and Classifications, §1307.27 Contents of tariffs, * * * (k) *Operating authority*, (2) modified by substituting the date Sept. 1, 1970, in lieu of June 1, 1970, where it appears therein, effective on date of order.

35 FR 8890, June 9, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.1(c) and §1056.12(a) modified, effective June 1, 1970.

35 FR 15444, Oct. 3, 1970, Part 1307: Freight Rate Tariffs, Schedules, and Classifications of Motor Carriers, Subpart B—Common Carrier Freight Tariffs and Classifications, §1307.22 Application of regulations, revised (Ex Parte No. 261; Special Permission No. 70-275), effective Oct. 26, 1970.

35 FR 16935, Nov. 3, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.4 Accessorial or terminal services, etc., order of Dec. 5, 1969 (335 ICC 698), reinstated and modified so as to become effective Dec. 1, 1970.

35 FR 19077, Dec. 17, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.11 Vehicle-load manifest; information required, amended by addition of new paragraph (b)(13), effective November 1970 [sic].

36 FR 158, Jan. 6, 1971, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.4 Accessorial or terminal services, etc., order served on Oct. 29, 1970 (35 FR 16935), modified so as to become effective on Feb. 1, 1971.

36 FR 16228, Aug. 20, 1971: Special Permission No. 72-810, Fares, Charges, Etc.; Postponement of Effectiveness of Increases, Reestablishment of Lower Rates. Effective Aug. 16, 1971, rules of various Commission tariff circulars are waived to extent necessary to permit carriers to publish and file tariff supplements mandated by the Executive Order of Aug. 15, 1971, entitled Providing for Stabilization of Prices, Rents, Wages, and Salaries.

36 FR 16228, Aug. 20 1971: Suspension Docket No. 8664, Stabilization of Rates and Charges, August 1971. Operation of schedules of new increased rates, fares and charges, etc., filed to become effective Aug. 17, 1971, and later, which would be in violation of the Executive Order of Aug. 15, 1971, entitled Providing for Stabilization of Prices, Rents Wages, and Salaries, is suspended, effective Aug. 16, 1971.

36 FR 16975, Aug. 26, 1971: Suspension Docket No . 8664, Sub. No. 1, Stabilization of Rates and Charges, August 1971. Operation of schedules of new increased rates, fares and charges, etc., filed to become effective Aug. 24, 1971, and later, is suspended, effective Aug. 23, 1971.

36 FR 21358, Nov. 6, 1971, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.6 Determinations of weights, paragraphs (b) and (e) modified, effective 30 days after date of publication in Federal Register.

36 FR 21857, Nov. 16, 1971: Suspension Docket No. 8688, Stabilization of Rates and Charges. Operation of schedules publishing new increased rates, fares and charges, etc., which, if permitted to become effective, would result in rates and charges that would violate Executive Order No. 11627, dated Oct. 15, 1971 (except those currently under suspension and investigation), ordered suspended, and use thereof deferred, for indefinite period pending further Commission order.

36 FR 22300, Nov. 24, 1971, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program, §1311.0 - §1311.5, new Part 1311 added, effective day after date of publication in Federal Register.

36 FR 22341, Nov. 24, 1971: Suspension Docket No. 8688, Sub-No. 2, vacates indefinite suspension of operation of certain schedules, subject to conditions set forth, effective on date of order.

36 FR 22579, Nov. 25, 1971, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.6(d) and §1056.7, amended, effective Jan. 1, 1972.

36 FR 23108, Dec. 3, 1971: Suspension Doc. No. 8688 (Sub No. 1) Stabilization of Rates and Charges, certain schedules of increased rates suspended by order of Nov. 19, 1971.

36 FR 23108, Dec. 3, 1971: Suspension Doc. No. 8688 (Sub No. 3) Stabilization of Rates and Charges, certain schedules of increased rates suspended by order of Nov. 24, 1971.

37 FR 1107, Jan. 26, 1972, Part 1311: Special Procedures for Tariff Findings Under the Wage and Price Stabilization Program, special procedures prescribed by order of Nov. 19, 1971 (36 FR 22300), revised in order to conform to, and implement, §300.16 of the regulations of the Price Commission (37 FR 652), effective on date of order.

37 FR 3354, Feb. 15, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program; Price Commission having deferred until March 10, 1972, public utility rate increases proposed to become effective on or after Feb. 10, 1972, carriers are directed to defer indefinitely the effective dates of all increased rates, fares, charges, etc., proposed to become effective during the Price Commission deferral period, effective on date of order.

37 FR 6149, March 24, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program. Carriers authorized to cancel indefinite postponement of effective dates of proposed increased rates, fares, charges, etc., required by the order of Feb. 11, 1972, effective on date of order.

37 FR 7159, Apr. 11, 1972, Part 1056: Transportation of Household Goods in Interstate of Foreign Commerce, §1056.3 amended by adding paragraph (d), §1056.7 summary amended, and §1056.12(b) amended by adding a new last sentence, effective April 28, 1972.

37 FR 9398, May 10, 1972, Part 1306: Passenger and Express Tariffs and Schedules of Motor Carriers, §1306.17 Transmission of publications to subscribers, added, effective June 21, 1972.

37 FR 9399, May 10, 1972, Part 1307: Freight Tariffs, Schedules, and Classifications of Motor Carriers, §1307.14 Transmission of publications to subscribers, added effective June 21, 1972.

37 FR 12239, June 21, 1972, Parts 1036 and 1037: Order of May 1, 1972 (37 FR 9398) requiring transmission of tariffs and schedules to subscribers and other interested parties, stayed pending disposition of timely filed petitions for reconsideration, effective on date of order.

37 FR 12324, June 22, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.10 Receipt or bill of lading; information thereon, revised, and §1056.20 Responsibilities and liabilities of principal carriers, added, effective July 31, 1972.

37 FR 14589, July 21, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce; reservation of vehicle space by shippers. Proceeding reopened for further consideration of regulation prohibiting carriers from making estimates and/or charges based on vehicle space reservation, but solely with respect to shipments of the particular

type of articles defined in §1056.1(a)(2) and (3); orders of Feb. 28, 1971, and Apr. 27, 1971, remain in full force and effect as to all other shipments. Effective on date of order.

37 FR 15867, Aug. 5, 1972, Part 1131: Temporary Authority Applications Under Section 210a(a) of the Interstate Commerce Act, §1131.5 Rates, fares, charges, and special permission applications, revised, effective on date of publication in Federal Register.

37 FR 15868, Aug. 5, 1972, Part 1306: Passenger and Express Tariffs and Schedules of Motor Carriers, §1306.100 Motor common carriers of property or passengers; establishment of rates, etc., covering emergency transportation, added, effective Aug. 7, 1972.

37 FR 15868, Aug. 5, 1972, Part 1307: Freight Rate Tariffs, Schedules, and Classifications of Motor Carriers, §1307.100 Motor common carriers of property or passengers; establishment of rates, etc., covering emergency transportation, revised, effective Aug. 7, 1972.

37 FR 14308, July 19, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program, entire Part 1311 revised, effective on day following publication in the Federal Register.

37 FR 14308, July 19, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.19(a) corrected.

37 FR 17838, Sept. 1, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.9(c) *Waiver of order for service*, added, effective Oct. 5, 1972.

37 FR 18551, Sept. 13, 1972, Part 1306: Passenger and Express Tariffs and Schedules of Motor Carriers, §1306.17 Transmission of publications to subscribers, amended, effective 60 days after publication in Federal Register.

37 FR 18552, Sept. 13, 1972, Part 1306: Passenger and Express Tariffs and Schedules of Motor Carriers, §1306.17 Transmission of publications to subscribers, amended, effective 60 days after publication in Federal Register.

37 FR 25399, Nov. 30, 1972, Parts 1306 and 1307: Order of Aug. 28, 1972 establishing regulations for the transmission of tariff and schedule publications to subscribers and other interested parties, which had been stayed, made effective 30 days after publication of order in the Federal Register (11/30/72).

38 FR 2177, Jan. 22, 1973, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program. Pursuant to end of Phase II and Beginning of Phase III, mandatory application of regulations is suspended, effective Jan. 11, 1973, until further notice; but such regulations shall be construed as voluntary guidelines.

38 FR 3389, Feb. 6, 1973, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program, §1311.5 Standards applicable during Phase III of the wage and price stabilization program, adopted Jan. 30, 1973.

38 FR 6392, March 9, 1973, Part 1506: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.6(d) *Reweighing of shipment*, corrected by amending first sentence.

38 FR 10154, Apr. 25, 1973, Part 1307: Freight Rate Tariffs, Schedules, and Classifications of Motor Carriers, §1307.201 *Released rates on household goods* subdivision (c) amended, effective June 1, 1973.

38 FR 16231, June 21, 1973, Part 1300: Freight Tariffs, §1300.0(a) amended so as more clearly to indicate those carriers subject to regulations promulgated under Part 1300 of the CFR.

Section 217. (b) [*§317(b) U.S.C.*] Deviation from rates and regulations enumerated in tariff forbidden; undue preferences.—[Unchanged. See vol. 10, p. 8224, vol. 11, p. 9561.]

Notes of Decisions

Volume 10—p. 8224; Volume 11—p.9561; Volume 12—p. 10464; Volume 13—p. 11113; Volume 14—p. 11636; Volume 15—p. 12245; Volume 16—p. 12909; Volume 17—p. 13616; Volume 18—p. 14626; Volume 19—p. 15901; Volume 21—p. 17638.

5. Effect of tariff in force.——[Vols. 16-18, 21].—In action against the United States to recover charges allegedly due on LTL shipments of explosives, made under government bills of lading from California and Arizona origins to various points in eastern States, "destination" in Note 1 to minimum-charge rule in governing bureau tariff means the place designated for ultimate unloading of shipments, rather than destination of rates named in the tariff as defendant argues. Thus, under tariff rule provision for LTL or AQ rate on a 7,500-pound minimum, applicable rate on movements from origin points to Memphis, Tenn., should be based on the minimum charge for 7,500 pounds and not, as the government claims, for the Note 1 minimum of 1,000 pounds. Though Note 1 provided a 1,000-pound minimum for shipments that moved from origin to destination via any of the carriers listed therein and line-haul carriers to Memphis were so listed, since the shipments were not transported from origin to place of delivery specified on each bill of lading by such designated carriers, minimum charge provisions of Note 1 are not applicable.—McLean Trucking Co. v. United States, 387 F. 2d 657 (660-2)*; T.I.M.E. Freight, Inc. v. United States, 302 F. Supp. 573 (574-5).

Similarly, in another suit to recover charges allegedly due on government l.t.l. shipments of explosives from Mare Island, Calif., to Earle, N.J., "destination" in Note 1 to minimum-charge rule in governing Rocky Mountain Freight Bureau tariff means Earle, N.J., the ultimate point of unloading. However, although all carriers participating in the movements from Mare Island to Earle were listed in Note 1 (providing 1,000-pound minimum via carriers listed), that tariff published rates from Mare Island to Colts Neck, N.J., but not to Earle. Thus, since governing tariff was not applicable over entire route of movement, i.e., did not apply from Colts Neck to Earle, the 1,000-pound minimum charge provisions of Note 1 did not apply to any portion of such movement. Under tariff minimum-charge rule, therefore, charges based on the 7,500-pound minimum rate were proper for considered movements from Mare Island to Colts Neck.—Id., 302 F. Supp. 575 (577-8).

Principles Governing Tariff Interpretation

10. In general.—[Vols. 13, 15-19, 21].—Whenever possible, terms used in a tariff must be taken in the sense in which they are generally understood and accepted commercially. See 310 ICC 207. Evidence adduced on further hearing establishes that the steel industry generally regards the word "gauge" in terms of precisely defined thickness ranges which are widely known and accepted within the industry. Accordingly, complainant's steel switch boxes fall within the range of 14 gauge steel and qualify for the lower class ratings as sought.—Roach Appleton Manufacturing Co. v. Clemans Truck Line, 332 I.C.C. 547 (551-52)*.

Commission held that railroads may file joint rates for end-to-end motor rail service in transportation of commodities exempted from our economic regulation by §203(b)(6) of the Act, without filing special permission applications. However, motor carriers providing such substitute service must be named in the tariff, and to facilitate this requirement blanket permission is granted to railroads to add or delete motor carriers' names on one day's notice.—Substitution of Motor for Rail Serv. & Publ. of Rates, 341 I.C.C. 88 (99-102).

16. Entire tariff to be considered.—[Vols. 10, 12, 14-16, 19, 21].—In construing freight tariffs, a question of law is presented; and, in carrier's suit to recover charges allegedly due on government LTL shipments of explosives, such interpretation of governing tariff must give effect to all the pertinent provisions, and every word, clause, and sentence must be given effect and construed together. Thus, since governing tariff did not apply over entire route of movement of considered shipments from Mare Island, Calif., to Earle, N.J., because, while rates were named from Mare Island to Colts Neck, N.J., no rates were published therein to Earle, provisions of Note 1 to tariff minimum-charge rule (under which 1,000-pound minimum applied on shipments moved via carriers listed) did not apply to any portion of the movements from Mare Island to Earle even though all participating carriers were listed in that note. Pursuant to the tariff rule, charges for movements from origin to Colts Neck should be based on the minimum charge for 7,500 pounds at applicable LTL or AQ rate.—T.I.M.E. Freight, Inc. v. United States, 302 F. Supp. 575 (577-8).

Observance of Published Tariffs

30. Rates applicable to articles as commercially described.—[Vols. 12, 14-18, 21].—See Roach Appleton Manufacturing Co. v. Clemans Truck Line case, §217(b), n. 10, supra.

40. Departure from tariff rates unlawful.—[Vols. 10-12, 14, 15, 18, 19, 21].—The Motor Carrier Act, applicable in carrier's suit against shipper for (1) breach of haulage contract between them and (2) under doctrine of promissory estoppel, prohibits any deviation from rates published in tariffs of common carriers subject thereto and bars agreements by carriers or shippers that might lead to any kind of discrimination. Moreover, considered contract by shipper agreeing to designate the common carrier as its sole freight carrier was wholly lacking in consideration and, thus, unenforceable because, in any event, the holder of a common-carrier certificate is obligated to provide service to the public in accordance with its holding out. Therefore, even though plaintiff carrier leased additional equipment (under 4-year leases requiring minimum annual payments of $192,000) in reliance on defendant shipper's promise to use plaintiff as its sole carrier for anticipated increased volume of freight from its new plant at Wilmington, Del., that fact did not estop defendant from subsequently terminating its use of plaintiff's motor freight service.—Feraco, Inc. v. Georgia Pacific Corp., 313 F. Supp. 660 (661-3).

Although respondent's transportation of imported iron and steel articles from Wilmington, N.C., to interior North Carolina destinations is found to be a continuation of the movement in foreign commerce, respondent admits that it has been charging intrastate rates on such shipments. As the intrastate rates are in some instances lower, or due to tariff provisions result in lower charges, than the applicable interstate rates, in such instances respondent is transporting traffic at rates and charges other than those specified in tariffs on file with the Commission, in violation of §217(b). Cease-and-desist order entered.—Iron and Steel Articles, Wilmington to Points in N.C., 323 I.C.C. 740 (741, 744)*.

43. Interlining.—Motor common carriers of property are not now obligated but rather are permitted, under §216(c) of the Act, to establish through routes and joint rates with each other covering the provision of interline service. However, once such interline arrangements or concurrences are established and published in their tariffs pursuant to §217(a) of the Act, the concurring carriers are under a legal duty to provide the interline service described in their tariffs. A motor common carrier has the obligation to accept and transport all freight (including interline freight) tendered in accordance with the provisions of its published tariffs.—Braswell Motor Frt. Lines, Inc., Investigation, 118 M.C.C. 392 (411); this obligation has been characterized as an almost absolute duty, and, for the adequate protection of the public, motor common carriers of property are held strictly accountable for its performance. The observance of this duty is excused only if performance is prevented by such intervening occurrences as acts of God or the public enemy.—Id., p. 411.

48. Strict compliance with tariff rules.—[Vols. 10, 11, 15-18, 21].—On reconsideration, "route" in motor carrier stopoff rule provides, as here concerned, for stops for partial unloading at stopoff points which "are directly intermediate to the point of final destination via the route over which the rate to such final destination applies". The term "route" as used in the rule does not mean any route, but can only mean the actual route of movement. Stopoff service, by its very nature, must occur at a point on the route of movement, whether direct or indirect, between origin and final destination.—Tex.-Ariz. Motor Frt. and Phelps Dodge—Investigation, 326 I.C.C. 567 (568-9)*.

125. Routing and misrouting.—[Vols. 13, 14, 16-18].—On reconsideration, no specific carrier or routing, other than respondent, was designated by the shipper. The ten shipments involved were tendered by the shipper with request, in each insta [illegible] off service for partial unloading of freight at points in Texas. While a carrier may transfer portions of a shipment from one vehicle to another for its own operating convenience in providing partial unloading at points off the direct route from origin to destination which are local to its lines, that is not the situation here. The services performed were not stopoffs, but were actually interchanges for subsequent line-haul movements by other carriers to points which the respondent could not serve directly. Respondent therefore found to have misrouted, since the shipments were not routed via a route over which the rate to the final destination applied.—Tex.-Ariz. Motor Frt. and Phelps Dodge—Investigation, 326 I.C.C. 567 (568, 570-1)*.

175. Undercharges.—[Vols. 13, 14, 17, 21].—Common carrier, authorized to operate (1) between certain New Jersey counties and parts of New York, including Peekskill, and (2) between same New Jersey counties and parts of Connecticut, including Bridgeport, could not recover undercharges on basis of increased tariff rate on 290 shipments of liquor transported by it directly from Peekskill to Bridgeport when, since it had no authority to operate directly between those points, such carrier operations were illegal. While plaintiff was a common carrier within the Act, mere holding of a certificate does not automatically entitle it to the rate filed with the Commission; before such carrier may take advantage of its published rate, it must follow its authorized route; therefore, plaintiff cannot recover undercharges for illegal carriage off route. Lower cout's judgement for defendant, affirmed.—Mars Express, Inc. v. David Masnik, Inc., 401 F. 2d 891 (892-4).

No determination as to the amount of undercharges due petitioning carrier could be made as record contained insufficient detail concerning the nature of the individual shipments. Commission therefore listed the 7 possible kinds of shipments and the applicable charges for each.—Arkansas-Best Freight System, Inc. v. Quartet, 332 I.C.C. 877 (881-2).

176. Refund of overcharges.—[Vols. 17, 18].—Upon remand by district court, complainant manufacturer awarded refund of overcharges inasmuch as respondent carrier had incorrectly applied higher class ratings on shipments of steel switch boxes.—Roach Appleton Manufacturing Co. v. Clemans Truck Line, 332 I.C.C. 547 (552)*.

222. Carrier's duty to collect tariff charges.—[Vols. 14-17, 21].—In carrier's suit to recover unpaid freight charges from consignee of "prepaid" shipments, intent and meaning of the statute (imposing on carrier the right and duty to collect its full, published tariff charges) does not sustain plaintiff's claim that, under the Act, it has an absolute right and duty to collect—and consignee has an absolute duty to pay—all lawful charges which cannot be defeated by equitable principles, although it results in double payment by consignee. As the district court concluded, plaintiff was estopped from proceeding on those shipments when the delivery receipts showed consignor as the party to be billed, shipping documents indicated that full tariff charges were prepaid, and consignee, relying thereon, took delivery and paid consignor's invoices for the charges. Moreover, plaintiff contributed materially to its inability to recover payment from consignor by its unlawful and lax credit extensions to him, which also increased amount of the loss resulting from consignor's financial failure; thus, to permit recovery from consignee would only reward carrier for its unlawful and inequitable conduct. Judgment for defendant, affirmed.—Consolidated Freightways Corp. of Del. v. Admiral Corp., 442 F. 2d 56 (59-63).

238. Tariff minimum weights.—]Vols. 17, 18, 21].—Respondent motor carriers have duty to establish minimum weights reasonably related to density of commodity involved. Proposed overflow rule change not shown just and reasonable as low-density articles would be subjected to an additional charge not justified by cost evidence of respondent.—Capacity Load Provisions, Mid. Atl & New Eng. States, 332 I.C.C. 428 (430).

Regulations of the Commission

36 FR 23068, Dec. 3, 1971, Part 1271: Motor Carrier Passes, §1271.25 Carriers' pass rules, revised, effective on date of publication in Federal Register.

Section 217. (c), (d). [§*317(c),(d) U.S.C.*].—[Unchanged. See vol. 10, p. 8227-8.]

Notes of Decisions

§217(d): Volume 10—p. 8228; Volume 11—p. 9562; Volume 12—p. 10466; Volume 15—p. 12248; Volume 16—p. 12913; Volume 21—p. 17646.

Section 218. [§*318(a) U.S.C.*] Schedules of contract carriers by motor vehicle—(a) Establishment, filing, and publication of schedules and rules affecting rates; notice of and hearing on proposed changes; undue preferences. [Unchanged. See vol. 18, p. 14631.]

Notes of Decisions

Volume 10—p. 8230; Volume 11—p. 9564; Volume 12—p. 10466; Volume 13—p. 11115; Volume 14—p. 11639; Volume 15—p. 12248; Volume 16—p. 12914; Volume 17—p. 13621; Volume 18—p. 14633; Volume 19—p. 15904; Volume 21—p. 17646.

25. Schedules; publication; content.—[Vols. 11, 12, 15-19, 21].—While the Commission's Tariff Circular No. 20 requires that tariffs shall be clear and explicit, complexity of itself does not necessarily render the tariff unlawful. Although complexity may tend to give rise to ambiguity, the two terms are not synonymous.—Stopping-in-Transit Rules & Charges Btw Southern Terr., 329 I.C.C. 353 (360).

Regulations of the Commission

35 FR 4052, Mar. 4, 1970, Part 1307: Freight Rate Tariffs, Schedules, and Classifications of Motor Carriers, Subpart C—Special Permission, §1307.101 Motor contract carriers of property; establishment of actual or minimum rates, etc., covering emergency movements of property, revised, effective on date of order.

35 FR 8282, May 27, 1970, Part 1307: Freight Rate Tariffs, Schedules, and Classifications of Motor Carriers, Subpart C—Special Permission, §1307.90 Suspension supplements and postponement notices, paragraph (f) amended, for purpose of changing the expiration date, effective on date of order.

36 FR 16228, Special Permission No. 72-810, Fares, Charges, Etc.; Postponement of Effectiveness of Increases, Reestablishment of Lower Rates. Effective Aug. 16, 1971, rules of various Commission tariff circulars are waived to extent necessary to permit carriers to publish and file tariff supplements mandated by the Executive Order of Aug. 15, 1971, entitled Providing for Stabilization of Prices, Rents, Wages, and Salaries.

36 FR 16228, Aug. 20, 1971: Suspension Docket No. 8664, Stabilization of Rates and Charges, August 1971. Operation of schedules of new increased rates, fares and charges, etc., filed to become effective Aug. 17, 1971, and later which would be in violation of the Executive Order of Aug. 15, 1971, entitled Providing for Stabilization of Prices, Rents, Wages, and Salaries, is suspended, effective Aug. 16, 1971.

36 FR 16975, Aug. 26, 1971: Suspension Docket No. 8664, Sub. No. 1, Stabilization of Rates and Charges, August 1971. Operation of schedules of new increased rates, fares and charges, etc., filed to become effective Aug. 24, 1971, and later, is suspended, effective Aug. 23, 1971.

36 FR 22300, Nov. 24, 1971, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program, §1311.0 - §1311.5, new Part 1311 added, effective day after publication in Federal Register.

36 FR 22341, Nov. 24, 1971: Suspension Docket No. 8688, Sub-No. 1, vacates indefinite suspension of operation of certain schedules, subject to conditions set forth, effective on date of order.

36 FR 23108, Dec. 3, 1971: Suspension Doc. No. 8688 (Sub No. 1) Stabilization of Rates and Charges, certain schedules of increased rates suspended by order of Nov. 19. 1971.

36 FR 23108, Dec. 3, 1971: Suspension Doc. No. 8688 (Sub No. 3) Stabilization of Rates and Charges, certain schedules of increased rates suspended by order of Nov. 24, 1971.

37 FR 1107, Jan. 26, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program, special procedures prescribed by order of Nov. 19, 1971 (36 FR 22300), revised in order to conform to, and implement, §300.16 of the regulations of the Price Commission (37 FR 652), effective on date of order.

37 FR 3354, Feb 15, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program; Price Commission having deferred until March 10, 1972, public utility rate increases proposed to become effective on or after Feb. 10, 1972, carriers are directed to defer indefinitely the effective dates of all increased rates, fares, charges, etc., proposed to become effective during the Price Commission deferral period, effective on date of order.

37 FR 6149, March 24, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program. Carriers authorized to cancel indefinite postponement of effective dates of proposed increased rates, fares, charges, etc., required by the order of Feb. 11, 1972, effective on date of order.

37 FR 9398, May 10, 1972, Part 1306: Passenger and Express Tariffs and Schedules of Motor Carriers, §1306.17 Transmission of publications to subscribers, added, effective June 21, 1972.

37 FR 9399, May 10, 1972, Part 1307: Freight Tariffs, Schedules and Classifications of Motor Carriers, §1307.14 Transmission of publications to subscribers, added, effective June 21, 1972.

37 FR 15867, Aug. 5, 1972, Part 1131: Temporary Authority Applications Under Section 210a(a) of the Interstate Commerce Act, §1131.5 Rates, fares, charges, and special permission applications, revised, effective on date of publication in Federal Register.

37 FR 15869, Aug. 5, 1972, Part 1306: Passenger and Express Tariffs and Schedules of Motor Carriers, §1306.101 Motor contract carriers of property or passengers; establishment or rates, etc., covering emergency transportation, added, effective Aug. 7, 1972.

37 FR 15869, Aug. 5, 1972, Part 1307: Freight Rate Tariffs, Schedules, and Classifications of Motor Carriers, §1307.101 Motor contract carriers of property or passengers; establishment of actual or minimum rates, etc., covering emergency transportation, revised, effective Aug. 7, 1972.

37 FR 14308, July 19, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Stabilization Program, entire Part 1311 revised, effective on day following publication in the Federal Register.

37 FR 14308, July 19, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.19(a) corrected.

38 FR 2177, Jan. 22, 1973, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program. Pursuant to end of Phase II and beginning of Phase III, mandatory application of regulations is suspended, effective Jan. 11, 1973, until further notice; but such regulations shall be construed as voluntary guidelines.

38 FR 3389, Feb. 6, 1973, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program, §1311.5 Standards applicable during Phase III of the wage and price stabilization program, adopted Jan. 30, 1973.

Section 218. (b) [§*318(b) U.S.C.*] Complaints and investigations; hearings and orders of Commission. [Unchanged. See vol. 11, p. 9565.]

Historical note, see vol. 21, p. 17648.

Notes of Decisions

Volume 10—p. 8233; Volume 11—p. 9566; Volume 12—p. 10468; Volume 13—p. 11116; Volume 15—p. 12249; Volume 16—p. 12915; Volume 17—p. 13623; Volume 18—p. 14635; Volume 19—p. 15904; Volume 21—p. 17648.

25. What considered in determining reasonableness.—[Vols. 10-13, 15-19, 21].—Defendant contract carrier being a specialized carrier of salt, its system average costs are an acceptable measure of cost of considered service; and as defendant common carrier's costs for handling salt parallel those of the contract carrier, latter's latest system average costs of record fairly represent the cost to both of handling involved salt traffic.—Midwest Emery Freight System, Inc. v. Lee Bros., Inc., 322 I.C.C. 701 (703)*; but Rates & Practices Review Board acted properly within its discretion in not taking official notice of data not of record; the Commission is not required to, nor would it normally, consider data filed subsequent to submission of the evidence in a proceeding on a complaint against rates. Contention that the board gave inadequate consideration to operating statistics subsequently filed by the contract carrier in its quarterly report, rejected.—Id., pp. 703-4; and comparison of the assailed rates with higher rates of other carriers does not establish that they are unreasonably low when circumstances surrounding establishment of the compared rates are not shown.—Id., p. 704.

30. Minimum rates and charges.—[Vols. 10-13, 15-19, 21].—Evidence supports finding that the lowest t.l. revenue consistent with cost of transporting salt between considered points would be about $120. On that basis defendant's rates of 40 cents, minimum 30,000 pounds, and 38 cents, minimum 40,000 pounds, which yield at least that minimum revenue, are not shown to be unreasonable; but its rate of 50 cents, minimum 20,000 pounds, earns less than cost of handling the traffic and is therefore unreasonably low. While finding that a reasonable minimum rate for the future must yield not less than $120 a truckload will require defendant to publish a rate of 60 cents, minimum 20,000 pounds, or 8 cents higher than present rates of complainant and other carriers, lawfulness of the compared rates is not in issue.—Midwest Emery Freight System, Inc. v. Lee Bros., Inc., 322 I.C.C. 701 (704)*.

50. Charge not to result in undue advantage or preference.—[Vols. 10, 11, 16].—Carrier's furnishing of mobile storage bins at jobsite without published schedule provisions or charge therefor, found to be in violation of §218 of the Act. Cease and desist order issued.—Chemcal Leaman, Matlack, and M. & M.—Investigation, 118 M.C.C. 238 (246).

Section 218. (c) [§*318(c) U.S.C.*] New or reduced charges; hearings and orders of Commission; suspension. [Unchanged. See vol. 11, p. 9568.]

Notes of Decisions

Volume 11—p. 9569; Volume 12—p. 10471; Volume 13—p. 11116; Volume 15—p. 12249; Volume 16—p. 12917; Volume 17—p. 13624; Volume 18—p. 14638; Volume 19—p. 15905; Volume 21—p. 17649.

5. Burden of proof.—[Vols. 12, 13, 16-19, 21].—The burden of proving the justness and reasonableness of tariff proposals, and the charges thereunder where applicable, rests upon the proponents thereof.—Segregation of Freight, New Eng. & Mid. Atl. States, 340 I.C.C. 306 (318)*.

Section 219. [§*319 U.S.C.*] Application of section 20 (11) and (12) of this title to common carriers by motor vehicle.—[Unchanged. See vol. 11, p. 9570, vol. 12, p. 10472.]

Historical Note

The Commission notes that its recommendations (340 ICC 515, 577) that the Commission be given jurisdiction to adjudicate loss and damage claims on their merits, have not been accorded favorable action in Congress.—Annual Report, 1975, p. 42.

Notes of Decisions

Volume 10—p. 8237; Volume 11—p. 9570; Volume 13—p. 11117; Volume 14—p. 11640; Volume 15—p. 12250; Volume 16—p. 12917; Volume 17—p. 13624; Volume 18—p. 14640; Volume 19—p. 15907; Volume 21—p. 17650.

10. In general.—[Vols. 10, 11, 13, 14, 16-19].—Due to conflicts arising in the implementation of the regulation requiring that the release value be entered by the shipper signing the bill of lading, in his own handwriting [49 CFR 1307.201(c)], in relations between carriers and national account shippers of household goods, the regulation was amended to permit the shipper to instruct the carrier in writing regarding the released value of a shipment, and the carrier to incorporate the instructions by reference into the bill of lading.—Practices of Motor Common Carriers of Household Goods, 118 M.C.C. 35 (41).

15. Bills of Lading Act; bills; nature and function.—[Vols. 10, 14, 16-19, 21].—See also Dublin Co. v. Ryder Truck Lines, Inc. case, §1(6), n. 65 *Action*, supra.

Bill of lading provision, stating that where a trailer is spotted for loading by consignor, or unloading by consignee, 48 hours' free time will be in effect, was designed and intended to set a tariff rate for containers for trailers that are delayed over a 48-hour period for loading and unloading while in custody of the consignor, or consignee. Thus, contrary to plaintiff consignee's contention, that provision did not continue carrier's liability as such for a 48-hour period after notice of arrival and placement for delivery at destination. Therefore, it was not applicable so as to make defendant carrier liable for value of stereo sets which were stolen following delivery, and acceptance, of considered shipment at consignee's warehouse.—General Electric Co. v. Acme Fast Freight, Inc., 324 F. Supp. 1079 (1081, 1083)*.

20. Interest.—[Vol. 10].—In federal courts the rule is that the trial court, in the exercise of sound discretion, may include interest on unliquidated damages as an element of damages; also, courts have held that interest may be allowed as compensation for delay in paying the damages, under the Carmack Amendment, whether technical form of the suit is in contract or tort recovery. Therefore, where carrier disallowed shipper's written claim for loss and damages to goods shipped, and evidence shows that value of plaintiff's household goods damaged or lost by defendant carriers during transportation from New York to california was $17,857, plaintiff is found entitled to recover prejudgment interest on that amount at 7 percent per annum—the legal rate of interest in California for detention of money—from date complaint was filed until entry of judgment for plaintiff plus $3.42 per day thereafter until the $17,857 with said interest shall be paid.—Cutten v. Allied Van Lines, Inc., 349 F. Supp. 907 (911, 912-13).

30. Limitation of liability.—[Vols. 10, 11, 13, 14, 16-18, 21].—In mandamus action to restrain carrier, engaged in driving of privately owned cars together with owner's baggage and personal effects from one point to another, from limiting its common-carrier liability for loss and damage to goods, lower court erred in ruling that tariff containing a "benefit of insurance" clause violated §20(11) which also applies to motor carriers. No express prohibition in §20(11) precludes a tariff "benefit of insurance" clause; such clause presupposes carrier's liablitiy for the full loss in conformity therewith, and is not an exemption from liability; however, carrier is permitted to recover from owner of the car the proceeds of insurance paid to him. There is no requirement that all shippers carry insurance protecting the carrier; and in event of a loss, carrier reimburses the owner for that part of his automobile insurance premium attributed to its custody of the car, and carrier bears the total loss. Therefore, there is no limitation of carrier's liability in violation of the statute.—United States v. Auto Driveaway Co., 464 F. 2d 1380 (1382-3).

32. Released rates and ratings, generally.—[Vols. 14, 16-19, 21].—See also Sun Insurance Office, Ltd. v. Greyhound Van Lines, Inc. case, §219, n. 115, infra.

Existing released-rates orders providing for a released valuation of 30 cents per pound do not afford reasonable protection in view of increased value of household goods since that figure was prescribed; present "full liability" released-rates order used by some carriers and provision of cargo insurance by others, resulting in carrier or insurer assuming liability only for that portion of actual loss or damage represented by the relation of the released value to the actual value of the goods, is inequitable, and resultant co-responsibility feature has caused many complaints by confused shippers who supposed they had protected themselves for any loss up to the amount of value for which they paid a valuation or insurance charge. One released-rates order should be substituted for the four present orders, so that every carrier will be on same basis, carrier representatives can more easily understand the order and explain its application to the public, and the public will not be confused by the different bases of liablitity offered by several carriers. —Practices of Motor Common Carriers of Household Goods, 96 M.C.C. 196 (196-7)*.

Any released-rates order designed for shippers dealing with the moving indurstry should be as fair and as simple as possible. Order proposed by one carrier, providing for basic minimum liability of 60 cents per pound per article, with full liability up to $10,000 per shipment at an additional charge of 50 cents per hundred pounds, or for higher valued shipments an additional charge of $5 per 1,000 of valuation in excess of the first $10,000, satisfies those requirements to a large extent. Use of weight as basis for the additional charge is clearly fair, and 50 cents per hundredweight is the best available estimate of carrier's risk, using weight in place of value. However, resulting double charge for any risk above $10,000 is unwarranted. To be fair to carriers, they should be apprised of valuable shipments, but there is no reason why their risk should be limited if they are willing to accept the revenue from transportation of a valuable shipment and the additional charge for full value protection. If shippers are required only to declare—and be held to—their estimated value of any shipment thought to be worth more than $10,000, carriers will be forewarned of unusual risks where sheer size of the shipment fails to account for the higher declared value.—Id., pp. 198-9.

To eliminate possibility of a double charge, carrier proposes that the 50-cent additional charge for full protection be subject to a maximum of $50, retaining the excess-value charge of $5 per $1,000. As thus modified, carrier's proposal contains the desired elements of simplicity, full liability when desired by shipper, and fair overall compensation to carriers for risks they are required to assume, and should be adopted. Full protection is automatically given the great majority of household goods shippers desiring it, whether or not they can accurately estimate the total weight and value of their belongings, and such protection will readily apply to goods worth both somewhat more and somewhat less than current average value of $1 per pound. Order adopted will continue to provide for shippers wanting only minimum protection at the lowest rate, as well as for those at the other extreme. Provision of a further charge based on values above $10,000 will in most instances reasonably compensate carriers for the additional risk, and while it will not compensate for risks on high-value shipments of extremely light weight, such shipments are comparatively rare; order adopted represents the best choice available.—Id., pp. 199-200.

If a carrier does not care to face the risk of transporting high-value, light-weight shipments at the released rates, it can operate without them under the centuries-old liability of common carriers, publishing rates which cover the risk, with additional insurance to protect itself from the consequences. Or it can operate under the new order and obtain additional released-rates orders for the specific types of light-weight shipments that it handles commercially.—Id., p. 200; and while it is possible that a small carrier might be ruined by large claims under the order adopted, such a carrier would be equally harmed by the same claim under any full liability provision. Responsibility for one's actions has long been a part of common carriage, and those who cannot afford a large claim will need to insure against it; but this is a carrier's, not a shipper's responsibility.—Id., p. 200.

Liability of Carriers

33. Liability, generally.—[Vols. 17-19, 21].—In forwarder's suit to recover from motor carrier the amount plaintiff was required to pay consignee for in-transit damage to one unit of printing press—that was turned over to it for shipment, transported by rail and motor carriers, and found to be damaged upon delivery by defendant—plaintiff's motion for a new trial on ground that jury's finding in favor of defendant was against weight of the evidence, denied. Testimony of defendant's officer that, while he saw torn canvas covers on some trailers, he did not note the damage on receipt, that he signed when he picked up the shipment (in six sealed "piggybacked" trailers) at railroad freight yard because he did not think that the contents were his responsibility, and that he did not hit or scrape the trailers against any object while delivering them to consignee, was for the jury to weigh along with all other evidence. Inasmuch as the jury may have believed that the damage occurred before shipment came into defendant's possession, and accepted officer's explanation of why the receipt contained no notation of damage, the court will not upset the jury's verdict for defendant.—International forwarding Co. v. Bison Freightways, Inc., 316 F. Supp. 464 (466-7).

In addition, plaintiff argues that jury's verdict resulted from an unauthorized visit by two jurors to highway underpass on route over which defendant moved the trailers to consignee, and was influenced by their report to the other jurors that the load could not have hit or scraped the underpass; however, while the allegations are supported by affidavit of its counsel that two jurors gave him such information after the trial, plaintiff's motion for an inquiry into misconduct of the jury is also denied. Testimony of jurors will not be received to impeach their own verdict unless it relates to extraneous influences brought to bear upon them; and an unauthorized visit is not an extraneous influence. Moreover, testimony of motor carrier's officer, alone, was sufficient to justify the jury's verdict that defendant was not liable for in-transit damage that was found upon delivery of the shipment.—Id., p. 467.

Defendant carrier has no liability, in consignee's suit to recover value of stereo sets which were stolen, where carrier's contract transfer company delivered its trailer (transported by rail piggyback service) to consignee's warehouse with cargo intact, transfer company and consignee's agents broke the seal and opened trailer doors, backed trailer up flush against a bay and overhead doors at the warehouse (barring access from outside) on Friday so that stereos could be unloaded by consignee on Monday, and arrangements were made for return of the trailer after unloading. Though the transfer company did not obtain a delivery receipt from consignee, stipulated facts of record clearly show that consignee accepted, and exercised dominion over, the trailer when it was delivered and left on its premises; therefore, the loss from theft which occurred over the weekend must be borne solely by consignee because it had accepted delivery of the shipment.—General Electric Co. v. Acme Fast Freight, Inc., 324 F. Supp. 1079 (1083-4)*.

Conduct of local agent for interstate household-goods carrier in holding itself out to the general public, including plaintiff, as being engaged in interstate transportation of property for compensation brought it within definition of an interstate common carrier by motor vehicle, and, as such carrier, it became liable for loss of or damage to an interstate motor carrier from the time it accepted plaintiff's order to ship her household goods, then stored in its New York warehouse, to her California residence. Also, issuance of the bill of lading by defendant carrier through its issuing local agent imposed on the carrier liability to plaintiff as lawful holder thereof for any loss of or damage to plaintiff's household goods while in interstate transit. Therefore, since interstate carrier and its local agent acted jointly for their mutual benefit in movement of plaintiff's household goods from New York to California, they both became jointly and severably liable to plaintiff for damages and losses during transportation.—Cutten v. Allied Van Lines, Inc., 349 F. Supp. 907 (911, 912).

In view of numerous instances of poor handling of loss and damage claims by common carriers of household goods, a new rule, §176.14, was added to the Commission's household goods regulations in the prior report, 95 MCC 138; that rule was intended to assure prompt acknowledgment, adequate record, and diligence in carriers' processing of such claims. On further consideration, and in view of concurrent revision of Released Rates Order No. MC-505, regulation pertaining to loss and damage claims is revised to require that the carrier, at expiration of 120 days and at expiration of each succeeding 30-day period while the claim remains pending, must advise claimant *in writing* of status of its claim and reasons for delay in disposition thereof, and send a copy of such letter to the Commission's District Supervisor for the area in which carrier has its principal place of business.—Practices of Motor Common Carriers of Household Goods, 96 M.C.C. 196 (201, 219)*.

No language releasing common carriers of household goods from liability for loss or damage of such shipments may be contained in the delivery receipt. Commission herein prescribed regulations for the handling of claims for loss or damage including a periodic report which notifies the Commission of the status of all such pending claims and the reasons for delays in processing such claims.—Practices of Motor Common Carriers of Household Goods, 111 M.C.C. 427 (478-9)*.

115. Actions to enforce liability.—[Vols. 14-19, 21].—See also General Electric Co. v. Acme Fast Freight, Inc. case, §219, n. 33, supra.

In light of factual findings in shipper's action against motor carrier, which sought damages for destruction by fire of plaintiff's household goods while being transported by defendant, that (1) shipper was not given a copy of the written cost estimate and the notice required by the Commission to be furnished all household goods shippers, (2) carrier's agent did not give her adequate advice concerning her opportunity to choose a valuation for the goods that would represent a limit of carrier's liability, and had assured her that suggested rate would afford sufficient insurance coverage, which she understood to be protection supplemental to carrier's liability for loss and damage, and (3) that carrier had typed in valuation figure on the bill of lading, the lower court properly held that shipper was not bound by the bill-of-lading valuation because the carrier had not complied with requirements of the statute and the applicable Commission regulations.—Brannon v. Smith Dray Line & Storage Co., 456 F. 2d 260 (261).

Furthermore, when record showed that agent of defendant's insurance company who obtained shipper's signature on the proof-of-loss form and release after the fire knew that shipper disputed the valuation he placed on the goods and told her that the release would not affect her claim against the carrier, shipper was not bound by the insurance company's release that she signed because of the agent's misrepresentation of its purpose and, also, because of shipper's lack of intent to surrender her claim against the carrier for entire value of the household goods shipped. Lower court's judgment in favor of plaintiff, affirmed.—Id., pp. 261-2.

In shipper's action against motor carrier for damages arising from loss of four shipments of clothing (which carrier accepted, issued covering bills of lading to plaintiff, and subsequently failed to deliver) plaintiff's motion for summary judgment, pursuant to Rule 56 of Federal Rules of Civil Procedure, is granted as to the issue of defendant's liability. Affidavits and other documents submitted by plaintiff, in support of its motion, substantiate the material facts underlying the complaint which defendant denied in its answer and defendant has neither presented any form of denial of those facts other than the general denials in its pleadings, nor shown by affidavit (authorized by Rule 56 (f)) that it is unable to present facts upon which it bases opposition to the motion; therefore, there being no dispute as to facts establishing carrier's liability, summary judgment on that issue is appropriate.—H. Daroff & Sons, Inc. v. Strickland Transportation Co., 284 F. Supp. 510 (511-13).

As to the proper measure of damages, however, the parties disagree; plaintiff claims the sum of the invoice values of the shipments, whereas defendant argues that plaintiff is not entitled to recover that part of invoice value representing its admitted profit. Courts have held generally that shipper is entitled to market value of the goods at destination at the time delivery should have been made; also, contract price may be used to determine the market price and, in instant circumstances, is the best standard for assessing plaintiff's damages. However, there is authority for limiting shipper's damages to costs of manufacture when he has replaced, or can replace, the lost goods and thus retain his profit on the shipment; and defendant has a right to establish the fact that replacement was feasible and, therefore, plaintiff's recovery should be limited to its costs of manufacture. In order to permit filing of affidavits indicating existence or absence of dispute as to facts material to the issue of damages, decision on plaintiff's motion for summary judgment on that issue is stayed for 30 days.—Id., pp. 513-4.

In shipper's action to recover for damages to shipment of electronic equipment which occurred in transit, defendant's liability is governed by provisions of standard household goods bill of lading limiting carrier's liability, where shipper declares a value on entire shipment less than full actual value thereof, to amount of actual loss or damage, not exceeding 30 cents per pound of gross weight for each shipping package or loose, unpackaged article. Shipper's agent declared in writing on the bill of lading a lump-sum value of $40,000 on entire 25,600-pound shipment which had an actual value of $160,000; and 16 of the 68 shipping packages and loose articles (combined gross weight of 8,920 pounds) were damaged and were returned to shipper by carrier. Therefore, carrier's liability is determined by multiplying total gross weight of the shipping packages and loose, unpackaged articles that were actually damaged by 30 cents, rather than by multiplying total weight of all packages and unpackaged articles in the shipment by 30 cents. Judgment accordingly. Sun Insurance Office, Ltd. v. Greyhound Van Lines, Inc., 289 F. Supp. 483 (485-7).

In suit against interstate carrier and its local agent for loss and damage to household goods shipment, plaintiff made a prima facie case by showing delivery of her household goods to carrier in good condition, arrival of some items in damaged condition and non-arrival of others, and the amount of damage including value of items not delivered; then, burden of proof was on each defendant to show both that it was not negli-

gent and that the damage was due to one of the excepted causes relieving carrier from liability. Carrier's issuance of the bill of lading without a note thereon of visible damages or defects in household goods items as to which loss or damage is claimed creates a presumption or prima facie case of good condition when received for shipment; carrier and its local agent acted jointly in interstate transportation of the shipment; thus, both are jointly and severally liable to shipper for damages and losses in transit. Plaintiff found entitled to recover from defendants, individually and jointly, amount of damages shown together with interest thereon at 7 percent from date complaint was filed until date of payment; plus court costs.—Cutten v. Allied Van Lines, Inc., 349 F. Supp. 907 (912-13).

Regulations of the Commission

34 FR 206, Jan. 7, 1969, Part 1307: Freight Rate Tariffs; Schedules and Classification of Motor Carriers, Subpart D—Released Rates, §1307.201 Released rates on household goods. Paragraph (a) Establishment authorized; rate bases, amended, effective Dec. 31, 1968.

35 FR 183, Jan. 6, 1970, Part 1307: Freight Rate Tariffs; Schedules, and Classification of Motor Carriers, Subpart D—Released Rates, §1307.201 Released rates on household goods. Paragraph (a) Establishment authorized; rate bases, further amended, effective Dec. 31, 1969.

35 FR 4754, Mar. 19, 1970 Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, entire Part, §1056.1-§1056.18, revised, effective May 1, 1970.

35 FR 5551, Apr. 3, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, miscellaneous corrections of revised regulations (35 FR 4754).

35 FR 7123, May 6, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.6 Determination of weights, new subparagraph (e) *Exception*, added, effective June 1, 1970.

35 FR 8890, June 9, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.1(c) and §1056.12 (a) modified, effective June 1, 1970.

35 FR 16935, Nov. 3, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.4 Accessorial or terminal services, etc., order of Dec. 5, 1969 (335 ICC 698), reinstated and modified so as to become effective Dec. 1, 1970.

35 FR 19077, Dec. 17, 1970, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.11 Vehicle-load manifest; information required, amended by addition of new paragraph (b)(13), effective November 1970 [sic].

36 FR 158, Jan. 6, 1971, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.4 Accessorial or terminal services, etc., order served Oct. 29, 1970 (35 FR 16935), modified so as to become effective on Feb. 1, 1971.

36 FR 21358, Nov. 6, 1971, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.6 Determinations of weights, paragraphs (b) and (e) modified, effective 30 days after date of publication in Federal Register.

36 FR 22579, Nov. 25 1971, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.6(d) and §1056.7 amended, effective Jan. 1, 1972.

37 FR 4257, March 1, 1972, Part 1005: Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, new Part 1005, §§1005.1-1005.6, added to become effective April 20, 1972.

37 FR 7159, Apr. 11, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.3 amended by adding paragraph (d), §1056.7 summary amended, and §1056.12(b) amended by adding a new last sentence, effective April 28, 1972.

37 FR 9027, May 4, 1972, Part 1005: Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, effective date of prescribed regulations postponed until July 1, 1972, effective on date of order.

37 FR 12324, June 22, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.10 Receipt or bill or lading; information thereon, revised, and §1056.20 Responsibilities and liabilities of principal carriers, added, effective July 31, 1972.

37 FR 14308, July 19, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.19(a) corrected.

37 FR 14589, July 21, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce; reservation of "hicle space by shippers. Proceeding reopened for further consideration against carriers' making estimates and/or charges based on vehicle space reservation, but solely with respect to shipments of the particular type of articles defined in §1056.1(a)(2) and (3); orders of Feb. 28, 1971, and Apr. 27, 1971, remain in full force and effect as to all other shipments. Effective on date of order.

37 FR 17712, Aug. 31, 1972, Part 1064: Notice of and Procedures for Baggage Excess Value Declaration, new Part 1064 added, effective Sept. 1, 1972.

37 FR 17712, Aug. 31, 1972, Part 1064: Effective date of order prescribing regulations in new Part 1064 postponed until Dec. 20, 1972.

37 FR 17838, Sept. 1, 1972, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.9(c) *Waiver of order for service*, added, effective Oct. 5, 1972.

37 FR 20943, Oct. 5, 1972, Part 1005: Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, §1005.3(b) and §1005.4(c) modified, effective Oct. 16, 1972.

37 FR 23908, Nov. 10, 1972, Part 1005: Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, second paragraph of §1005.3 and §1005.4(c) revised, effective Oct. 16, 1972.

37 FR 28425, Dec. 23, 1972, Part 1064: Notice of and Procedures for Baggage Excess Value Declaration, effective date of order of July 11, 1972 (115 MCC 566) promulgating regulations is postponed to a date to be subsequently fixed, effective on date of order.

38 FR 6392, March 9, 1973, Part 1056: Transportation of Household Goods in Interstate or Foreign Commerce, §1056.6(d) *Reweighing of shipment*, corrected by amending first sentence.

Section 220. [§*320(a) U.S.C.*] Accounts, records and reports.—(a) Reports to Commission; copies of contracts; publication of information.—[Unchanged. See vol. 11, p. 9571, vol. 15, p. 12250.]

Historical notes, vol. 12, p. 10330, vol. 13, p. 11032, vol. 14, p. 11543; vol. 19, p. 15909; vol. 21, p. 17656.

Notes of Decisions

Vol. 12—p. 10472; Vol. 14—p. 11641; Vol. 15—p. 12251; Vol. 16—p. 12919; Vol. 17—p. 13626; Vol. 18—p. 14644; Vol. 21—p. 17657.

5. In general.—[Vols. 12, 14-18, 21].—See also Loss and Damage Claims case, §6(5), n. 2; Refiners Transport & Term. Corp.—Purchase—Mitchell case, §5(3), n. 10; Transportation of Explosives—Private Motor Carriers case, §204(a)(3), n. 1, supra.

To dispense with reporting requrements prescribed in 329 ICC 376 relative to private carriage of explosives would defeat one of the basic reasons for the rule, i.e., to keep reasonably current a list of private carriers engaged in such transportation, as well as to provide the basic information that the rule requires as to accidents occurring among such carriers.—Transportation of Explosives—Private Motor Carriers, 329 ICC 411 (413).

Under §220, Commission may require any motor carrier to file a copy of any contract, agreement, or arrangement between such carrier and any other carrier or person relating to any traffic, except that the Commission may not make public any contract, agreement, or arrangement between a motor contract carrier and a shipper. Commission's authority sufficiently encompasses reporting requirements at issue herein.—Annual Reports of Motor Carriers of Property, 335 I.C.C. 707 (711); proposed revisions of class I and class II motor common carriers annual reports requiring additional information, specified herein, as to transactions between carriers and their affiliates are approved as modified. These data are essential to Commission's evaluation of revised rates, fares, and charges of such carriers pursuant to §§216(g) and 216(i)—Id., pp. 711-2.

Commission hereby required that common carriers of household goods make and keep a vehicle-load manifest reflecting the weights and the sequential relationship of the several shipments. Commission also stated the information required to be entered on such manifests in regulations prescribed in 49 CFR 1056.11—Practices of Motor Common Carriers of Household Goods, 111 M.C.C. 427 (446-7)*.

Regulations adopted prohibiting estimates and charges based on reservation of a portion of the space of a vehicle in the transportation of household goods. Quarterly reports required to be filed with the Commission of all the instances where a carrier has participated in the transportation of split shipments of household goods weighing less than 10,000 pounds because these regulations prescribed might be utilized by the carriers to justify an increase in the number of split shipments and, as a result, there might be some deterioration in the quality of service provided.—Practices of Motor Common Carriers of Household Goods, 115, M.C.C. 49 (66).

15. Performance report.—See also Carolina Freight Carriers Corp. v. United States case, §207(a), n. 9, supra.

There is a growing number of cases where shippers, who have satisfactory service to some but not all of the points to which they ship, in order to obtain a satisfactory service on all of their small-shipment traffic, have found it necessary to support an entirely new operation which covers not only the area that lacks adequate service but also the areas that are served satisfactorily. However, a shipper's expressed requirement for a "complete" service to several destination points should not be allowed to become a "gimmick" whereby a "preferred" applicant may obtain authority merely by naming some destination points which cannot be served adequately by existing carriers. Therefore, only if some procedure for obtaining data relative to actual operations following issuance of the certificate is established, can the Commission be satisfied that its established policy against imposition of administratively undersirable restrictions in certificates requires no change.—Bilyeu Refrigerated Transp. Corp. Extension, 106 M.C.C. 692 (694-5).

In this light, after considering various alternatives, including issuance of limited-term certificates, it is not unreasonable to require the applicant, who has been successful in obtaining authority on the basis of its proposal for a shipper-tailored pickup and delivery service, to report to the Commission in an annual "Performance Report" its success in meeting the shipper's requirements. Each "Performance Report" should include sufficient and pertinent information concerning applicant's multiple delivery shipments and its actual performance under each certificate granted in this proceeding; and to give applicant sufficient opportunity to establish and develop the service contemplated, a reasonable reporting period would be 3 years. Certificates granted accordingly.—Id., p. 695.

Applicant is hereby required to file an annual "Performance Report" with Commission's Bureau of Economics at the close of each full year of the three years to which the certificate issued herein is limited. Such report is to include all information as detailed herein.—Texas-Oklahoma Express, Inc., Ext.—Oklahoma Points, 110 M.C.C. 769 (784-5).

Since supporting shippers and receivers have shown a need for the proposed service to transport general commodities, with usual exceptions, between Pittsburgh, Pa., specified Ohio points, and Louisville, Ky., on the one hand, and, on the other, Columbus, Ga., and the fact that many carriers on receiving authority on the basis of a proposed "small shipments" problem have followed the example of existing carriers and concentrated their efforts on the most profitable volume traffic moving between principal points, a 3-year term certificate was issued conditioned upon carrier filing a performance report at the end of 2 full years.—Transamerican Freight Lines, Inc., Extension, 115 M.C.C. 416 (428).

Since shippers and receivers of general commodities, with exceptions, between Portland, Oreg., and Seattle, Wash., have shown that the existing joint-line service is not meeting their reasonalble transportation requirements such as consistent overnight service, scheduled pickup, available specific types of equipment and a carrier willing to handle the traffic. The Commission should be provided with sufficient and pertinent data to permit a determination as to the extent to which applicant's actual performance measures up to the operation proposed and shown to be needed by the shipping public. Applicant granted a 3-year term certificate with a condition that it file an annual Performance Report at the end of each of the first 2 years after the date of issuance of the certificate.—Trans West. Exp., Inc., Ext.—Seattle-Portland, 118 M.C.C. 1 (12).

Regulations of the Commission

34 FR 1442, Jan. 30, 1969, Part 1249: Reports of Motor Carriers, §1249.5, §1249.6, and §1249.11 amended, effective Jan. 30. 1969

35 FR 3900, Feb. 28, 1970, Part 1249: Reports of Motor Carriers, §1249.1 Annual reports of Class I carriers of property, and §1249.2 Annual reports of Class II carriers of property, revised, effective with reports for year ending Dec. 31, 1969.

36 FR 14384, Aug. 5, 1971, Part 1249: Reports of Motor Carriers, new §1249.15 Quarterly report of freight loss and damage claims, added, effective with reports for the quarter beginning Oct. 1, 1971.

37 FR 7328, Apr. 13, 1972, Part 1252: Piggyback Traffic Statistics, §1252.1 Rail carriers, Form PTR-R (Rev), and §1252.2 Motor carriers, Form PTR-M (Rev), prescribed for quarterly reports beginning with July 1, 1972.

37 FR 20944, Oct. 5, 1972, Part 1249: Reports of Motor Carriers, §1249.15 Quarterly reports of Freight loss and damage claims, revised, effective Nov. 13, 1972.

38 FR 3602, Feb. 8, 1973, Part 1249: Reports of Motor Carriers, §1249.3 Motor carrier holding companies, revised to read as set forth, effective on date of order.

Section 220. (b) [§*320(b) U.S.C.*] Period covered by report; time of filing; oath.—Said annual reports shall contain all the required information either (1) for the period of twelve months ending on the thirty-first day of December in each year, unless the Commission shall specify a different date; or (2) for a thirteen-period accounting year ending at the close of one of the last seven days of each calendar year, if the person making the report keeps his books on the basis of such an accounting year, and elects to make such report on the basis of such accounting year, subject to such rules and regulations as the Commission may prescribe. Any annual report shall be made out under oath and filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the commission. Such periodical or special reports as may be required by the Commission under subsection (a) hereof shall also be under oath,. whenever the Commission so requires. (Sept. 18, 1940, c. 722, §24, 54 Stat. 927; July 7, 1972, Public Law 92-338, 86 Stat. 423.) (See vol. 11, p. 9572.)

Historical note, vol. 21, p. 17658.

Section 220. (c) [*§320(c) U.S.C.*] Depreciation charges.—[Unchanged. See vol. 11, p. 9572.]

Notes of Decisions

Volume 15—p. 12251; Volume 19—p. 15910.

Section 220. (d) [§*320(d) U.S.C.*] Accounts, records, etc., form; period of preservation; access to by commission or agents.—[Unchanged. See vol. 11, p. 9573, vol. 15, p. 12251.]

Notes of Decisions

Volume 11—p. 9574; Volume 13—p. 11118; Volume 17—p. 13627; Volume 19—p. 15911; Volume 21—p. 17659.

1. Constitutionality.—[Vols. 11, 19, 21].—. It is well established that a person making an equipment inspection should not be in any material way connected with, or owe allegiance to, the owner of the equipment. In this regard, Administrative Ruling No.

106 (Jan. 22, 1958, Question 16), states that "the person making the inspection must make it as a representative of the carrier under whose rights the transportation will be performed, and the carrier may not employ as its representative a person who has an adverse interest, such as the driver or an employee of the owner." See also 74 MCC 167 (173), and 77 MCC 501 (508).—Diamond Transp. System, Ext.—Wis. and Okla. Origin, 117 M.C.C. 706 (712).

Regulations of the Commission

34 FR 1441, Jan. 30, 1969, Part 1206: Common and Contract Motor Carriers of Passengers, paragraph (a) of Instruction 2—1 Classifications of carriers, amended, effective Jan. 1, 1969.

34 FR 1442, Jan. 30 1969, Part 1240: Classes of Carriers, §1240.4 Classification of motor carriers of passengers, amended, effective Jan. 1, 1969.

34 FR 3568, Feb. 27, 1969: Record Retention Guide, XXIV Interstate Commerce Commission [Revised] 1.9 Motor Carriers and brokers, 49, CFR Part 1226.

35 FR 3620, Feb. 21, 1970: Record Retention Guide, XXIV Interstate Commerce Commission; 1.9 Motor carriers and brokers, 49 CFR Part 1226.

36 FR 3772, Feb. 26, 1971: Record Retention Guide, XXIV Interstate Commerce Commission; 1.9 Motor carriers and brokers, 49 CFR Part 1226.

37 FR 4671, March 3, 1972: Record Retention Guide, XXX Interstate Commerce Commission; 1.9 Motor carriers and brokers, 49 CFR Part 1226.

37 FR 20695, Oct. 3, 1972, Part 1207: Class I and Class II Common and Contract Motor Carriers of Property, accounting regulations, insofar as they apply to the investment tax credit, amended to bring them into compliance with the Revenue Act of 1971 (Pub. Law 92-178), effective on publication in the Federal Register.

37 FR 25845, Dec. 5, 1972, Part 1206: Common and Contract Motor Carriers of Passengers, Uniform System of Accounts, miscellaneous amendments of accounting regulations, effective Jan. 1, 1973.

37 FR 25919, Dec. 6, 1972, Part 1206—Common and Contract Motor Carriers of Passengers; and Part 1207—Class I and Class II Common and Contract Motor Carriers of Property, accounting regulations. Order of Sept. 12, 1972 (37 FR 20695) amending regulations to comply with Revenue Act of 1971, corrected, effective on date of order.

38 FR 1870, Jan. 18, 1973: Record Retention Guide, XXX Interstate Commerce Commission; 1.9 Motor carriers and brokers, 49 CFR Part 1226.

38 FR 3602, Feb. 8, 1973, Part 1206: Common and Contract Motor Carriers of Passengers, Uniform system of accounts instruction "2-3 Accounting period" revised to provide for a thirteen-period accounting year.

38 FR 3602, Feb. 8, 1973, Part 1207: Class I and Class II Common and Contract Motor Carriers of Property, Uniform system of accounts instruction " 3 Accounting period" is revised to provide for a thirteen-period accounting year.

38 FR 3602, Feb. 8, 1973, Part 1240: Classes of Carriers, §1240.4 Classification of motor carriers of passengers, paragraph (b) revoked, paragraphs (c) and (d) redesignated as (b) and (c), and redesignated paragraph (b) revised to read as set forth; and §1240.5 Classification of motor carriers of property is amended by revising paragraph (b) to read as set forth.

38 FR 12335, May 11, 1973, Part 1207: Class I and Class II Common and Contract Motor Carriers of Property, Uniform System of Accounts, accounting regulations revised to read as set forth, effective Jan. 1, 1974.

39 FR 5766, Feb. 15, 1974, Parts 1240 & 1249: Classes of Carriers; and Reports of Motor Carriers. Revisions of Parts 1240 & 1249 of 49 CFR, as regards Quarterly Financial Reports of Motor Carriers of Property.

39 FR 7301, Feb. 26, 1974, Part 1207: Class I and Class II Common and Contract Carriers of Property. Publication of the new Uniform System of Accounts for Motor Carriers of Property, effective Jan. 1, 1974.

39 FR 11424, Mar. 28, 1974, Part 1207: Uniform System of Accounts for Class I and Class II Common and Contract Motor Carriers of Property, Amendment of 49 CFR 1207, Instruction 2, Records of operating revenues and expenses, effective upon date of service.

Section 220. (e), (f) [§*320(e),(f) U.S.C.*]—Report of accident as evidence in damage suit.—[Unchanged. See vol. 15, p. 12252; vol. 11, p. 9575.]

5. In general.—Section 220(f) proscribing admission in evidence of any accident report, made by a motor carrier pursuant to any Commission requirement, in a suit for damages growing out of any matter mentioned therein does not extend the limited privilege against disclosure only to the carrier filing the report; such privilege may be invoked by others. Moreover, without evidence of Congressional intent to the contrary, §220(f) can only be read as a flat prohibition against the use of accident reports to the Commission, or any part of them, as evidence in a suit for damages growing out of

matter contained in such reports. Therefore, motor carrier employer's accident report to the Commission containing deceased truck driver's statement as to loading procedure followed, which was inconsistent with his testimony in later deposition, was inadmissible in wrongful death action by decedent's administratrix against automobile manufacturer, alleging negligence in manufacture of truck which, while decedent was loading it, rolled forward and pinned him against the automobile carrier on which it was being loaded. Remanded for new trial.—Blankenship v. General Motors Corp., 428 F. 2d 1006 (1009).

Section 221. [§*321(a) U.S.C.*] Orders, notices and service of process.—(a) Persons upon whom notice or orders served; manner and time of service.—[Unchanged. See vol. 10, p. 8241, vol. 11, p. 9475, vol. 15, p. 12252.]

Historical notes, vol. 12, p. 10473, vol. 14, note to § 16(5), p. 11533.

Notes of Decisions

Volume 10—p. 8241; Volume 17—p. 13628; Volume 19—p. 15912.

Section 221. (b) [§*321 (b) U.S.C.*] Effective date and duration of orders of Commission.—[Unchanged. See vol. 10, p. 8242, vol. 11, 9575.]

Amendment, see footnote, vol. 11, p. 9575.

Historical Note

Since §221(b) appeared to preclude the Commission from making its final order in Ex Parte MC-43 (Sub-No. 2) effective in fewer than thirty days, and in order to alleviate a serious and pressing transportation problem by requiring carriers to reimburse their owner-operators for all increases in the price of fuel over the base period May 15, 1973, P.L. 93-249 (88 Stat. 11) was approved Feb. 8, 1974, directing the Commission to issue a final order in the Ex Parte MC-43 (Sub-No. 2) as soon as possible, to become effective not later than Feb. 15, 1974.

Notes of Decision

Volume 11—p. 9575; Volume 16—p. 12920; Volume 17—p. 13628; Volume 19—p. 15912.

Section 221. (c) [§*321(c) U.S.C.*[Designation of agent for service of process.—[Unchanged. See vol. 17, p. 13628.]

Notes of Decisions

Volume 11—p. 9576; Volume 12—p. 10474; Volume 13—p. 11119; Volume 14—p. 11642; Volume 15—p. 12253; Volume 17—p. 13629; Volume 19—p. 15913.

Regulations of the Commission

33 FR 18626, Dec. 17, 1968, Part 1044: Designation of Process Agents by Motor Carriers and Brokers, §1044.1 Applicability, revised, effective upon publication in the Federal Register.

Section 221. (d) [§ *321(d) U.S.C.*] "Motor carriers" as including brokers.—[Unchanged. See vol. 10, p. 8242.]

Section 222. [§ *322(a) U.S.C.*] Unlawful operation—(a) Violation of chapter or rules or orders; penalty when none otherwise provided.—[Unchanged. See vol. 10, p. 8243, vol. 18, p. 14647.]

Historical Note

Historical notes, see vol. 11, p. 9577, vol. 12, p. 10474, vol. 13, p. 11119, vol. 14, p. 11643, See Historical Note to Safety Appliance Acts, 45 USC §6, infra.

Notes of Decisions

Volume 10—p. 8243; Volume 11—p. 9577; Volume 12—p. 10474; Volume 17—p 13629; Volume 18—p. 14648; Volume 19—p. 15914; Volume 21—p. 17662.

15. Violation of Act, orders or regulations.—[Vol. 21].—Reading §222(a) in conjunction with §223, a violation of §223 constitutes a crime whenever an offender willfully and knowingly does what that statute forbids. Section 222 applies equally to the entire spectrum of the Motor Carrier Act, not only is the penal section for purposes of criminal prosecution, but it also provides for civil action for fines, and sets the amounts; therefore, the willful and knowing extension of credit, in violation of §223 and rules and regulations promulgated thereunder, charged in each count of the information constitutes a crime within ambit of §222(a), and the indictment under attack includes the requisites necessary to criminal prosecution. Defendant's motion to dismiss the information, on ground that it failed to state sufficient facts to constitute an offence, denied.—United States v. Infinger Transportation Co., 316 F. Supp. 124 (127-9).

Section 222. (b) [§ *322(b) U.S.C.*] Jurisdiction of district courts to restrain violations and enforce orders.—[Unchanged. See vol. 21, p. 17665.]

Notes of Decisions

Volume 10—p. 8244; Volume 11—p. 9577; Volume 12—p. 10475; Volume 13—p. 11119; Volume 14—p. 11643; Volume 15—p. 12254; Volume 16—p. 12921; Volume 17—p. 13629; Volume 18—p. 14648; Volume 19—p. 15915; Volume 21—p. 17666.

2. Construction and interpretation.—[Vols. 19, 21].—Legislative history of 1965 amendment of §222(b) shows that its purpose was to permit any injured person to apply to the federal courts for enforcement of §§203(c), 206, 209 or 211; and §222(b)(2) is designed to afford injured parties a measure of self-protection against openly and obviously unlawful operations. Prior to the amendment, only the Commission could obtain an enforcement order from the courts; thus, by its passage, Congress obviously desired to expedite such remedy where "clear and patent" violations were shown. Not only is a remedy provided, the words "clear and patent" are used therein to indicate jurisdiction separate and apart from the Commission's primary jurisdiction. In order to regain primary jurisdiction and prevent the use of §222(b)(2) to harass legitimately operating carriers, the Commission may take jurisdiction of the matter under §222(b)(3) and stay further court action. District court had jurisdiction to entertain, and issue injunction in, appellee's private suit for enforcement and did not invade Commission jurisdiction when, though the Commission intervened therein, it did not seek a stay under §222(b)(3).—Baggett Transp. Co. v. Hughes Transp., Inc., 393 F. 2d 710 (714-6)*.

Private suits are authorized by §222(b)(2), but only in certain circumstances, i.e., by any person injured as a result of carrier operations in clear and patent violation of certain sections of the Act, or any rule, regulation, requirement, or order thereunder. However, motor carrier safety regulations are provided for and issued under §204, and that section is not designated in the statute as one whose violation may premise a private suit. Accordingly, appellant's suit (which did not allege violation of any particular safety regulation or claim any personal injury) to enjoin motor carrier from operating equipment allegedly in defective condition was not authorized by §222(b)(2); and, since jurisdiction is lacking under §222(b), district court decision, denying the request for injunction, is affirmed.—Hamper v. Transcon Lines, Corp., 425 F. 2d 1178 (1179).

When the Commission notified the court in which munitions carriers filed a §222(b)(2) "self-help" suit (to enjoin heavy hauler from carrying explosives) that it would consider the matter of scope of the heavy hauler's authority, thus requiring stay of the court suit, the issue thus raised was "referred" to the Commission for initial decision and order deciding it was one "arising from such referrals," within the exclusive jurisdiction and venue statutes. Notice and stay method embodied in §222(b)(3) is effectually the same as procedure for referring issues to the Commission prior to its enactment; only difference is procedural—rather than an issue being referred on the court's initiative, the Commission on its own initiative can take primary jurisdiction. Nothing peculiar to §222(b) "self-help" suits is persuasive that 28 USC §1336(b) and §1398(b), as amended, should not apply; motives that prompted 1964 amendments have no relation to procedural nicety of whether court or agency takes the initiative in having the Commission first resolve an issue; thus, those statutes apply insofar as instant action seeks to set aside Commission order on an issue raised in carriers' "self-help" suit in another district court.—Leonard Bros. Trucking Co. v. United States, 301 F. Supp. 893 (894, 897-8)*.

District court has jurisdiction to grant relief sought in munitions carriers' §222(b)(2) "self-help" action to enjoin defendant heavy-hauler from transporting palletized shipments of 500- and 750-pound bombs, and other ammunitions weighing less than 150 pounds per item, when verified complaint charged a clear and patent violation of the act or lawful rules and regulations issued thereunder; the Commission's *Dillner* decision, 79 MCC 335, clearly established that a heavy-hauler could not successfully base its right to transport on the size and weight of commodities in palletized form unless the inherent nature of the items required palletization; and, as early as the preliminary injunction hearing, supporting evidence disclosed a clear and patent violation in the defendant's hauling of palletized boxed shells, and other ammunition which was comparatively light in weight and none of which required palletization.—Tri-State Motor Transit Co. v. International Transport, Inc., 343 F. Supp. 588 (592-3).

And referral to the Commission of question as to whether defendant held authority to haul described bombs, and withholding decision on that issue pending the commission's ruling on it, did not deprive the court of jurisdiction to decide the clear and patent question as to those items. As stated in 301 F. Supp. 893, court jurisdiction is only postponed, not ousted, by the doctrine of primary jurisdiction; and while referrals under 28 USC §1336(b) are encouraged as part of the overall statutory scheme of regulation, the Commission is looked to for primary regulation of motor carriers. Under §222(b)(2), all that is required is that—at time of the decision—evidence before the district court support, and the court find, the statutorily required clear and patent violation charged in the complaint. Viewed in light of the three-judge decision in 337 F. Supp. 985, sustaining the Commission's ruling on referred question, evidence before the court fully supports its finding that defendant's hauling of the 500- and 750-pound bombs was and is clearly and patently outside the scope of its heavy-hauler authority and in violation of §§203(c) and 206 of the Act.—Id., pp. 594-5.

Also, as allowance of attorneys' fees is within the court's discretion under §222(b)(2), plaintiffs are allowed counsel fees in amount shown to be reasonable, if only services in the "self-help" case are considered, plus the amount shown for out-of-pocket necessary expenses. Plaintiffs also request attorneys' fees for legal services in connection with the case after referral to the Commission, and/or while it was before the Commission, but no authority is submitted to support that part of the request. Had Congress intended counsel fees to be paid on referred issues, it would have specifically provided such authority by statute; therefore, in the absence of any statutory provision for such fees, the court declines to award any attorneys' fees for work performed while the case was before the Commission.—Id., p. 599; Tri-State Motor Transit Co. v. Leonard Bros. Trucking Co., 347 F. Supp. 872 (875-6, 878-9); Tri-State Motor Transit Co. v. C & H Transp. Co., 347 F. Supp. 879 (882-3, 885-6); Tri-State Motor Transit Co. v. H. J. Jeffries Truck Lines, Inc., 347 F. Supp. 864 (867-9, 870-1).

Violations of the orders prescribed herein as to filing of reports and vehicle identification by private motor carriers of explosives and dangerous articles shall be prosecuted and penalized only under Interstate Commerce Act. Commission holds that penalties should be at least equalized between private and regulated carriers and as Transportation of Explosives Act is inapplicable to regulated carriers, prosecution of private carriers under such act would be unequal treatment.—Transportation of Explosives—Private Motor Carriers, 329 I.C.C. 411 (413)*.

10. Indictment and information in general.—[Vols. 10-16, 21].—Information charging that defendant motor carrier extended credit to shipper for payment of freight charges knowing that such charges would not be paid within the required period, and that in fact the charges were not paid within the time required, is sufficient to support a criminal prosecution; such a violation of §223 and the rules promulgated thereunder constitutes a crime within the ambit of §222(a). Thus, even though §222(a) requires proof of both knowledge and willfulness, and §223 is a statute of the malum prohibitum class, the indictment under attack correctly includes the requisites necessary to a criminal prosecution. Therefore, since the information will support a criminal prosecution, defendant's motion to dismiss it for failure to state sufficient facts to constitute an offense is denied.—United States v. Infinger Transportation Co., 316 F. Supp. 124 (127-9).

11. Interstate operation without certificate or permit.—[Vols. 10-19, 21].—On appeal from district court's grant of injunction sought by the Commission, activities of defendant cooperative's transportation division, i.e., extensive for-hire transportation of general commodities for nonmembers throughout the United States, violated the Motor Carrier Act when the Commission had issued no authority for such transportation and, contrary to defendant's contention, questioned activities are not within the agricultural cooperative association exemption in §203(b5). Transportation activities in issue are not incidental to the milk and dairy business operated by the cooperative in a relatively small area in Kansas and Missouri; and they are not shown to be necessary to effective performance of primary objective of a cooperative association, as defined in the Agricultural Marketing Act, when the only claim of necessity is that profitable interstate truck operations are needed to sustain money-losing primary activity of the cooperative. Lower court's decision, affirmed.—I.C.C. v. Milk Producers Marketing Co., 405 F. 2d 639 (641-2)*.

On appeal from district court judgments in two separate cases, activities of defendant cooperative association, i.e., for-hire transportation of government freight and Class A and B explosives on government bills of lading in interstate commerce, violated the Motor Carrier Act when such transportation had not been authorized by the Commission and, contrary to defendant's contention, the questioned activities are not within agricultural cooperative association exemption of §203(b5). Transportation activities in issue are not within the cooperative's primary activity, as set out in the Agricultural Marketing Act; and, although economically advantageous to its transportation business, they are not shown to be necessary to effective performance of its primary activity. Therefore, since the acts complained of were a clear and patent violation of the Act, the district court had jurisdiction of actions seeking to enjoin defendant and two of its employees from continuing the questioned activities and its judgments and findings are affirmed.—Munitions Carriers Conference, Inc. v. American Farm Lines, 415 F. 2d 747 (749-50)*.

In suit to enjoin defendant association from engaging in for-hire motor carrier operations, without appropriate authority, defendant cannot claim benefits of the §203(b5) "agricultural cooperative exemption" when the evidence shows that it is not a bona fide agricultural cooperative association as defined in the Agricultural Marketing Act. Record shows that the association was not substantially controlled by its members and, as advisory jury found, it has performed transportation for nonmembers that was not necessary and incidental to that performed for nonmembers and it consistently hauled nonmember tonnage in excess of 15 percent of its total interstate tonnage; such activities constitute a clear and patent violation of the Act and (contrary to jury's findings) common carrier plaintiffs have been injured thereby. Therefore, as a matter of law, association's transportation of nonexempt commodities for members, nonmembers, of the Government, for compensation, without authority from the Commission, violates §§203(c), 206(a), and 209(a); defendant association and its general manager are permanently enjoined from conducting such unauthorized motor carrier activities.—I.C.C. v. Southwest Marketing Association, 315 F. Supp. 805 (813-4).

So long as defendant agricultural cooperative holds no interstate motor carrier authority and performs interstate transportation for compensation, such transportation must be performed pursuant to the §203(b5) exemption. Therefore, cooperative's for-hire transportation of non-exempt products and commodities (including that performed for the government) beyond the scope of the §203(b5) exemption is unlawful and subject to permanent injunction and restraint until such time as appropriate authority therefor is obtained.—I.C.C. v. Big Sky Farmers & Ranch. Mkg. Coop. of Montana, 321 F. Supp. 79 (80, 82-3)*.

By agreement of the parties in proceedings to enjoin trucking company from interstate transportation of considered products without appropriate authority, and all the factual issues having been resolved by written stipulation, the question for the court's determination is whether lactose and Culturemate (produced from milk) are exempt agricultural commodities, within §203(b6), that may be transported by defendant company even though it does not hold interstate authority. Applying standards set forth in 351 US 49, to resolve the challenged exemption, therefore, the court concludes that lactose retains its substantial identity as milk sugar, notwithstanding the processing changes, and is an exempt commodity. However, since Culturemate has lost its original characteristics and has been manufactured into a different article with its own distinctive name, character and use, that commodity is a new, manufactured product which is not within the §203(b6) exemption. Order accordingly.—I.C.C. v. Schaetzel, 339 F. Supp. 1345 (1346-7).

In action to enjoin defendant carriers from conducting further line haul motor operations between nonairfield points in and around Benton Harbor and Kalamazoo, Mich., and O'Hare Field and Midway Airport at Chicago, Ill., comprised of local pickups in Michigan by carrier holding authority only between Benton Harbor and Kalamazoo airports, on one hand, and the named Chicago airports, such operations of defendants are line-haul interstate motor carriage which require authorization. Since specific authority to operate between named airports does not imply authority to serve any nonairfield points within "commercial zones" of cities where those airports are located, and since Michigan origin points are well outside "terminal areas" of the Chicago airports, challenged operations are not within either the commercial zone, or the incidential-to-air, exemption provisions of the Act.—I.C.C. v. Howard, 342 F. Supp. 1112 (1114-5).

All in all, defendants have the right, without authority, to collect goods in and around the Michigan airports and to deliver them to those airports, respectively, for subsequent air shipment and, in addition, the general-commodity authority granted by the Commission allows them to transport goods from those airports to O'Hare and Midway airports at Chicago. But transportation from nonairfield points in Michigan to any interstate destination is not authorized and such motor carrier operations must be authorized to be lawful. Accordingly, defendants are ordered to cease and desist from all interstate motor carriage, except that authorized between the named airports, unless and until appropriate authority therefor is obtained from the Commission.—Id., p. 1116.

14. Operation beyond scope of authority granted.—[Vols. 15-19, 21].—See Tri-State Motor Transit Co. v. International Transport, Inc., n. 2, above; and Interstate Commerce Comm. v. Howard, at n. 11 above.

25. Injunction.—[Vols. 10-12, 15-19, 21].—See also Hamper v. Transcon Lines Corp., n. 2, above.

Since a petition for temporary injunction is addressed to discretion of the trial court, the reviewing court will consider merits of the case only to extent necessary to determine whether lower court properly exercised its discretion. Under 1965 amendment of 222(b), which provided for private enforcement actions to afford injured parties some protection against openly and obviously unlawful carrier operations, Missouri district court had jurisdiction of appellee's action to enjoin appellant's operations in excess of its authority (though a Commission cease-and-desist order against appellant was then under review in an Alabama court); and issuance of considered preliminary injuction was not an abuse of judicial discretion when the trial court found that appellant's operations clearly exceeded its authority and that continuance of such operations while review of the Commission order was pending would deprive appellee of substantial revenue.—Baggett Transp. Co. v. Hughes Transp., Inc., 393 F. 2d 710 (713-5)*.

Appellee will lose considerable revenue if the preliminary injunction is dissolved and the Commission's order eventually upheld but, under current laws, it could not recover damages from appellant. As amended, §222(b) provides a remedy for parties injured by patently illegal operations and, also, jurisdiction (separate and apart from that of the Commission) for private enforcement actions to secure prompt and effective protection against such injury. Though, as appellant argues, historically a preliminary injunction could be used only to preserve the status quo, in the present circumstances a preliminary injunction was available to appellee. It is significant that the status quo changed was appellant's operations which the trial court found to be in clear violation of its authority; also, the change in status quo thus enjoined those illegal operations and that is the purpose of §222(b)(2). Moreover, applying the language used in 347 US 514 (antitrust case), private-injunction suits to restrain violations of the Act and public actions to prevent violations were designed to be cumulative, not mutually exclusive. Decision of the lower court is affirmed. Id., pp. 715-8.

In action to show cause why agricultural marketing cooperative and its officers should not be held in contempt of order permanently enjoining them from interstate for-hire transportation of nonmembers' freight when (1) proceeding to pickup and transport shipments for members and (2) returning from delivery of member shipments, except when necessary to prevent an incidental empty-vehicle movement, record clearly shows that defendants' hauling of all Government and nonmember traffic eastbound from the west coast and, also, described "long layover" operations and "sandwich" moves are not necessary to prevent such empty-vehicle movements. Nature of the operations and fact that the bulk of their revenue comes from Government traffic show that defendants engage in general trucking for the Government beyond the §203(b5) exemptions; therefore, defendants are in contemptuous violation of the injunction. And since plaintiff carriers, or some of them, would have obtained the traffic and revenues therefrom had not defendants done so, plaintiffs are entitled to damages in amount of net revenues diverted from them by defendants' wrongful and contemptuous acts.—Munitions Carriers Conference, Inc. v. American Farm Lines, 303 F. Supp. 1078 (1079-80, 1084-6)*.

Agricultural cooperative's interstate for-hire transportation of non-exempt products and commodities beyond scope of the

§203(b5) exemption, as applied to defendants, is unlawful and in violation of the Act; thus, plaintiff is entitled to permanent injunction restraining the cooperative, its officers, agents, directors, and members participating with it from engaging in such transportation until appropriate authority therefor is obtained. Also, while the cooperative has applied for authority, such permanent injunction will not be stayed pending Commission action on the application; final Commission determination will take many months, perhaps years, and it would be against the public interest to allow defendants to continue an operation found to be illegal for any such period of time. However, the cooperative should have a reasonably short time in which to change its method of operation so as to lessen economic impact on it of the permanent injunction; defendants granted a 2-month temporary stay of enforcement.—I.C.C. v. Big Sky Farmers & Ranch. Mkg. Coop. of Montana, 321 F. Supp. 79 (83-4)*.

In munitions carriers' §222(b) (2) "self-help" suit to enjoin heavy hauler from clear and patent unlawful transportation of palletized bombs and ammunition for cannon, decision as to whether an injunction should be issued rests to large extent in the court's sound discretion, and requires careful consideration of all salient facts and applicable principles of equity. While defendant ceased hauling the bombs when it became unprofitable, such economic reasons for cessation provide no assurance that future illegal hauling will not occur; also, cessation of violation, whether before or after initiation of the suit, does not bar issuance of an injunction, nor render the case moot. The court may act on the evidence before it when it decides the merits of the case; there is a reasonable likelihood that the illegal hauling may start again any time the economic benefits appeal to defendant as favorable; and practicalities of the situation are such that plaintiffs cannot be protected from future illegal hauling of the bombs absent a court order enjoining such transportation.—Tri-State Motor Transit Co. v. Internaitonal Transport, Inc., 343 F Supp. 588 (597-8).

Nor does cessation of the unlawful carriage of palletized shells and cannon ammunition, whether before or after initiation of the suit, bar issuance of a permanent injunction. While defendant professes its good faith belief that it was authorized to transport those class A and B explosives, and states that it no longer hauls them, record is convincing that an injunction is necessary to assure against future illegal hauling of such articles. Furthermore, where evidence demonstrates all the equitable consideration, including irreparable injury and no adequate remedy at law, the injunction should issue. Therefore, defendant heavy hauler is enjoined from transporting 500- and 750-pound bombs whether palletized or unpalletized, and cannon or other ammunition which individually or boxed weighs 150 pounds or less, until appropriate interstate authority therefor is obtained.—Id., pp. 598-9; TriState Motor Transit Co. v. H.J. Jeffries Truck Lines, Inc., 347 F. Supp. 864 (869-71); Tri-State Motor Transit Co. v. Leonard Bros. Trucking Co., 347 F. Supp. 872 (877-9); Tri-State Motor Transit Co. v. C & H Transp. Co., 347 F. Supp. 879 (885-6).

30. Evidence.—[Vols. 11-14, 17-19, 21].—See United States v. Webb, case, §222(c), n. 5.

35. Jury trial.—[Vol. 15].—In action to enjoin alleged agricultural cooperative association from unauthorized for-hire motor carrier operations (tried before a one-judge court and an advisory jury) the function of an advisory jury is to advise the trial court but the jury's verdict has no binding effect upon the court. If the court does not accept the jury's advice, it may proceed to make its own independent findings of fact and conclusions of law, and its rejection of the advisory verdict is not subject to appellate review; the review on appeal is from the trial court's judgment as though no jury had been present. Responsibility for the lower court's decision is upon the trial judge; therefore, disagreeing with the advisory jury's findings, the court reached its own findings and conclusions in the case after considering the pleadings, evidence, stipulations, counsel's arguments and briefs, and the advisory jury's verdict. Judgment for plaintiffs.—I.C.C. v. Southwest Marketing Association, 315 F. Supp. 805 (807, 813-4).

Section 222. (c) [§*322(c) U.S.C.*] Participation in unjust discrimination; evasion of regulations; penalty.—[Unchanged. See vol. 10, p. 8247, vol. 18, p. 14651.]

Notes of Decisions

Volume 10—p. 8247; Volume 11—p. 9581; Volume 13—p. 11121; Volume 14—p. 11644; Volume 15—p. 12256; Volume 17—p. 13631; Volume 19—p. 15919; Volume 21—p. 17671.

5. Defeating or evading regulation.—[Vols. 15, 19, 21].—Statements made by appellant carrier in first interview at his office with Commission investigator, documents and records (required to be kept by Commission regulations) which he voluntarily released to the investigator at that time and, also, the written statement signed by carrier during second interview in his office, were admissible in prosecution of carrier (under 18 USC §2) for aiding and abetting another trucker to engage in for-hire interstate hauling in violation of §203(c). Prosecution for statutory violation would be a misdemeanor and, though carrier was not warned of his constitutional rights to counsel and to remain silent, investigator did warn him that he did not have to sign the written statement; at time of first interview, no criminal action was contemplated, and carrier was never in custody. While appellant claims that failure to advise him fully of his constitutional rights renders all documents and statements gathered in the investigation inadmissible under doctrine of the *Miranda* case, 384 U.S 436, the mandate of that decision is not so broad as to include the non-custodial interrogation which was not actually or potentially coercive or intimidating.—United States v. Webb, 398 F. 2d 553 (555-7).

Furthermore, evidence of record clearly showed that leasing arrangement between defendant regulated carrier and uncertified trucker was a mere subterfuge whereby defendant illegally engaged in interstate hauling; and, since expectation of payment is sufficient to constitute "for hire" within the statute, it was unnecessary to prove that defendant, allegedly leasing trucks owned by uncertified trucker, had paid latter carrier for any hauls. Evidence sustained defendant's conviction for aiding and abetting another trucker to engage in unauthorized for-hire interstate hauling.—Id., pp. 557-8.

In prosecution of carrier for knowingly and willfully using false freight bills to evade or defeat Commission regulation in violation of §222(c), and charging individual defendant as an aider and abettor under 18 USC §2, the Government is not required to show common law prerequisites of a criminal fraud action, such as a specific intent to deceive or some scheme of "subterfuge". As a *malum prohibitum* offense, proof is required to show that defendants used false documents knowingly and willfully to evade or defeat Commission regulation; proof of specific intent to defraud the Commission is not a prerequisite to a finding of guilt. Evidence shows that, in performing unauthorized interstate service, defendant carrier used false freight bills (indicating intrastate service) to evade or defeat regulation, and that individual defendant aided and abetted the carrier, in violation of the Act; and neither defendants' failure to try to conceal carrier services being performed nor cooperation with Commission investigator raised a reasonable doubt as to guilt. Judgment upon a finding of guilty as charged, entered.—United States v. Indiana Trucking, Inc., 300 F. Supp. 765 (767, 768-70).

10. Prohibited devices.—[Vols. 15, 17].—Continued use by petitioner of "Good Housekeeping Consumer's Guaranty" in its advertising will not subject petitioner to penalties imposed by §222(c) because Commission had no jurisdiction to regulate advertising of regulated carrier.—Wheaton Van Lines—Petition for Declaratory Order, 339 I.C.C. 1(7).

Section 222. (d), (e) [§*322(d), (e) U.S.C.*]—[Unchanged. See vol. 11, p. 9582; vol. 10, p. 8248.]

Notes of Decisions

§222(e): Volume 10—p. 8248; Volume 17—p. 13632; Volume 21—p. 17673.

§222(e). 3. Disclosure of information without shipper's consent.—[Vols. 17, 21].—Additional information herein required to be filed in annual reports of class I and class II motor common carriers of property does not violate §222(e) as the proposed revisions provide the carriers with alternatives to such requirements by the filing of a proforma balance sheet and income statement or by application for special relief.—Annual Reports of Motor Carriers of Property, 335 I.C.C. 707 (713).

One supporting shipper, a data processing concern, is unwilling to tender traffic to protestant (who is commonly controlled through management with one of its competitors) for fear that information concerning the identity and location of its customers would be used to its disadvantage; and, as protestant is the only motor carrier offering the type of service proposed, shipper's alternatives are private carriage or less desirable transportation modes. Therefore, the Commission's policy against common control of a shipper and carrier is applicable, and outweighs those considerations which favor protection of a protestant's monopoly position; the public interest would best be served by a grant of authority to a carrier not encumbered with a conflict of interest.—American Courier Corp., Extension, 103 M.C.C. 298 (303-4)*.

Section 222. (f), (g), [§*322(f), (g), U.S.C.*]—[Unchanged. See vol. 10, p. 8249, vol. 11, p. 9583; vol. 15, p. 12256.]

Notes of Decisions

§222(g): Volume 16—p. 12924; Volume 18—p. 14651; Volume 21—p. 17674.

Section 222. (h) [§*322(h) U.S.C.*]—Civil action for fines; amount; service of process; payment of costs and expenses.—[Unchanged. See Vol. 21, p. 17675.]

Historical Note

See Vol. 21, p. 17675.

5. Failure or refusal to comply with Act.—Defendant bus line is subject to civil forfeiture provisions of §222(h) for failing and refusing to comply with §203(c) when, without having been issued required certificate or permit, it had transported college students through several states. While defendant contends all of that transportation was exempt under §203(b1), and research reveals no prior statutory construction of the term "school children" therein, the Commission interprets that term as not including, and not intended by Congress to include, students attending a college or university. Contemporaneous construction of provisions of the Act by the Commission is entitled to great weight and respect and should not be overturned by the courts unless it is arbitrary or plainly erroneous; therefore, since the Commission's construction of the §203(b1) as not including transportation of college students is not arbitrary or clearly erroneous, the bus company is subject to civil forfeiture proceeding. Commission motion for summary judgment, granted.—United States v. Chartered Bus Service, Inc., 329 F. Supp. 1073 (1076-7).

Section 223 [§*323 U.S.C.*] Collection of rates and charges; extension of credit; liability of agent of beneficial owner.—[Unchanged. See Vol. 10, p. 8250.]

Historical Note

By provision of §108 of the Truth in Lending Act, Public Law 90-321, 82 Stat. 146, responsibility for administrative enforcement of that act is assigned to the Commission with respect to any common carrier which it regulates and, for the purpose of enforcing compliance therewith, the Commission may exercise any other authority conferred on it by law. Also, while the Board of Governors of the Federal Reserve System is directed to prescribe regulations to carry out purposes of the Truth in Lending Act (12 CFR Part 226, 34 FR 2002, Feb. 11, 1969), the statute specifically provides that such Board authority does not impair the authority of any other agency responsible for administrative enforcement to make rules respecting its own enforcement and compliance procedures.

Notes of Decisions

Volume 10—p. 8251; Volume 11—p. 9584; Volume 12—p. 10476; Volume 14—p. 11645; Volume 15—p. 12257; Volume 16—p. 12924; Volume 17—p. 13632; Volume 21—p. 17675.

1 Construction and interpretation.—[Vols. 10, 17, 21].—See also United States v. Infinger Transportation Co., §222(a), n. 15.

Nothing in the language or policies of §223 suggests that Congress intended to impose absolute liability on a consignee for freight charges; nor does the court hold that the application of equitable estoppel against plaintiff's claim, in motor carrier's suit against consignee of the goods for unpaid freight charges, would circumvent policies of the section. When the statute was enacted, Congress was concerned with eliminating rate and credit discrimination in the collection of the lawful charges from the party liable, regardless of whether that person is consignor, consignee, or another shipper with a beneficial interest in the goods shipped. Moreover, the statute is not primarily directed to establishing or locating liability for payment of freight charges; nor does it attempt to specify from whom payment should be collected under ordinary circumstances.—Consolidated Freightways Corp. of Del. v. Admiral Corp., 442 F. 2d 56 (61-2).

Permitting the use of credit cards by shippers of household goods will in no way "liberalize" codified credit requirements [49 CFR 1056.8(b) and 1322 (1) (b)], for the carriers, following delivery, merely forward imprinted documents to the bank which credits the carrier's account immediately for the full amount of the tariff charges (less a $10 credit investigation fee). The shipper has from 30 to 50 days to pay the bank without additional charges and may extend its payments under the standard installment loan agreement. This credit relationship is between the bank and the shipper. The carrier, having been paid in full (less an amount directly attributable to the cost of a credit investigation), is not a part of this relationship and has not extended any credit in violation of the Commission's regulations.—Practices of Motor Common Carriers of Household Goods, 118 M.C.C. 97 (105).

The Commission will continue to require carriers to submit any proposed credit payment plan for review. The Commission will then be in a position to determine whether the plan complies with credit regulations and adequately protects the shipping public. A motor carrier submitting such a plan will avoid the possibility of entering into an unlawful contract as well as remedial action by the Commission. Such plans generally will be approved informally by letter from the Commission. Plans will be disapproved if (1) found not to be in compliance with credit regulations, or (2) found not to be in the best interest of the shipping public, the motor carrier, or the industry as a whole.—Id. (106).

2. Unfair practice; discrimination effected by extension of credit.—[Vols. 10, 11, 21].—In motor carrier's suit to recover unpaid freight charges from consignee of goods transported under shipping documents indicating that the charges were prepaid, evidence shows that carrier's transactions with consignor of the shipments often involved extension of credit well beyond the 7-day limit prescribed in the Commission's credit regulations; and that, through its unlawful and lax credit practices, plaintiff contributed substantially to its ultimate inability to recover payment of the charges from consignor and, also, to increase in the amount of loss which resulted from consignor's financial failure. As plaintiff thus created the risk of loss, and increased gravity thereof, by its credit transactions with consignor, it is estopped from recovering the unpaid freight charges. Permitting recovery in instant case would only serve to reward the carrier for its unlawful and inequitable conduct; lower court's judgment for defendant consignee affirmed.—Consolidated Freightways Corp. of Del. v. Admiral Corp., 442 F. 2d 56 (58-60, 63).

Proposed extension of the time (from 7 days to 15 days) in which oilfield carriers may extend credit to shippers to permit the latter to audit bills was found to be unjustified, since such an extension would entail unjust discrimination against other classes of shippers, and time to audit is a privilege rather than a right.—Payment of Rates and Charges of Motor Carriers, 118 M.C.C. 379 (387-389).

3. Prescription of regulations by Commission.—[Vols. 10, 14].—In view of evidence of such factors as (1) delay in the mail, (2) backlog in billing shippers caused by extreme seasonal fluctuations, and (3) impracticality of preparing the shipping papers in advance, because of the necessity of obtaining and incorporating in the customer's bill third party accessorial charges, record clearly shows that forces beyond household goods carriers control make it impossible for them to comply with the present credit regulations. Therefore, an extension from present 7-day period to a period of 15-days for presentation of freight bills is warranted. Regulations governing extension of credit by motor carriers of household goods modified accordingly.—Payment of Rates and Charges of Motor Carriers, 105 M.C.C. 460 (465-6).

Proposal to extend period of time during which motor carrier of household goods may extend credit not shown to be justified as these carriers were recently granted (in 105 MCC 460) an extension of the time period within which they must present their bill to shippers thus extending credit period in fact and any further extension of this specialized traffic would create too great a disadvantage over other carriers. Shippers have no right to such extension so as to expedite their auditing purposes when it would be detrimental to carriers' financial situation.—Payments of Rates and Charges of Motor Carriers, 110 M.C.C. 79 (88-9).

Commission herein reopened the proceeding in Ex Parte No. MC-1 (Sub-No.1) in order to amend 49 CFR §1322.1 thereby allowing common carriers of household goods to relinquish possession of such traffic in advance of payment of tariff charges thereon and to extend credit in the amount of such charges to those who undertake to pay them.—Practices of Motor Common Carriers of Household Goods, 111 M.C.C. 427 (552-3)*.

Commission herein adopted a regulation (49 CFR 1056.21) permitting and encouraging motor common carriers of household goods to use credit card systems inasmuch as the credit card has become an American economic institution and the use of credit cards in such transportation will benefit the American public. To facilitate the use of such systems, the Commission did not prescribe cumbersome filing requirements but will publish its approval or disapproval in the Federal Register and will require a quarterly report by carriers using such systems.—Practices of Motor Common Carriers of Household Goods, 118 M.C.C. 746 (751-54).

Since numerous shippers had not paid their freight bills within the current 7 day free period, the Commission modified the regulations (49 CFR 1322.1) to require household goods carriers to publish tariff provisions extending credit beyond the 7 days free credit period to 30 calendar days subject to the assessment of a 1 percent service charge, minimum $10, for the additional period of credit.—Payment of Rates and Charges of Motor Carriers, 118 M.C.C. 778 (798-800).

5. Practices, in general.—[Vols. 11, 12, 21].—Respondents' weekly rates on gasoline and fuel oils moving in one vehicle from one shipper over a 7-day period do not violate the Commission's regulations limiting extension of credit to shippers to a period of 7 days. Provision of the pertinent tariff item that freight charges must be prepaid in effect requires consignor to pay the charges within the period authorized by the credit regulations. Moreover, as the type of shipment contemplated covers all individual movements comprising the weekly aggregate tender, delivery of entire shipment would not be concluded until transportation of the last lot of the bulk tender is complete. Seven days is a reasonable period for respondents to aggregate and transport a bulk shipment within purview of the credit regulations, and they can comply therewith by billing within 7 days after delivery of the last lot in the bulk shipment and collecting the freight charges within 7 days thereafter.—Weekly Rates on Petroleum Products—from Sparks, Nev., 322 I.C.C. 541 (550).

Defendant's practice of denying credit to a complainant who refuses to pay the applicable charges within the 7-day period prescribed by Commission's credit regulation, 49 CFR 1322.1 is found to be just, reasonable, and otherwise lawful.—Glama Dress Co. v. Mid-South Transport, 335 I.C.C. 586 (596-7).

It was found that the complexities involved in the carriage of oilfield equipment justified an extension of the period carriers had to present their freight bills from 7 days to 15 days, excluding Saturdays, Sundays, and holidays, from the first 12 o'clock midnight following the delivery of freight. Regulation (49 CFR 1322.3) was amended to conform to this finding.—Payment of Rates and Charges of Motor Carriers, 118 M.C.C. 379 (386).

25. Third person's liability.—[Vol. 15].—Motor carrier is estopped from collecting upaid freight charges from consignee of the goods where the delivery receipts showed that customs-broker consignor was party to be billed, shipping documents indicated that charges were prepaid, and consignee took delivery of the shipments on those representations and promptly paid consignor's invoices for the charges. Principles of equity apply, also, since carrier's unlawful and lax credit extension practices contributed materially to its inability to recover payment from consignor, increased amount of the loss resulting from latter's financial failure, and effectively prevented consignee's protecting itself from consignor's conversion. Nothing in §223 suggests that Congress intended to impose absolute liability on a consignee for freight charges; and in instant case, no conflict is discerned between the application of equitable principles to bar carrier's recovery and the statute forbidding discriminatory treatment of shippers, since requiring double payment of freight charges by consignee would not further statutory policy of preventing unjust discrimination or undue prejudice. Judgment for defendant affirmed.—Consolidated Freightways Corp. of Del. v. Admiral Corp., 442 F. 2d 56 (59-61, 63).

Statute relating to collection of rates and charges and liability of agent of beneficial owner speaks only to "nonliability" in certain narrow situation of warehousemen and others similarly situated, who appear as consignees on a bill of lading, and does not impose liability on an agent not a party to the contract. To make shippers and others liable to carrier in connection with transportation of goods requires a stronger direct contractual base between the parties than maritime contracts, and land carriers in the United States must rely upon liabilities created according to common law principles.—Middle Atlantic Conference v. United States, 353 F. Supp. 1109 (1115, 1120)*.

Commission concluded that the tariff provisions here in question, which require that detention charges be paid by the party causing the delay, are unlawful as the Commission had found previously in 318 ICC 593, that agents and other persons, not parties to the transportation contract, cannot be subjected to liability for payment of detention charges resulting from delay in performance of loading or unloading freight. However, assessment of detention charges

against consignor in case of loading and against consignee in case of unloading is not improper and is consistent with the rationale of 318 ICC 593. By duly notifying the delivering carrier, the consignee-agent would not be liable for any charges.—Payment of Detention Charges, Eastern Central States, 332 ICC 585 (587-8).

A person, not a party to a contract for transportation, is not liable for charges resulting from detention of motor common carrier equipment. Established principles of law hold that a person acting as an agent and known as such assumes no personal liability for the debts of his principal.—Payment for Detention Charges, Eastern Central States, 335 I.C.C. 537 (543)*.

Regulations of the Commission

35 FR 4758, Mar. 19, 1970, Part 1322: Extension of Credit to Shippers by Motor Carriers, §1322.1 Carrier may extend credit to shipper, revised, effective May 1, 1970.

37 FR 5304, March 14, 1972, Part 1325: Extension of Credit to Candidates for Federal Office or Their Representatives, in implementation of the Federal Election Campaign Act of 1971 (Public Law 92-225), new Part 1325, as set forth, added effective May 5, 1972 unless modified or amended by further order of the Commission.

37 FR 10446, May 23, 1972, Part 1325: Extension of Credit to Candidates for Federal Office or Their Representatives. Credit regulations set forth in notice of proposed rule making and order (37 FR 5304) prescribed to become effective May 5, 1972.

38 FR 18253, July 9, 1973, Part 1322: Extension of Credit to Shippers by Motor Carriers, revises and modifies §1322.3 ordering all freight bills to be presented within 7 calendar days of delivery, except for oilfield equipment (15 days), effective Aug. 15, 1973.

38 FR 26726, Sept. 25, 1973, Part 1322: Extension of Credit to Shippers by Motor Carriers, amending §1322.1 by promulgating rules for common carriers of household goods, effective Nov. 5, 1973.

39 FR 29188, Aug 14, 1974, Part 1322: Extension of Credit to Shippers by Motor Carriers. §1322.1 is amended by adding paragraph (c) prescribing an exception governing extension of credit to shippers by household goods carriers, effective on date of service.

Section 224. [§*324 U.S.C.*] Identification plates for interstate motor carriers.—[Unchanged. See vol. 10, p. 8253.]

Amendments, see footnotes, vol. 10, p. 8253; historical notes, vol. 10, p. 8253, vol. 11, p. 9584, vol. 12, p. 10477, vol. 13, p. 11122, vol. 14, p. 11645.

Notes of Decisions

Volume 16—p. 12925.

Section 225. [§*324a U.S.C.*] Allowances to shippers for transportation services.—[Unchanged. See vol. 11, p. 9585.]

Amendments, see footnotes, vol 411, p. 9585.

Notes of Decisions

Volume 15—p. 12257; Volume 16—p. 12925; Volume 17—p. 13633; Volume 18—p. 14652; Volume 19—p. 15920; Volume 21—p. 17677.

Section 226. [§*325 U.S.C.*] Investigation of motor vehicle sizes and weights and qualifications and hours of service of employees.—[Unchanged. See vol. 11, p. 9585.]

Amendment, see footnote, p. 9585; historical notes, p. 9586, vol. 12, p. 10477; vol. 21, p. 17678.

Notes of Decisions

Volume 10—p. 8254; Volume 11—p. 9586; Volume 14—p. 11646; Volume 17—p. 13633; Volume 18—p. 14653.

25. Weight of vehicles.—[Vols. 10, 11, 14, 17, 18].—The only evidence of violations pertaining to safety relates to size and weight limitations; however, there was no evidence of accidents. The complaint did not allege reckless operation on Wisconsin highways and the weight violations were not so gross as to cause an accident, nor is there sufficient evidence to establish that the violations were willful. Out of 30 weight violations during 1961-1962, only 8 were not correctible at the scale house, and there were no weight violations in 1963 that could not be corrected by reloading. The record, therefore, does not show that defendant's violations were of sufficient gravity and extensiveness to warrant the revocation or suspension of its interstate authority.—Wisconsin Public Service Comm. v. Ace Doran, 96 M.C.C. 347 (355).

Section 226A. [§*325a U.S.C.*] State or subdivision income tax withholding on compensation paid to interstate motor carrier employees.—(a) No part of the compensation paid by any motor carrier subject to the provisions of this part, or by any private carrier of property by motor vehicle, to any employee who performs his regularly assigned duties as such an employee on a motor vehicle in more than one State, shall be withheld for income tax purposes pursuant to the laws of any State or subdivision thereof other than the State or subdivision wherein more than 50 per centum of the compensation paid by the carrier to such employee is earned: *Provided, however,* That if the empolyee did not earn more than 50 per centum of his compensation from said carrier in any one State or any subdivision thereof during the preceding calendar year, then withholding shall be required only for the State or subdivision of the employee's residence, as shown on the employment records of any such carrier; nor shall such carrier file any information return or other report for income tax purposes with respect to such compensation with any State or subdivision thereof other than such State or subdivision of residence, and the State or subdivision for which the withholding of such tax has been required under this subsection.

(b) For the purposes of subsection (a), an employee shall be deemed to have earned more than 50 per centum of his compensation in any State or subdivision in which the mileage traveled by him in such State or subdivision is more than 50 per centum of the total mileage traveled by him in the calendar year while so employed.

(c) For the purpose of this section the term 'State' also means any possession of the United States or the Commonwealth of Puerto Rico; and the term 'compensation' shall mean all moneys received for services rendered by an employee, as defined in subsection (a) in the performance of his duties and shall include wages and salary. (Act of Dec. 23, 1970, Public Law 91-569, §2, 84 Stat. 1500, 1501.)

Sections 227, 228. [§*326, 327 U.S.C.*]—[Unchanged. See vol. 11, p. 9586.]

PART III

INTERSTATE COMMERCE ACT; WATER CARRIERS

Chapter 12, Title 49, U.S. Code

Section 301. [§*901 U.S.C.*] **Short title.**—[Unchanged. See vol. 11, p. 9587.]

Section 302. (a), (b), (c), (d) [§*902 U.S.C.*] **Definitions; "water carrier," "common carrier by water."**—[Unchanged. See vol. 11, p. 9588.]

Notes of Decisions

§302(c): Volume 12—p. 10478; Volume 14—p. 11646; Volume 15—p. 12259; Volume 16—p. 12926; Volume 18—p. 14654.

§302(d): Volume 11—p. 9588; Volume 12—p. 10479; Volume 13—p. 11123; Volume 14—p. 11646; Volume 15—p. 12259; Volume 16—p. 12926; Volume 17—p. 13633; Volume 18—p. 14654; Volume 21—p. 17679.

5. Charter or special operations.—[Vols. 12, 19].—A "charter party" is a contract of affreightment whereby the owner of a ship lets the whole, or part of the ship, to a shipper for conveyance of goods in consideration for payment of freight.—Middle Atlantic Conference v. United States, 353 F. Supp. 1109 (1113)*.

Section 302 (e) [§*902(e) U.S.C.*] **"Contract carrier by water."**—[Unchanged. See vol. 11, p. 9589.]

Notes of Decisions

Volume 11—p. 9590; Volume 12—p. 10482; Volume 13—p. 11124; Volume 14—p. 11647; Volume 15—p. 12259; Volume 16—p. 12926; Volume 17—p. 13634; Volume 19—p. 15921; Volume 21—p. 17679.

Regulations of the Commission

38 FR 3389, Feb. 6, 1973, Part 1003: List of Forms, §1002.2 Water Carrier Application Forms; Form BWC 4 is vacated and set aside, to be superseded by Form OP-WC-10. 49 CFR §1003.2 is amended by adding thereto the heading OP-WC-10, effective Feb. 12, 1973.

Section 302 (f), (g), (h) [§*902(f),(g),(h) U.S.C.*]—[Unchanged. See vol. 11, p. 9592.]

Notes of Decisions

302(g): Volume 13—p. 11125; §302(h): Volume 11—p. 9592; Volume 12—p. 10483; Volume 15—p. 12261; Volume 18—p. 14655.

Section 302. (i) [§*902(i) U.S.C.*] "Interstate or foreign transportation"—[Unchanged. See vol. 11, p. 9592.]

Historical notes, see vol. 14, p. 11649.

Notes of Decisions

Volume 11—p. 9593; Volume 12—p. 10484; Volume 13—p. 11126; Volume 14—p. 11649; Volume 15—p. 12261; Volume 16—p. 12927; Volume 17—p. 13635; Volume 18—p. 14655; Volume 19—p. 15922; Volume 21—p. 17681.

5. Interstate transportation.—[Vols. 11-17].—Petitioner's water carrier operations between Port of Sacramento, Calif., and ports in San Francisco Bay area found to be in interstate or foreign commerce. Petitioner acts as a substitute for and in lieu of direct call at Sacramento by ocean common carriers and this Commission has consistently held that service substituted for common carriage is itself common carriage and requires the appropriate authority.—Sacramento—Yolo Port District, Petition, 341 I.C.C. 105 (112-13).

10 Transportation to or from a foreign country.—[Vols. 12, 14, 15, 17-19, 21].—The Commission has jurisdiction over tariffs of joint rates and through movements established by carriers subject to this section and vessels engaged in foreign commerce.—International Joint Rates and Through Routes, 337 I.C.C. 625 (631-32).

Commission has jurisdiction to the extent that there is a movement between two points in the United States and a "transshipment" of lading among vessels generally is sufficient to bring inland water movements within our jurisdiction except that transfer between commonly owned vessels and LASH (lighter-aboard-ship) movements do not constitute a transshipment.—Sacramento—Yolo Port District, Petition, 341 I.C.C. 105 (110-12).

Applicant subject to regulation as contract motor carrier for shipper (unregulated water carrier) engaged in foreign commerce, regardless of limited scope of proposed transportation service.—Service Transfer, Inc., Contract Carrier Application, 115 M.C.C. 29 (32-33).

Section 302 (j)—(m) [§*902 U.S.C.*] Definitions.—[Unchanged. See vol. 11, p. 9593, 9594.]

Section 303. (a) [§*903(a) U.S.C.*] Application of provisions; exemptions.—[Unchanged. See vol. 11, p. 9594.]

Section 303. (b) [§*903(b) U.S.C.*] Bulk cargo carriers; commodities.—Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended. (Sept. 18, 1940, c. 722, 54 Stat. 931; December 27, 1973, Public Law 93-201, 87 Stat. 838. See vol. 11, p. 9594).

Historical notes, vol. 14, p. 11649; vol. 19, p. 15923; vol. 21, p. 17681.

Notes of Decisions

Volume 11—p. 9594; Volume 12—p. 10486; Volume 13—p. 11127; Volume 14—p. 11650; Volume 15—p. 12262; Volume 16—p. 12928; Volume 17—p. 13635; Volume 18—p. 14656; Volume 19—p. 15923; Volume 21—p. 17681.

1. In general.—[Vols. 11-19, 21].—See Behnken Truck Service, Inc., Ext.—Ex-barge Traffic, at §203(a)(10), n. 5, and Bulk Food Carriers, Inc.—Exemption Application, at §303(e)(2), n. 10.

Section 303. (c) [§*903(c) U.S.C.*]—[Unchanged. See vol. 11, p. 9595.]

Section 303. (d) [§*903(d) U.S.C.*] Liquid cargoes in bulk in tank vessels, exempt.—[Unchanged. See vol. 11, p. 9595.]

Notes of Decisions

Volume 11—p. 9596; Volume 12—p. 10487; Volume 13—p. 11127; Volume 14—p. 11650; Volume 19—p. 15924.

Section 303. (e) [§*903(e) U.S.C.*] Passenger transportation via foreign ports; Noncompetitive contract carriers.—[Unchanged. See vol. 19, p. 15924.]

See vol. 19, p. 15924.]

Notes of Decisions

Volume 11—p. 9597; Volume 12—p. 10488; Volume 13—p. 11128; Volume 14—p. 11651; Volume 15—p. 12262; Volume 17—p. 13637; Volume 18—p. 14656; Volume 19—p. 15925.

10. Noncompetitive contract carrier operation.—[Vols. 11-15, 17, 18].—Proposed transportation by applicant as a contract carrier by water, of phosphate rock, in bulk, from ports on the west coast of Florida to ports in California by way of the Panama Canal is not actually and substantially competitive with common carriers by rail, motor, or water, and an exemption therefor should be granted. Application for permit consequently denied. Legislative history shows that the absolute exemptions in subsection 303(b), from which phosphate rock was excluded because intercoastal transportation was subject to the provisions of the Intercoastal Shipping Act of 1933 at the time part III of the Interstate Commerce Act was enacted, were given on the premise that the transportation by water carriers of bulk commodities under certain conditions can be performed at such low cost as not to be competitive with transportation by other water carriers or land carriers.—Bulk Food Carriers, Inc.—Exemption Application, 326 I.C.C. 106 (107, 109-10, 112).

Where, as here, no realistic rail rate on the same or a similar movement exists from and to the same points, the conclusion is warranted that at least the bulk nature of this commodity, and the volume of the commodity which must move at one time, coupled with other transportation characteristics has made rail movements impractical or unattractive.—Id., p. 112.

There is little support for the alternative claim of the railroads that by virtue of the fact that they now participate in the movement of substantially the same commodity from points in Wyoming to the same destinations as are here concerned they are in actual competition for the traffic. If market competition were to be the determinative consideration there would be few or no situations wherein an absence of such competition could be found. Moreover, proceedings of a similar nature in the past have given no consideration to market competition. There is nothing in the plain wording of §303 or the legislative history thereof to demonstrate that the requested exemption should be denied in order to enable or help a land carrier which serves markets other than those from which water transportation is available to negate the advantages of low-cost water transportation.—Id., p. 111.

Section 303. (f) [§*903(f) U.S.C.*] Incidental water transportation, terminal services, subject to Part I or Part II, exempt.—[Unchanged. See vol. 11, p. 9599.]

Amendments, see footnotes, p. 9599.

Notes of Decisions

Volume 11—p. 9600; Volume 12—p. 10489; Volume 13—p. 11128; Volume 14—p. 11651; Volume 17—p. 13637;Volume 18—p. 14657; Volume 21—p. 17682.

Section 303. (g) [§*903(g) U.S.C.*] Intraharbor, contiguous harbors; small craft.—[Unchanged. See vol. 11, p. 9600.]

Notes of Decisions

Volume 11—p. 9601; Volume 12—p. 10491; Volume 13—p. 11129; Volume 14—p. 11651; Volume 15—p. 12263; olume 16—p. 12928; Volume 17—p. 13637; Volume 18—p. 14657.

Section 303. (h) [§*903(h) U.S.C.*] Property transported that of the carrier; certificate of exemption; revocation. [Unchanged. See vol. 11, p. 9602.]

Notes of Decisions

Volume 11—p. 9602; Volume 12—p. 10493; Volume 13—p. 11130; Volume 17—p. 13638; Volume 19—p. 15925.

Regulations of the Commission

38 FR 3389, Feb. 6, 1973, Part 1003: List of Forms, §1003.2 Water Carrier Application Forms; Form BWC 4 is vacated and set aside, to be superceded by Form OP-WC-10. 49 CFR §1003.2 amended by adding thereto the heading OP-WC-10, effective Feb. 12, 1973.

Section 303. (i), (j), (k), (l) [§*903(i)—(l) U.S.C.*]—[Unchanged. See vol. 11, p. 9603.]

Notes of Decisions

§303(j): Volume 12—p. 10493; Volume 14—p. 11652.

Section 304. (a)—(d) [§*904(a)—(d) U.S.C.*]—[Unchanged. See vol. 11, p. 9604.]

Historical Note

On August 9, 1973, the Commission recommended to Congress legislation to amend §§12(1), 204(a)(6), 304(a), and 403(a) of the Interstate Commerce Act to enable the Commission to exempt certain transportation from regulation upon a finding that the regulation is not necessary in order to effectuate the National Transportation Policy and that regulation would serve no public purpose. (S. 2458). Annual Report, 1974, p. 84.

See also vol. 21, p. 17683.

Notes of Decisions

§304(c): Volume 11—p. 9604; Volume 12—p. 10493; Volume 13—p. 11130, Volume 14—p. 11652; Volume 15—p. 12264; Volume 16—p. 12928; Volume 21—p. 17683.

Section 304. (e) [§*904(e) U.S.C.*] Investigation of complaints; orders.—[Unchanged. See vol. 11, p. 9605.]

Notes of Decisions

Volume 16—p. 12929; Volume 17—p. 13638; Volume 21—p. 17684.

Section 305. (a) [§*905(a) U.S.C.*] Reasonable rates, fares, charges; classifications, regulations, practices.—[Unchanged. See vol. 11, p. 9605.]

Notes of Decisions

Volume 11—p. 9606; Volume 12—p. 10494; Volume 13—p. 11131; Volume 14—p. 11653; Volume 15—p. 12264; Volume 16—p. 12929; Volume 17—p. 13639; Volume 18—p. 14658; Volume 19—p. 15926; Volume 21—p. 17685.

1. Charges required to be just and reasonable.—[Vols. 15, 19].—Respondent's reduced rate for deferred service found just and reasonable, as well as compensatory.—Safety Matches from Atlantic Ports to Pacific Ports, 325 I.C.C. 212 (219)*.

Rates, by Commodities

125. Commodities; characteristics; rates prescribed or approved.—[Vols. 11-19, 21].—Part I, §1(5), n. 350; Part II, §216(b), n. 125; Part IV, §404(a), n. 125.

Miscellaneous: [Vols. 11, 21].—Proposed rates for deferred service, whereby shippers request transportation when the carrier would have otherwise unutilized capacity available, approved at $36.80 per ton for safety matches, and $28.00 per ton for piling casings.—Safety Matches from Atlantic Ports to Pacific Ports, 325 I.C.C. 212 (219)*.

Rules, Regulations, Practices

550. Duty to provide transportation.—See also John J. Mulqueen Revocation of Certificate, at §312a, notes 27 and 30.

Under "deferred service", whereby shippers request transportation when the carrier would have otherwise unutilized capacity, and under which they would pay a special rate, the carrier nonetheless has an obligation which cannot be avoided and does not have the option to refuse to accept merchandise. Deferred service therefore is not in violation of §305(a).—Safety Matches from Atlantic Ports to Pacific Ports, 325 I.C.C. 212 (215)*.

Section 305. (b) [§*905(b) U.S.C.*] Duty to establish through routes, joint rates; divisions.—[Unchanged. See vol. 11, p. 9612; vol. 21, p. 17689.]

Notes of Decisions

Volume 11—p. 9612; Volume 12—p. 10495; Volume 13—p. 11131; Volume 15—p. 12267; Volume 16—p. 12931; Volume 21—p. 17690.

Section 305. (c) [§*905(c) U.S.C.*] Undue preferences or prejudices prohibited.—[Unchanged. See vol. 11, p. 9612.]

Notes of Decisions

Volume 12—p. 10495; Volume 14—p. 11655; Volume 15—p. 12267; Volume 16—p. 12932; Volume 18—p. 14660; Volume 19—p. 15928; Volume 21—p. 17690.

15. Differences in and comparisons of rates.—[Vols. 15, 18].—Respondent's proposal to offer a special rate for "deferred service", whereby shippers request transportation when the carrier would have otherwise unutilized capacity available, is not unjustly discriminatory, since all shippers alike could avail themselves of the proposed rate. Approved.—Safety Matches from Atlantic Ports to Pacific Ports, 325 I.C.C. 212 (215, 218)*.

Proposed rates for deferred service were not predicated on the "added-traffic" theory, which assumes that equipment would move empty or partially empty and that the running costs should be omitted except for the minor incremental costs incurred over and above that of running loaded rather than empty. The full amount of vessel steaming costs, based on an average cost per weight-ton, was used by respondent in computing the costs of moving the traffic on its deferred service basis.—Id., p. 218.

Section 305. (d) [§*905(d) U.S.C.*] Interchange of traffic.—[Unchanged. See vol. 11, p. 9613.]

Notes of Decisions

Volume 13—p. 11132; Volume 14—p. 11656; Volume 15—p. 12268; Volume 17—p. 13640.

Section 306. (a) [§*906(a) U.S.C.*] Schedule of rates, fares, and charges; filing and posting; content.—[Unchanged. See vol. 11, p. 9613.]

Notes of Decisions

Volume 11—p. 9614; Volume 12—p. 10496; Volume 14—p. 11656; Volume 15—p. 12268; Volume 16—p. 12932; Volume 18—p. 14661; Volume 19—p. 15929; Volume 21—p. 17691.

Regulations of the Commission

36 FR 16228, Aug. 20, 1971: Special Permission No. 72-810, Fares, Charges, Etc.; Postponement of Effectiveness of Increases, Reestablishment of Lower Rates. Effective Aug. 16, 1971, rules of various Commission tariff circulars are waived to extent necessary to permit carriers to publish and file tariff supplements mandated by the Executive Order of Aug. 15, 1971 entitled Providing for Stabilization of Prices, Rents, Wages, and Salaries.

36 FR 16228, Aug. 20, 1971: Suspension Docket No. 8664, Stabilization of Rates and Charges, August 1971. Operation of schedules of new increased rates, fares and charges, etc., filed to become effective Aug. 17, 1971, and later, which would be in violation of the Executive Order of Aug. 15, 1971 entitled Providing for Stabilization of Prices, Rents, Wages, and Salaries, is suspended, effective Aug. 16, 1971.

36 FR 16975, Aug. 26, 1971: Suspension Docket No. 8664, Sub. No. 1, Stabilization of Rates and Charges, August 1971. Operation of schedules of new increased rates, fares and charges, etc., filed to become effective Aug. 24, 1971, and later, is suspended, effective Aug. 23, 1971.

36 FR 21857, Nov. 16, 1971: Suspension Docket No. 8688, Stabilization of Rates and Charges. Operation of schedules publishing new increased rates, fares and charges, etc., which, if permitted to become effective, would result in rates and charges that would violate Executive Order No. 11627, dated Oct. 15, 1971 (except those currently under suspension and investigation), ordered suspended, and use thereof deferred, for indefinite period pending further Commission order.

36 FR 22300, Nov. 24, 1971, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program, §1311.0 - §1311.5, new Part 1311 added, effective day after publication in Federal Register.

36 FR 22341, Nov. 24, 1971: Suspension Docket No. 8688, Sub-No. 2, vacates indefinite suspension of operation of certain schedules, subject to conditions set forth, effective on date of order.

36 FR 23108, Dec. 3, 1971: Suspension Doc. No. 8688 (Sub No. 1) Stabilization of Rates and Charges, certain schedules of increased rates suspended by order of Nov. 19, 1971.

36 FR 23108, Dec. 3, 1971: Suspension Doc. No. 8688 (Sub No. 3) Stabilization of Rates and Charges, certain schedules of increased rates suspended by order of Nov. 24, 1971.

37 FR 1107, Jan 26, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program, special procedures prescribed by order of Nov. 19, 1971 (36 FR 22300) revised in order to conform to, and implement, §300.16 of the regulations of the Price Commission (37 FR 652), effective on date of order.

37 FR 3354, Feb. 15, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program; Price Commission having deferred until March 10, 1972 public utility rate increases proposed to become effective on or after Feb. 10, 1972, carriers are directed to defer indefinitely the effective dates of all increased rates, fares, charges, etc., proposed to become effective during the Price Commission deferral period, effective on date of order.

37 FR 6149, March 24, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program. Carriers authorized to cancel indefinite postponement of effective dates of proposed increased rates, fares, charges, etc., required by the order of Feb. 11, 1972, effective on date of order.

37 FR 9398, May 10, 1972, Part 1303: Passenger Service Schedules—Rail and Water Carriers, §1303.36 Transmission of publications to subscribers, added, effective June 21, 1972.

37 FR 9399, May 10, 1972, Part 1308: Freight Tariffs and Schedules of Water Carriers, §1308.12 Transmission of publications to subscribers, added, effective June 21, 1972.

37 FR 12239, June 21, 1972, Parts 1303 and 1308: Order of May 1, 1972 (37 FR 9398) requiring transmission of tariffs and schedules to subscribers and other interested parties, stayed pending disposition of timely filed petitions for reconsideration, effective on date of order.

37 FR 14308, July 19, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Stabilization Program, entire Part 1311 revised, effective on day following publication in the Federal Register.

37 FR 18550, Sept. 13, 1972, Part 1303: Passenger Service Schedules—Rail and Water Carriers, §1303.36 Transmission of publications to subscribers, amended, effective 60 days after publication in Federal Register.

37 FR 18553, Sept. 13, 1972, Part 1308: Freight Tariffs and Schedules of Water Carriers, §1308.12 Transmission of publications to subscribers, amended, effective 60 days after publication in Federal Register.

37 FR 25399, Nov. 30, 1972, Parts 1303 and 1308: Order of Aug. 28, 1972 establishing regulations for the transmission of tariff and schedule publications to subscribers and other interested parties, which had been stayed, made effective 30 days after publication of order in the Federal Register.

38 FR 2177, Jan. 22, 1973, Part 1311: Special Procedures for Tariff Filings under the Wage and Price Stabilization Program. Pursuant to end of Phase II and beginning of Phase III, mandatory application of regulations is suspended, effective Jan. 11, 1973, until further notice; but such regulations shall be construed as voluntary guidelines.

38 FR 3389, Feb. 6, 1973, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program, §1311.5 Standards applicable during Phase III of the wage and price stabilization program, adopted Jan. 30, 1973.

37 FR 4257, March 1, 1972, Part 1005: Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, new Part 1005, §§1005.1 - 1005.6, added to become effective April 20, 1972.

37 FR 9027, May 4, 1972, Part 1005: Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, effective date of prescribed regulations postponed until July 1, 1972, effective on date of order.

37 FR 20943, Oct. 5, 1972, Part 1005: Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, §§1005.3(b) and 1005.4(c) modified, effective Oct. 16, 1972.

37 FR 23908, Nov. 10, 1972, Part 1005: Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, second paragraph of §1005.3 and §1005.4(c) revised, effective Oct. 16, 1972.

38 FR 16231, June 21, 1973, Part 1300: Freight Tariffs, §1300.0(a) amended so as to more clearly indicate those carriers subject to regulations promulgated under Part 1300 of the CFR.

39 FR 30145, Aug. 21, 1975, Part 1308: Freight tariffs and schedules of water carriers. Rules promulgating general provisions; definitions, effective Sept. 30, 1974.

40 FR 6503, Feb. 12, 1975, Part 1308: Freight tariffs and schedules of water carriers. Miscellaneous amendments, effective 90 days from date of service.

40 FR 7653, Feb. 21, 1975, Part 1308: Freight tariffs and schedules of water carriers. Correction of 40 FR 6503.

40 FR 25677, June 18, 1975, Part 1308: Freight tariffs and schedules of water carriers. Miscellaneous amendments, effective 30 days from date of service.

Section 306. (b) [§*906(b) U.S.C.*] Form and manner of publishing, filing, posting schedules; unlawful use.—[Unchanged. See vol. 11, p. 9614.]

Section 306. (c) [§*906(c) U.S.C.*] Deviation from tariff rates forbidden.—[Unchanged. See vol. 11, p. 9615.]

Notes of Decisions

Volume 11—p. 9615; Volume 12—p. 10497; Volume 15—p. 12269; Volume 16—p. 12933; Volume 17—p. 13642; Volume 18—p. 14663; Volume 19—p. 15929.

Section 306. (d) [§*906(d) U.S.C.*] Transportation without published schedules forbidden; change in rates.—[Unchanged. See vol. 11, p. 9615.]

Notes of Decisions

Volume 12—p. 10498.

Section 306. (e) [§*906(e) U.S.C.*] Establishment, filing and publication of schedules and rules affecting rates; notice of changes; deviation from rates forbidden.—[Unchanged. See vol. 11, p. 9616.]

Notes of Decisions

Volume 16—p. 12934; Volume 17—p. 13641; Volume 21—p. 17691.

Section 307. (a)-(c) [§*907 U.S.C.*]—[Unchanged. See vol. 11, pp. 9617-8.]

Notes of Decisions

Volume 21—p. 17692.

Section 307. (d) [§*907(d) U.S.C.*] Establishment of through routes, joint classification, joint rates, fares, etc; differentials.—[Unchanged. See vol. 11, p. 9618.]

Notes of Decisions

Volume 12—p. 10498; Volume 14—p. 11657; Volume 15—p. 12269; Volume 16—p. 12934; Volume 17—p. 13642; Volume 19—p. 15930; Volume 21—p. 17692.

Section 307. (e) [§*907(e) U.S.C.*] Commission to establish just divisions of joint rates, fares, or charges; adjustments.—[Unchanged. See vol. 11, p. 9619.]

Notes of Decisions

Volume 12—p. 10499.

Section 307. (f) [§*907(f) U.S.C.*] Transportation needs and fair return considered in determining rates, etc.—[Unchanged. See vol. 11, p. 9620.]

Historical notes, see vol. 11, p. 9620, vol. 12, p. 10499.

Notes of Decisions

Volume 11—p. 9620; Volume 13—p. 11133; Volume 14—p. 11658; Volume 15—p. 12271; Volume 16—p. 12937; Volume 17—p. 13643.

10. Inherent advantages of water transportation.—[Vols. 14, 16].—Applicant's ability to provide direct deliveries to the jobsite and cost of the transportation are factors to be considered in determining the inherent advantages possessed by the several modes of transportation. See 355 US 83.—McAllister Bros., Inc., Ext.,—Steel, 332 I.C.C. 505 (510).

Section 307. (g) [§*907(g) U.S.C.*] New rates; determination of lawfulness by commission.—[Unchanged. See vol. 11, p. 9621.]

Notes of Decisions

Volume 11—p. 9622; Volume 12—p. 10499; Volume 16—p. 12937; Volume 19—p. 15932; Volume 21—p. 17693.

27. Particular issues; reasonableness.—[Vols. 16, 21].—Sea-Land's proposed reduced rate on canned goods of 78 cents, minimum 80,000 pounds, from Florida origins to New York City and New Jersey and New York points taking New York City rates, designed to maintain slight differential under reduced rail TOFC level, found to be no lower than necessary to enable it to participate in the traffic and to be just and reasonable. While proposed motor-water-motor rate is not shown to cover out-of-pocket costs, it will return more revenue than could be obtained under present rates and will enable water carrier to avoid further diversion of traffic to rail movement; moreover, shippers benefit from having available competing modes of service and, considering service advantages of rail movement, survival of Sea-Land's service requires a lower rate level than the railroads; approved.—Canned or Preserved Foodstuffs from Fla. to N.Y. & N.J., 326 I.C.C. 776 (782-4)*.

Section 307. (h), (i) [§*907(h),(i) U.S.C.*]—[Unchanged. See vol. 11, pp. 9622, 9623.]

Historical note, see vol. 21, p. 17694.

Notes of Decisions

§307(h): Volume 16—p. 12938, Volume 21—p. 17694; §307(i): Volume 11—p. 9624.

Section 308. (a) [§*908(a) U.S.C.*] Reparation awards; limitation of actions; "carrier".—[Unchanged. See vol. 15, p. 12272.]

Amendment, see footnote, vol. 15, p. 12272; historical notes, see vol. 14, p. 11568.

Notes of Decisions

Volume 13—p. 11133; Volume 14—p. 11658; Volume 15—p. 12272.

Section 308. (b)-(e) [§*908 U.S.C.*] Liability in damages; Remedies; election; Orders by Commission for payment; Courts to enforce orders; costs; attorney's fee.—[Unchanged. See vol. 11, pp. 9624-5.]

Notes of Decisions

§308(d); Volume 11—p. 9625; Volume 12—p. 10500.

Section 308. (f) [§*908(f) U.S.C.*] Limitation of actions.—[Unchanged. See vol. 18, p. 14664.]

Notes of Decisions

Volume 17—p. 13644.

Section 308. (g) [§*908(g) U.S.C.*] Joinder of parties; process; judgment.—[Unchanged. See vol. 11, p. 9626.]

Section 309. (a) [§*909(a) U.S.C.*] Certificates of public convenience and necessity; water carriers in bona fide operation on January 1, 1940.—[Unchanged. See vol. 11, p. 9627, vol. 19, p. 15933.]

Notes of Decisions

Volume 11—p. 9628; Volume 12—p. 10500; Volume 13—p. 11134; Volume 14—p. 11659; Volume 15—p. 12274; Volume 21—p. 17696.

Section 309. (b) [§*909(b) U.S.C.*] **Application for certificate; form and contents.**—[Unchanged. See vol. 11, p. 9631.]

Historical note, see vol. 21, p. 17697.

Notes of Decisions

Volume 11—p. 9631; Volume 12—p. 10505; Volume 13—p. 11137; Volume 14—p. 11660; Volume 15—p. 12274; Volume 16—p. 12938; Volume 17—p. 13645; Volume 18—p. 14666; Volume 19—p. 15934; Volume 21—p. 17698.

Section 309. (c) [§*909(c) U.S.C.*] **Issuance of certificate to qualified applicants.**—[Unchanged. See vol. 11, p. 9632.]

Historical note, see vol. 21, p. 17698.

Notes of Decisions

Volume 11—p. 9632; Volume 12—p. 10506; Volume 13—p. 11137; Volume 14—p. 11661; Volume 15—p. 12275; Volume 16—p. 12939; Volume 17—p. 13645; Volume 18—p. 14666; Volume 19—p. 15934; Volume 21—p. 17698.

5. Competition.—[Vols. 12-19, 21].—Although traffic now moving to or from points on waterways over which applicant seeks extension authority is handled chiefly by rail or motor carriers, and no shipper dissatisfaction with their services is shown, adequate rail and motor service, standing alone, does not warrant denial of authority for a water-carrier operation. The shipping public is entitled to benefit from advantages of water-carrier service, including low-cost transportation, even though rail and motor transportation is available. And though protestant water carrier holds authority over waterways involved, its service through interchange has proved unsatisfactory to public supporting extension application, especially through failure to provide suitable equipment and its disinterest in shippers' needs, as demonstrated by its failure to reply to inquiries concerning service and rates. Extension authority granted.—Coyle Lines, Inc., Extension, 323 I.C.C. 386 (392-3).

Commission did not consider competitive effect of granting of authority to additional applicants as no existing service is now available on the Waterway and a conclusion of destructive competition would be based on highly speculative inferences not supported by the record.—Igert Extension—Arkansas River, 332 I.C.C. 696 (703-704).

7. Restriction of operation.—[Vols. 13-15, 17-19].—Imposition of a tacking restriction on authority granted applicant Sioux City & New Orleans Barge Lines, Inc., is not warranted as protestant applicant Mississippi Valley Barge Line Co. has not shown that it will be adversely affected by the tacking of authorities which will permit another carrier to perform similar operations.—Igert Extension—Arkansas River, 332 I.C.C. 696 (707).

25. Necessity, demand for service, in general.—[Vols. 11-19, 21].—In action to suspend, annul, set aside and reverse decision and order of the Commission denying application of barge line (plaintiff) for extension of its common carrier authority, judicial review is limited to consideration of whether the order has a rational basis and is supported by substantial evidence. A reviewing court may not substitute its own judgment, with reference to competitive considerations or others, for that of the Commission upon matters committed to its determination, if the Commission's judgment has support in the record and the applicable law. The court cannot say that record fails to support the Commission's conclusion that, all circumstances considered, applicant had not sustained its burden of proof to show that public convenience and necessity require its proposed service, or that Commission order denying the application lacks a rational basis; complaint dismissed.—James Hughes, Inc. v. United States, 292 F. Supp. 372 (373)*.

In determining whether a proposed service is required by present or future public convenience and necessity, it is essential to consider service available from existing carriers. While most of traffic of supporting shippers to and from points in considered territory now moves by rail, a substantial portion thereof has characteristics inherently suited to low-cost water transportation. Supporting shippers seek low-cost transportation on a competitive basis, without interchange among carriers, as barge service available through interchange has proved generally unsatisfactory. While shippers and receivers of freight are not necessarily entitled to single-line barge service, they are entitled to adequate water service upon proof of need therefor. Extension authority granted.—Coyle Lines, Inc., Extension, 323 I.C.C. 386 (392-3).

Commission found that applicant's transportation of passengers is not interstate commerce, regardless of the passenger's intention to continue or complete an interstate journey, inasmuch as applicant has no joint fares with motor carriers, sells no through tickets, and operates within a single state. Similarly, the bulk of applicant's freight transportation within the State of Massachusetts cannot be considered interstate commerce in the absence of a showing of continuity of transportation from out of state origins, or where the original movement into the state was within vehicle of a private carrier. Shippers' support of applicant is inadequate to establish a need for the proposed service. Application denied.—Nantucket Exp. Lines, Inc., Common Carrier Application, 332 I.C.C. 80 (82-83).

The record is clear that supporting public requires low-cost transportation suitable for the considered traffic volume, and applicant has undertaken to supply the need therefor. No water carriers oppose the application. The shipping public is entitled to the inherent advantages of water as well as rail service where a need for water carrier service is shown. See 285 ICC 472. Application approved.—McAllister Bros., Inc., Ext.—Steel, 332 I.C.C. 505 (510).

Under part II of the Act, specific authority is not required for the return transportation of shipments rejected by consignee prior to delivery, see 74 MCC 659, and we see no reason why this policy may not be extended to this question under part III. However, applicant may not tow vessels containing "rejected" shipments accepted initially by consignee and subsequently rejected as no need for this service has been shown.—Id., pp. 510-511.

Commission has consistently held that public is entitled to certain inherent advantages in water transportation including advantage of low rates, if such be the case. Shipper desire for lower rates does not justify a grant of authority but is a factor to be considered. Cost data proving lower rate will result from applicant's service is desirable but not essential; its absence does not require denial of application. Similarly, availability of rail service does not preclude grant of authority. Application approved.—McAllister Brothers, Inc., Extension—Steel, 335 I.C.C. 52 (54-6)*.

Commission, following the principle of 83 MCC 123, held that return of empty shipper-owned or shipper-furnished vessels or barges used in connection with an authorized movement is merely incidental to that movement and is an integral part of the authorized movement, requiring no additional grant of authority. Essential element is that shipper have a preconceived plan whereby one portion of the total movement involves delivery or return of empty vessel.—Id., p. 56.

Multiple applications for certification to operate non-self-propelled vessels and separate towing vessels over indicated routes granted, with restrictions indicated herein, as great public expense has recently made the proposed routes navigable; substantial industrial development is anticipated; and numerous shippers and public officials support the applications.—Igert Extension—Arkansas River, 335 I.C.C. 225 (230-31)*.

26. Fitness; financial ability.—[Vols. 11-19, 21].—Commission found that applicant's failure to prove proposed extension of water carrier operations between indicated ports to be economically sound is not sufficient ground to deny such application. Management should have the prerogative of having the determinant role in this respect provided the other requirements of the act are met.—Sea-Land Service, Inc., Extension—Pacific Coastwise, 329 I.C.C. 447 (455)*.

A specific finding as to applicant's fitness is not required herein as application to operate as water common carrier between points in Massachusetts was denied for failure to establish that a need exists for such proposed service.—Nantucket Exp. Lines, Inc., Common Carrier Application, 332 I.C.C. 80 (84).

65. Extension of operations.—[Vols. 12-19].—Extension authority granted applicant for freighting and towage operations over Chattahoochee and Flint River tributaries of Appalachicola River, over which it already operates. A substantial portion of traffic now moving to and from points thereon, and of that which will be generated upon completion of plants now under construction in the area, particularly inbound raw materials and products of industries on Mississippi River and Gulf Intracoastal Waterway, over which applicant also operates, is inherently suited to low-cost water transportation; and though protestant can provide through water service by interchange with other carriers, most of supporting shippers' traffic now requires negotiation of interline arrangements for each movement, and service thus available has proved generally unsatisfactory. Applicant should be permitted to provide the single-line service for which shippers have expressed need.—Coyle Lines, Inc., Extension, 323 I.C.C. 386 (392-3).

Proposed extension of operations as water common carrier of general commodities between specified Pacific coast ports approved upon compliance with certain conditions and restrictions indicated herein. No water carrier containership service is now available for such movements and testimony by shipping public has shown a need exists therefor. Presence of adequate motor and rail services is no reason to deny shippers the inherent advantages of water transportation.—Sea-Land Service, Inc., Extension—Pacific Coastwise, 329 I.C.C. 447 (456)*.

Commission authorized 10 applicants to conduct towing and freighting operations along the recently opened Arkansas—Verdegris Waterway from Catoosa, Okla., to the Waterway's confluence with the Mississippi River in view of their extensive past operations on the Mississippi River, the anticipated traffic growth on the Waterway, and needs of shippers for carriers with nearby bases. However, 4 applicants were denied authority sought for failure to show any substantial past operations on the pertinent portion of the Mississippi River and the substantial distances between their bases of operations and the Waterway. Also, one applicant was denied authority for failure to show a public need for its service.—Igert Extension—Arkansas River, 332 I.C.C. 696 (704-05).

Section 309. (d) [§*909(d) U.S.C.*] Specifications of routes, ports; extension of routes; restriction on additions to equipment.—[Unchanged. See vol. 11, p. 9633.]

Notes of Decisions

Volume 12—p. 10510; Volume 13—p. 11139; Volume 14—p. 11663; Volume 15—p. 12276; Volume 16—p. 12942; Volume 17—p. 13650; Volume 18—p. 14670; Volume 19—p. 15937; Volume 21—p. 17699.

30. Ports, points, routes, waterways to be served.—[Vols. 14, 15, 19].—Defendant's authority to serve the port of Los Angeles Harbor includes service at port facilities of Long Beach, Calif., as well as those of Los Angeles, Calif., because related port and industrial development at Long Beach is within limits of terminal area of the port of LosiAngeles and because these ports are in fact one continuous and extensive harbor area, although governed by separate municipal organizations.—Atchison, T. & S. F. Ry. Co. v. Sea-Land Service, Inc., 103 M.C.C. 184 (191-92).

Section 309. (e) [§*909(e) U.S.C.*] Certificate not to confer proprietary or exclusive rights in waterways.—[Unchanged. See vol. 11, p. 9634.]

Section 309. (f) [§*909(f) U.S.C.*] Permit essential to operation; carriers in bonafide operation on January 1, 1940.—[Unchanged. See vol. 19, p. 15938.]

Notes of Decisions

Volume 11—p. 9635; Volume 12—p. 10511; Volume 13—p. 11140; Volume 14—p. 11664; Volume 15—p. 12277; Volume 21—p. 17699.

Section 309. (g) [§*909(g) U.S.C.*] Application for permit; form and contents; issuance of permit; terms and conditions.—[Unchanged. See vol. 11, p. 9636.]

Historical note, see vol. 21, p. 17700.

Notes of Decisions

Volume 11—p. 9636; Volume 12—p. 10512; Volume 13—p. 11141; Volume 14—p. 11666; Volume 15—p. 12278; Volume 16—p. 12942; Volume 17—p. 13651; Volume 18—p. 14670; Volume 19—p. 15939; Volume 21—p. 17700.

2. Construction and interpretation.—[Vols. 11, 15].—See also Bulk Food Carriers, Inc.—Exemption Application, at §303(e)(2), n. 10.

Application of §309(g) is not limited to carriers engaged in actual contract carriage, but also to the furnishing or chartering of vessels, since §302(e) specifies that chartering activities shall be considered engaging in transportation. However, the proviso of §309(g) forbidding any restriction on a contract carrier's right to add to its equipment and services within scope of its permit does not bar the imposition in a §5 proceeding of a restriction on the chartering rights transferred limiting vendee to the chartering of vessels owned by it; such a restriction is a part of the terms and conditions of approval of the transaction and is unlike one imposed on authority granted in a permit which will continue to be held by the carrier to which it was initially issued.—Ingram Corp.—Purchase—Barrett Line, Inc., 324 I.C.C. 263 (267,270).

25. Necessity, demand for service, in general.—[Vols. 11-19, 21].—Commission approved application as contract carrier of newsprint inasmuch as supporting shipper has shown a need for proposed service and protestant water carriers have not solicited this traffic and have not shown that their available joint-line service would be as economical as proposed operations. Protestant railroad also offers service but shippers are entitled to inherent advantages of water as well as rail service as was stated in 285 ICC 472. Criteria for approval of contract carrier applications by water carriers rest upon same statutory findings as those for motor carriers. However, the Congress spelled out certain criteria of public interest in its 1957 amendment of §209(b) but the provisions of this section have remained unchanged since 1940 and are stated in 285 ICC 107 and 311 ICC 609.—American Coastal Lines, Inc., Ext.—Houston, Tex., 337 I.C.C. 849 (855-56).

Regulations of the Commission

38 FR 26205, Part 1003: List of Forms. Setting forth Form OP—WC—20 to be used for applications for water carrier certificate or permit and revoking previous forms B.W.C. 3 and B.W.C. 7, effective Sept. 23, 1973.

Section 310. [§*910 U.S.C.*] Dual operations under certificates and permits.—[Unchanged. See vol. 11, p. 9638.]

Amendment, see footnote, vol. 11, p. 9638.

Notes of Decisions

Volume 11—p. 9638; Volume 12—p. 10512; Volume 13—p. 11142; Volume 14—p. 11666; Volume 18—p. 14671; Volume 21—p. 17701.

1. In general.—[Vols. 11-14, 18, 21].—Subject to cancellation of that part of vendor's permit authorizing towage operations duplicating common-carrier towage rights of one of vendee's subsidiaries, vendee's holding or control of operating rights both as a common and a contract carrier will be unobjectionable, since operations under the certificates and the permit will be conducted entirely separately.—Ingram Corp.—Purchase—Barrett Line, Inc., 324 I.C.C. 263 (267, 269).

Section 311. (a), (b) [§*911 U.S.C.*] Temporary operations.—[Unchanged. See vol. 11, p. 9638, vol. 15, p. 12279, vol. 16, pp. 12943-4.]

Notes of Decisions

Volume 12—p. 10513; Volume 13—p. 11142; Volume 14—p. 11667; Volume 15—p. 12280; Volume 16—p. 12944; Volume 18—p. 14671.

Regulations of the Commission

39 FR 6711, Feb. 22, 1974, Part 1131a: Temporary Authority Applications under §311(a) of the Interstate Commerce Act. Promulgation of regulations regarding Water Carrier Temporary Authority by addition of Part 1131a to 49 CFR, effective Mar. 17, 1974.

Section 312. [§*912 U.S.C.*] Transfer of certificates and permits.—[Unchanged. See vol. 11, p. 9639.]

Historical Notes, see vol. 15, p. 12280, vol. 16, p. 12945, vol. 17, p. 13652, vol. 19, p. 15940.

Notes of Decisions

Volume 13—p. 11143; Volume 14—p. 11667; Volume 16—p. 12945; Volume 17—p. 13632; Volume 18—p. 14671; Volume 19—p. 15940; Volume 21—p. 17701.

5. Transfers, in general.—[Vols. 14, 16-18, 21].—Evidence of record establishes that operations under certificate W-195 had ceased in 1955 on the extinguishment of respondent's corporate charter and said certificate constituted only assets of the corporation. Then holders of respondent's capital stock failed to give notice and seek approval of a transfer of certificate to successors-in-interest, failing which present holders of respondent's capital stock have no authority to conduct operations under the certificate.—River Transp. Co. of St. Louis Cancellation, 337 I.C.C. 487 (490-91).

10 Transactions under §5.—[Vols. 13, 14, 19, 21].—Sale of vendor's permit and physical properties to a corporation already controlling water carriers is properly for consideration only under §5; transfer of the permit itself is merely an incident flowing from approval of the §5 transaction, and it has been the practice before and since effective date of the transfer regulations to handle transfers of type involved under §5.—Ingram Corp.—Purchase—Barrett Line, Inc., 324 I.C.C. 263 (268).

Section 312a. [§*912a U.S.C.*] Revocation of certificates and permits.—[Unchanged. See vol. 21, p. 17702.]

2. Construction and interpretation.—Complainant Mechling's argument that defendant's failure to exercise its certificate authority is a self-executing forfeiture of the certificate is not valid. Supreme Court held in 329 US 424 that a "certificate when finally granted and time fixed for rehearing has passed is not subject to revocation in whole or in part except as specifically authorized by Congress". Complainant having failed to bear burden of proof required by Congress in §312a of the act for revocation, complaint is hereby dismissed.—Mechling Barge Lines, Inc. v. N.O. & Vicksburg Packet, 337 I.C.C. 257 (262).

Although dormant, certificate authority may be revived at any time by holder. Defendant's conduct is not shown to violate §305(a) which prescribes duties of water common carriers. Applicant's failure to attract sufficient traffic so as to render continuous service is not determinative of compliance with §305(a) as applicant cannot be penalized for shippers' failure to tender traffic. Record shows defendant intends to serve general public and complainant fails to establish any material allegations to the contrary.—Id., p. 263-64.

Commission found that respondent holding certificate W-195 as a water common carrier has ceased all operations authorized by such certificate in willful violation of §305(a). Obligation to provide service still rests upon respondent corporation and any successor-in-interest entitled to corporation assets under governing State laws. The respondent is ordered to resume authorized operations and inform this Commission of such resumption, failing which said certificate will be revoked.—River Transp. Co. of St. Louis Cancellation, 337 I.C.C. 487 (491-2).

20. Abandonment generally.—Evidence of record, herein specified, shows that operations by certificate holder Mulqueen have been completely dormant for 14 years. Such evidence constitutes a voluntary and willful cessation of operations on a permanent basis and is sufficient by itself to show abandonment and it is unnecessary to prove that a recent request for service has been unmet as such request would not logically be made.—John J. Mulqueen Revocation of Certificate, 332 I.C.C. 390 (393-94).

27. Suspension of authority.—Section 312a provides that a water carrier certificate may be revoked after reasonable notice and opportunity for hearing but such power is limited solely to carriers which willfully fail to perform, provide, or furnish transportation upon reasonable request therefor as provided in §305(a).—John J. Mulqueen Revocation of Certificate, 332 I.C.C. 390 (393)..

30. Orders of Commission.—The Commission finds certificate holder Mulqueen has ceased authorized operations and we hereby order respondent, Mulqueen's successor-in-interest, to provide such authorized operations and to notify this Commission of its compliance within the time periods specified herein, failing which the operating authority will be revoked for non-compliance with provisions of §305(a).—John J. Mulqueen Revocation of Certificate, 332 I.C.C. 390 (395).

Section 313. (a) [§*913(a) U.S.C.*] Accounts, records and reports.—[Unchanged. See vol. 11, p. 9639, vol. 15, p. 12280.]

Amendments, see footnotes, vol. 15, p. 12281; historical notes, see vol. 12, p. 10330, vol. 13, p. 11032, vol. 14, note to §20(1), p. 11543; vol. 19, p. 15940; Volume 21—p. 17703.

Regulations of the Commission

39 FR 18656, May 29, 1974, Part 1209: Inland and Coastal Waterways Carriers. Promulgation of a minimum rule of property accounting for inland and coastal waterways carriers. Effective Jan. 1, 1974.

Section 313. (b) [§*913(b) U.S.C.*] Copies of contracts, agreements, to be filed.—[Unchanged. See vol. 11, p. 9640.]

Notes of Decisions

Volume 16—p. 12945.

Section 313. (c) [§*913(c) U.S.C.*] Uniform system of accounts.—[Unchanged. See vol. 11, p. 9640.]

Notes of Decisions

Volume 21—p. 17703.

Section 313. (d), (e) [§*913(d),(e) U.S.C.*] Depreciation charges; forms of accounts, records, memoranda.—[Unchanged. See vol. 11, p. 9641.]

Section 313. (f), (g) [§*913(f),(g) U.S.C.*] Access to records, etc.; destruction of records.—[Unchanged. See vol. 11, p. 9641, vol. 15, p. 12281.]

Amendment, see footnote, vol. 15, p. 12281.

Regulations of the Commission

34 FR 3568, Feb. 27, 1969: Record Retention Guide, XXIV Interstate Commerce Commission [Revised] 1.10 Water carriers, 49 CFR Part 1227.

35 FR 3620, Feb. 21, 1970: Record Retention Guide, XXIV Interstate Commerce Commission; 1.10 Water Carriers, 49 CFR Part 1227.

36 FR 3772, Feb. 26, 1971: Record Retention Guide, XXIV Interstate Commerce Commission; 1.10 Water carriers, 49 CFR Part 1227.

37 FR 4671, March 3, 1972: Record Retention Guide, XXX Interstate Commerce Commission; 1.10 Water carriers, 49 CFR Part 1227.

37 FR 20695, Oct. 3, 1972, Part 1209: Inland and Coastal Waterways Carriers, accounting regulations, insofar as they apply to the investment tax credit, amended to bring them into compliance with the Revenue Act of 1971 (Pub. Law 92-178), effective on publication in the Federal Register.

37 FR 25919, Dec. 6, 1972, Part 1209: Inland and Coastal Waterways Carriers, accounting regulations. Order of Sept. 12, 1972 (37 FR 20695) amending regulations to comply with Revenue Act of 1971, corrected, effective on date of order.

38 FR 1870, Jan. 18, 1973: Record Retention Guide, XXX Interstate Commerce Commission; 1.10 Water carriers, 49 CFR Part 1227.

Section 313. (h) [§*913(h) U.S.C.*] Definitions.—[Unchanged. See vol. 15, p. 12282.]

Amendments, see footnotes, vol. 15, p. 12282.

Section 314. [§*914 U.S.C.*] Allowances to shippers for transportation services.—[Unchanged. See vol. 11, p. 9643.]

Notes of Decisions

Volume 12—p. 10517; Volume 15—p. 12282; Volume 16—p. 12946; Volume 18—p. 14673; Volume 21—p. 17704.

Section 315. (a), (b) [§*915(a),(b) U.S.C.*]—[Unchanged. See vol. 11, pp. 9643, 9644.]

Section 315. (c) [§*915(c) U.S.C.*] Suspension and modification of orders.—[Unchanged. See vol. 11, p. 9644.]

Historical note, vol. 14, p. 11668.

Notes of Decisions

Volume 13—p. 11144; Volume 14—p. 11668; Volume 16—p. 12946; Volume 17—p. 13653; Volume 19—p. 15941; Volume 21—p. 17705.

Section 315. (d) [§*915(d) U.S.C.*] Time when orders take effect; continuance in effect.—[Unchanged. See vol. 11, p. 9644.]

Notes of Decisions

Volume 13—p. 11145; Volume 16—p. 12946.

Section 315. (e) [§*915(e) U.S.C.*] Compliance with orders.—[Unchanged. See vol. 11, p. 9644.]

Section 316. [§*916 U.S.C.*] Enforcement and procedure.—(a) The provisions of section 12 and section 17 of part I and the Compulsory Testimony Act (27 Stat. 443) shall apply with full force and effect in the administration and enforcement of this part. (Sept. 18, 1940, c. 722. 54 Stat. 946; Oct. 15, 1970, P.L. 91-452, §243(b), 84 Stat. 931.)

Section 316. (b)-(d). [§*916(b)-(d) U.S.C.*]—[Unchanged. See vol. 11, pp. 9645, 9646.]

Notes of Decisions

§316(c) Volume 16—p. 12947.

Section 317. (a)-(f) [§*917(a)-(f) U.S.C.*] Unlawful acts and penalties; Rebates, concessions; false billing; false reports; disclosure of information.—[Unchanged. See vol. 11, pp. 9647-9649.]

Historical note, see vol. 12, p. 10474.

Notes of Decisions

§317(f): Volume 12—p. 10515; Volume 21—p. 17706.

Section 318. [§*918 U.S.C.*]—[Unchanged. See vol. 11, p. 9650.]

Historical Note

By provision of §108 of the Truth in Lending Act, Public Law 90-321, 82 Stat. 146, responsibility for administrative enforcement of that act is assigned to the Commission with respect to any common carrier which it regulates and, for the purpose of enforcing compliance therewith, the Commission may exercise any other authority conferred on it by law. Also, while the Board of Governors of the Federal Reserve System is directed to prescribe regulations to carry out purposes of the Truth in Lending Act (12 CFR Part 226, 34 FR 2002, Feb. 11, 1969), the statute specifically provides that such Board authority does not impair the authority of any other agency responsible for administrative enforcement to make rules respecting its own enforcement and compliance procedures.

Regulations of the Commission

37 FR 5304, March 14, 1972, Part 1325: Extension of Credit to Candidates for Federal Office of Their Representatives, in implementation of the Federal Election Campaign Act of 1971 (Public Law 92-225), new Part 1325, as set forth, added effective May 5, 1972 unless modified or amended by further order of the Commission.

37 FR 10446, May 23, 1972, Part 1325: Extension of Credit to Candidates for Federal Office or Their Representatives. Credit regulations set forth in notice of proposed rule making and order (37 FR 5304) prescribed to become effective May 5, 1972.

Section 319. [§*919 U.S.C.*]—[Unchanged. See Vol. 11, p. 9652.]

Section 320. [§*920 U.S.C.*] **Repeals.**—[Unchanged. See vol. 11, p. 9652.]

Notes of Decisions

Volume 12—p. 10516; Volume 14—p. 11669; Volume 19—p. 15942; Volume 21—p. 17706.

Sections 321, 322. [§§*921,922 U.S.C.*]—[Unchanged. See vol. 11, pp. 9653, 9654.]

Section 323. [§*922a U.S.C.*] **Recording of evidences of equipment indebtedness.**—[Unchanged. See vol. 21, p. 17706.]

Regulations of the Commission

33 FR 17688, Nov. 27, 1968, Part 1116: Recordation of Documents, §§1116.1(a), 1116.4(c) and (d), and 1116.5 are amended to provide for filing and recordation of documents by water carriers, effective Dec. 23, 1968.

Section 324. [§*922b U.S.C.*] **Filing of information return or other report for income tax purposes with State or subdivision by water carrier on compensation paid to interstate employees.**—(a) No water carrier subject to the provisions of this part nor any water carrier or class of water carriers operating on inland or coastal waters under an exemption provided therein shall file any information return or other report for income tax purposes with respect to the compensation paid to any employee who performs his regularly assigned duties as an employee of such carrier in more than one State with any State or subdivision thereof other than the State or subdivision of such employee's residence, as shown on the employment records of such carrier, and the State or subdivision in which such employee earned more than 50 per centum of the compensation paid him by such carrier during the preceding calendar year. The provisions of this section shall also apply with respect to the compensation paid to any master, officer, or seaman who is a member of the crew on a vessel engaged in foreign, coastwise, intercoastal or noncontiguous trade or in the fisheries of the United States.

(b) For the purposes of subsection (a), an employee shall be deemed to have earned more than 50 per centum of his compensation in any State or subdivision in which the time worked by him in such State or subdivision is more than 50 per centum of the total time worked by him in the calendar year while so employed.

(c) For the purpose of this section the term 'compensation' shall mean all moneys received for services rendered by an employee, as defined in subsection (a) in the performance of his duties and shall include wages and salary. (Act of Dec. 23, 1970, Public Law 91-569, §3, 84 Stat. 1501.)

Section 325. [§*923 U.S.C.*] **Separability of provisions.**—[By act of Dec. 23, 1970, Public Law 91-569, §3, 84 Stat. 1501, former section 324 is redesignated as section 325. See vol. 11, p. 9656.]

PART IV

INTERSTATE COMMERCE ACT, FREIGHT FORWARDERS

Chapter 13, Title 49, U.S. Code

Section 401. ***[§1001 U.S.C.]*** **Short title.**—[Unchanged. See vol. 11, p. 9656.]

Section 402. (a) (1)-(4) ***[§1002(a) (1)-(4) U.S.C.]*** **Definitions and exemptions.**—[Unchanged. See vol. 11, p. 9656.]

Section 402. (a) (5) ***[§1002(a) (5) U.S.C.]*** **Freight forwarder defined.**—[Unchanged. See vol. 15, p. 12284.]

Notes of Decisions

Volume 12—p.10516; Vol. 13—p. 11147; Volume 14—p. 11670; Volume 15—p. 12285; Volume 16—p. 12947; Volume 17—p. 13654; Volume 18—p. 14674; Volume 19—p. 15943; Volume 21—p. 17708.

1. Freight forwarder defined.—[Vols. 12-19, 21].—Since §402 (a)(5) requires, among other things, that a freight forwarder perform or provide for break-bulk and distribution of consolidated loads and assume common-carrier responsibility for transporting freight from origin to destination for the general public, failure of an organization to provide those specific services can only mean that it is not providing a complete forwarder service and thus is not subject to regulation. Therefore, there being no evidence to show that either the exempt shippers' association or the corporate consolidator or shippers' agent, which—because it is owned by person hired as association's general agent—the Commission found to be controlled by the association, provides any break-bulk or distribution services to the public or assumes any carrier responsibility, the record does not support the Commission's conclusion that combined operations of the association and the shippers' agent constituted an unauthorized freight forwarder service.—Columbia Shippers and Receivers Ass'n, Inc. v. United States, 301 F. Supp. 310 (323-4)*.

Accordingly, as the Commission has no basis upon which to regulate either the exempt association or the shippers' agent, the record affords no support for its decision that the association's practice of utilizing services of the corporate agent to co-load its members' truckload freight with that of independent, for-profit, non-member shippers constituted a complete freight forwarder service which, being performed without a forwarder permit, violated the statute. The Commission's cease and desist order, requiring plaintiff shippers' association to terminate the specified unlawful co-loading practice, therefore, must be set aside.—Id., pp. 314, 321-2, 324.

To be within the statutory definition of "freight forwarder," one need not actually perform all the functions specified in §402(a)(5); as long as a party *proffers* all the services described in the statute, whether or not performed, it will qualify as a freight forwarder. Therefore, though plaintiff claims its operations were those of an exempt "shippers' agent," if it performs or proffers to the general public—and for compensation—the services enumerated in §402(a)(5), then provisions of §410(a) would require that it terminate operations until such time as it receives appropriate freight forwarder authorization therefor. The Commission's cease-and-desist order, sustained.—Metropolitan Shipping Agents of Ill., Inc. v. United States, 342 F. Supp. 1266 (1268-9, 1271)*.

One carrier may make use of the service which another carrier holds out to the public generally. So long as the first carrier is operating *qua* carrier and gives the public proper notice through its tariff, it can substitute another's service for its own in this way. However, should the first carrier hold out to perform what may amount only to assembly and distribution services at points, and should it use the underlying transportation of the second carrier between points, which it cannot itself serve in a practicable manner, it would no doubt be found to be operating not a carrier but as a freight forwarder. Where it does have the requisite authority, it may perform such service not as a forwarder but as a carrier because §402(a)(5) defines a freight forwarder as any person performing forwarding services other than as a carrier subject to parts I, II, or II of the Act.—Substituted Service—Piggyback, 322 I.C.C. 301 (335)*.

Record as a whole is convincing that petitioner, though ostensibly offering a consolidation service to shippers as their agent, actually provides a complete freight forwarder service, for compensation, within meaning of §402(a)(5). It holds out to serve the public, being willing to serve any shipper that will sign its agreement and agency designation and pay its bills; it solicits new accounts and has not refused to serve anyone seeking to use its services. Consignors look to it to provide a complete transportation service, and in doing so it uses its own service for pickup and consolidation, rail TOFC service for the line-haul to Chicago (generally in trailers leased from the railroad's subsidiary), and a single common distributor (a certificated motor carrier) at Chicago for all else. Whether it actually requires shippers to use the one Chicago distributor is unimportant, since the plan III service cannot be used otherwise, and, having chosen to use petitioner's service, no other choice is possible to them. Petitioner's activities satisfy all requirements of the forwarder definition, and its petition for a declaratory order to the contrary must be denied.—Bab Transfer, Inc., Petition for Declaratory Order, 323 I.C.C. 574 (597-8).

At the suggestion of the president of a freight consolidator which then employed him, respondent Bentin organized respondent Cooperative and became its general manager, and Cooperative employed the consolidator as its exclusive consolidating agent; and distribution service at New Orleans was performed by a local cartage company owned by Bentin's son. The purported membership of Cooperative, obtained by

Bentin's solicitation of New Orleans receivers of goods from the East and Midwest, had no voice in management of the business, the profit of which went almost entirely to Bentin, who termed himself Cooperative's "sole owner," and at all times controlled and managed its affairs. As it is abundantly clear that the physical service received by Cooperative's individual shipper members was identical to that ordinarily provided by a regulated forwarder, it is beyond dispute that the combined operations of Cooperative and its consolidating and distributing agents were conducted as an unauthorized forwarder service.—New Orleans Shippers Assn., Inc., Investigation, 323 I.C.C. 619 (621, 636, 637).

The total situation remained essentially the same in all substantive respects after Bentin incorporated respondent Association and became its salaried general manager. Association occupied the same premises and performed the same functions with the same personnel; the consolidating agent's identity and services remained unchanged; though Bentin and his son formed a partnership to supplant the son's sole proprietorship, the distribution service was performed with the same trucks and drivers under essentially the same management; Cooperative's members were automatically treated as those of Association; and respondent consolidator continued to finance the operation by prepaying rail freight charges and advancing inbound motor carrier charges. Conclusively, the operations conducted in Association's name were for all practical purposes identical to those of Cooperative, albeit under a new cloak. And though, following Bentin's illness and incapacity, there was some minor shifting of responsibility, there were no material changes. Association has thus continued Cooperative's unlawful operations; cease-and-desist order entered.—Id., pp. 637-8.

One of the essential elements of a freight forwarder service as defined in §402(a)(5) is that the forwarder use, "for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act." While shipments handled by applicant or its predecessor between points in Hawaii were interstate in character because they originated outside of Hawaii, the underlying carriers operated between Hawaiian ports by ship or barge, and such water carriers, operating on the high seas between ports in Hawaii, are not subject to part III. No service by any carrier subject to part I is snown to have been used, and, to the extent that incidental motor carrier services may be used, such transportation has been exempted from regulation under part II. Therefore, any transportation service provided by applicant between points wholly within Hawaii is not a freight forwarder service subject to the permit requirements of part IV.—Star Forwarders, Inc., 323 I.C.C. 721 (726).

The evidence adduced concerning defendant's piggyback service for individual or non-association groups of shippers persuasively establishes that such operations are in fact those of a freight forwarder as defined in §402(a)(5) of the Act. Two letters, one to a shipper, and one to consignees, sent by defendant, and an advertisement placed by defendant show that defendant holds itself out to perform a complete freight forwarding service including the essential requisites of performing consolidation and either performing or providing for the performance of break-bulk and distribution service. Nothing more is required of the shipper other than the mere tender of traffic to defendant at New York in order to obtain delivery to the ultimate consignee. It is further apparent that such service is held out to the general public since no more is required to avail oneself of defendants comprehensive service than execution of an "agency" agreement, and the tender of shipments of a class consolidated by defendants and destined to points to which its service is offered. Cease and desist order entered.—Natl. Motor Frt. Traf. Assn., Inc., v. Vendors Consolidating, 326 I.C.C. 262 (274-75).

On reconsideration, prior finding that in order to retain the status of freight forwarder, it is not necessary for applicant to assemble and consolidate and break bulk and distribute as to every shipment handled, is affirmed. To hold otherwise would disregard §402(a)(5), which defines a freight forwarder as "any person which *** in the ordinary and usual course of its undertaking assembles and consolidates***." The very essence of applicant's proposal is to pair truckload shipments to obtain the advantages of TOFC plan III service. If in certain instances he is unable to pair two shipments destined to the same point at the same time, he does not destroy his forwarder status by handling a single unconsolidated shipment. —Brinke Freight Forwarder Application, 326 I.C.C. 322 (324-25)*.

On reconsideration, definitional provisions of this section are satisfied where applicant's proposed operations between states of Washington and Alaska contemplate utilization of the services of a carrier subject to part I of the Act for switching at Seattle, despite fact that remainder of transportation is to be performed by carriers not subject to part I, II, or III of the act.— North Star Forwarding Co. Freight Forwarder Applic., 326 I.C.C. 734 (735)*.

On question of whether a forwarding service is offered, statutory requirement that assembling, consolidating, and break-bulk operations be performed "in the ordinary and usual course of [forwarder] undertaking" does not require that they be performed on all shipments. Also, while applicant may perform some consolidation and break-bulk operations at ports, airports, or outside of the United States, the performance thereof is what is important in determining whether the nature of its service is that of a freight forwarder, not that geographical location of the performance was within the Commission's jurisdiction. Evidence shows that applicant, in fact, performs consolidation and break-bulk operations "in the normal course of its business" as an exempt forwarder of used household goods, and on part of the unaccompanied baggage it handles; therefore, its operations do meet criteria specified in §402(a)(5) definition of a freight forwarder despite fact that, because economy or dispatch may warrant individual handling, such operations are not performed on all shipments.—Routed Thru-Pac, Inc., Freight Forwarder Application, 332 I.C.C. 352 (367-9)*.

Commission found that operations of defendant Intermountain between points in California and Hawaii are those of a freight forwarder as evidence shows defendant advertises and offers the public a "door to door" service on such movements utilizing motor and water common carriers as its agents and defendant assumes responsibility for the disposition of loss and damage claims.—Star Forwarders, Inc. v. Intermountain Fast Frt., 337 I.C.C. 265 (268-73).

Any person which offers a service involving the consolidation of c.o.d. traffic, moving from multiple consignors to multiple consignees, and which undertakes to effect the transportation arrangements, will find it extremely difficult to avoid freight forwarder status. To the shipping public, such an undertaking constitutes the essence of freight forwarding, for it proclaims to the shipper essentially that his traffic will move to destination at volume rates, without further effort on his part. Consequently, in a determination of the status of such an operation under §402(a)(5), the form of the arrangements among the participants in the process is of secondary concern; it makes no essential difference whether the through transportation process is coordinated under formal agreements or is conducted by means of implied understandings or working arrangements between the consolidator and its distributing agents.—Haley Transfer & Storage—Investigation of Operations, 340 I.C.C. 350 (356).

Commission notes that our regulatory jurisdiction in connection with the performance of an intermodal land-water-land service extends only to that part of the through movement conducted by underlying carriers subject to our jurisdiction under parts I, II, or III of the Interstate Commerce Act. A nonvessel-operating common carrier, such as applicant, remains subject to jurisdiction of the Federal Maritime Commission while utilizing services of a vessel-operating (ocean) common carrier by water. This situation is analogous to that of air freight forwarders stated in 339 ICC 17. Applicant's questioned inland operations are those of a freight forwarder.—C T I— Container Transport, Internat., Frt. Forwarder Applic., 341 I.C.C. 169 (184-88).

Although applicant explicitly conceded that its questioned operations are those of a freight forwarder thus rendering that issue uncontroverted and moot, the Commission's conclusion is in no way altered. All elements delineated in §402(a)(5) as definitive of a freight forwarder's operations are profferred by either applicant or its proposed agent.—Id., pp. 188-91.

Since §402(a)(5) excludes motor carriers subject to part II from "freight forwarder" as defined therein, once applicant becomes a certificated motor carrier subject to part II, whether or not it performs operations engaged in by freight forwarders becomes moot, because its certificated authority permits such operations subject only to appropriate tariffs. Applicant's proposed transportation of cash letters between country banks and correspondent banks, using service of buslines for part of the haul under interline arrangement but under its responsibility to shipper for the entire movement, is therefore not a forwarder operation.—Continental Dispatch, Inc., 95 M.C.C. 483 (486, 488).

Operations of persons engaged in forwarding containerized shipments of used household goods (both independent forwarders and those controlled by regulated motor carriers), purportedly conducted under §402(b)(2) exemption, found to be those of a freight forwarder as defined in §402(a)(5), including requirement therein that forwarders consolidate and breakbulk or provide therefor. The statute does not require that consolidation occur at one place, and the Commission has recognized that consolidation may be performed in various ways; thus, considered joint loading by independent forwarders, if properly effected, constitutes the assembly and consolidation required of a forwarder; and, in circumstances presented, such consolidations are effected in the ordinary and usual course of exempt forwarders' undertakings when the joint loading is properly effected.—Kingpak, Inc., Investigation of Operations, 103 M.C.C. 318 (327-32)*.

Furthermore, inasmuch as the independent forwarders and the motor carriers render substantially the same type of service in the same manner to the shipper (i.e., a bona fide freight forwarding service, albeit exempted from regulation under part IV), insofar as authorized motor carriers render considered containerized services, they are, in fact, operating as forwarders; and conclusions stated with regard to the forwarder operations apply equally in all respects to such motor carriers. Criteria to assist exempt forwarders, and practices to be observed by regulated motor carriers performing the same service, are set forth merely as guidelines for their future performance of considered services.—Id., pp. 332, 333-6.

In enacting part IV of the Act, it was contemplated by Congress that the Interstate Commerce Commission was to have jurisdiction over that part of the activities of air freight forwarders which constitute surface forwarding not within the scope of the §203(b)(7a) exemption. Thus, those activities of air freight forwarders conducted beyond recognized air terminal areas and bearing the indicia of surface forwarding as set forth in §402(a)(5) of the Act are subject to the Commission's economic regulation under part IV of the Interstate Commerce Act.—Theodore Savage Contract Carrier Application, 108 M.C.C. 205, (215-6)*.

Section 402. (a)(6)-(8) *[§1002(a) (1)-(8) U.S.C.]*—[Unchanged. See vol. 11, p. 9657.]

Notes of Decisions

Volume 12—p. 10517; Volume 13—p. 11148; Volume 14—p. 11671; Volume 21—p. 17713.

Section 402. (b) *[§1002(b) U.S.C.]* Exemptions.—[Unchanged. See vol. 11, p. 9658.]

Historical notes, see vol. 15, p. 12286, vol. 16, p. 12948, vol. 17, p. 13655.

Notes of Decisions

Volume 18—p. 14675; Volume 19—p. 15944; Volume 21—p. 17713.

2. Construction and interpretation.—[Vol. 19]—See also Trans-American World Transit, Inc., Frt. Fwd. Applic., at §402(b), n. 30.

In suit to set aside Commission finding that the forwarding of unaccompanied baggage which moves independently from householder's other goods is not within §402 (b)(2) "used household goods" exemption, the court is not concerned with accuracy of the Commission's reasoning, but only with whether there is warrant in the law and facts for its decision. The legislative history, and the absence of a statutory definition of "used household goods," make it clear that Congress left to the Commission the responsibility for delineating the scope of that exemption; and the determination thereof is clearly within its competence. The Commission's interpretation of the exemption is consistent with practice in the freight forwarding industry and is within the congressional intent to exempt only used household goods; its determination is one within Commission expertise, and is amply supported by the record. Therefore, on the record, the Commission correctly concluded that where an exempt forwarder of used household goods handles any commodity not within that description, its operation is subject to Commission jurisdiction.—American Movers Conference v. United States, 307 F. Supp. 74 (79-80)*.

Proposal by applicant, operating as an exempt freight forwarder, to forward "used household goods," one of the commodities listed in the statute as exempt, as well as "used automobiles and unaccompanied baggage," which are not so listed, raises questions concerning §402(b)(2) which require proper interpretation, in light of legislative history and past precedents, of the used household goods exemption. The Commission has taken the view, since first required to interpret the section, that when one is engaged in forwarding commodities other than one of the classes specified in §402(b)(2), its entire operation is subject to the provisions of part IV; and the legislative history gives support to prior Commission interpretation. On review of all pertinent legislative history, the only conclusion to be drawn is that §402(b)(2) was intended to exempt only a forwarding service which is confined exclusively to one of the commodities enumerated as exempt. Therefore, absent any convincing reason for reversal of that interpretation, conclusions reached in the cited proceedings, which have stood as the Commission's decision since shortly after enactment of part IV, are affirmed.—Routed Thru-Pac, Inc., Freight Forwarder Application, 332 I.C.C. 352 (355-61)*.

30. Household goods.—[Vols. 12, 14, 18, 19, 21].—Although "used household goods" includes used automobiles when forwarded in connection with the personal effects and furniture of a householder, and such operations are exempt from economic regulation under Part IV, (since it engages in service with respect to more than one of the classifications of property specified in §402(b)), applicant is entitled to "grandfather" authority for continuance of those operations under §410(a)(2),(3).—Bekins Household Shipping Co., 323 I.C.C. 382 (384). [But see dissent.]

Proposal by applicant, operating as an exempt forwarder, to forward commodities for which authority is otherwise required (used automobiles and unaccompanied baggage) in addition to used household goods, forwarding of which is exempt by §402(b)(2), would remove the exemption as to latter commodity so as to require authority for its entire operation. It is recognized that used automobiles when a part of the householder's property are "used household goods" and that, as a practical matter, automobiles do not move in the same manner nor together with such other goods, nevertheless they must be forwarded as part of, or in connection with, other household goods to fall within that category; and that requires their tender as part of the same shipment at approximately the same time. Therefore, since automobiles handled by applicant generally move with the shipper and not with other household goods, they cannot be considered as part of, or moved in connection with, a household goods shipment for which applicant, as a forwarder, is required to assume responsibility from origin to destination.—Routed Thru-Pac, Inc., Freight Forwarder Application, 332 I.C.C. 352 (355-8, 361-2)*.

On the other hand, the unaccompanied baggage applicant proposed to handle is shipped through from origin to destination, but often separately and by a different mode of conveyance. Though a householder's clothing and other personal belongings constitute household goods, unaccompanied baggage when shipped independently and in a separate movement may not be so classified and has traditionally required authority.

Also, while baggage need not move together with other used household goods in order to constitute a part thereof, it must be moved as a part of the same shipment, tendered about the same time, and handled under the same contract; if it is tendered at a different time, or if baggage is all that is moving, authority is required because the commodity has acquired a specific description and can no longer be considered within the generic description "used household goods." Thus, appropriate authority is required to handle unaccompanied baggage when (whether as only part of householder's total shipment, or as the only goods moving for a shipper) it moves independently at shipper's option and request.—Id., pp. 362-3.

Commission concluded that applicants' proposed operations in the forwarding of used household goods, unaccompanied baggage, and used automobiles are not exempt from Commission's regulation under §402(b) (2). Commission briefly stated scope of §402 (b) (2) exemption as regards traffic at issue and our jurisdiction over such traffic. Commission also noted that there is a much fuller discussion of the scope of the exemption and our jurisdiction in 332 ICC 352.—Smyth Worldwide Movers, Inc., F. F. Application, 337 I.C.C. 721 (734-6)*.

The term "used household goods" clearly does not comprehend such terms as fall within the second and third parts of Commission's definition of "household goods" at 49 CFR 1056, and "new" furniture or other "new " commodities obviously cannot be considered as "used" within the meaning of the exemption. Commission, citing 337 ICC 721 and 332 ICC 352, distinguished "household goods as defined by the Commission" and other items not embraced in §402(b) exemption from "used household goods".—International Sea Van, Inc., Frt. Forwarder Applic., 339 I.C.C. 408 (412-17).

"Used household goods" reflects only a portion of the commodity description "household goods as defined by the Commission", and does not encompass those services performed in relation to unaccompanied baggage and the other two categories of goods included within the phrase "household goods as defined by the Commission", nor does it include "new" articles.—Home-Pack Transport, Applic. for Forwarder Permit, 340 I.C.C. 98 (102-103)*.

Prior decision granting applicant domestic forwarding authority to transport used household goods, used automobiles, and unaccompanied baggage seems to be principally predicated on the examiner's mistaken belief that since the decision in 332 ICC 352, it is necessary for certificated motor carriers of household goods to be licensed under part IV in order lawfully to continue the household goods services performed in the past. That conclusion not only runs counter to express language in the cited case, but it also is inconsistent with other Commission and court decisions wherein it has been found that the cited decision relates solely to the interpretation of an exemption under part IV (in terms of commodities that may be forwarded) and not to operating authorities issued under part II (which describe services that carrier may provide), and that it may not be applied to construe motor carrier operating rights. See 307 F. Supp. 74.—Trans-American World Transit, Inc., Frt Fwd. Applic., 340 I.C.C. 196 (197, 203)*.

Statements of supporting shippers that they are forwarders of used household goods, exempt from regulation under §402(b), are accepted at face value; record contains no probative evidence to support a finding that they are unlawfully operating as unlicensed brokers, as protestant contends. Moreover, record does not indicate that that issue was raised at the hearing; nor does it indicate any distinguishing characteristics between protestant's "Maypack" service and the services of supporting shippers.—Nilson Extension, 95 M.C.C. 326 (328-9).

Forwarders of containerized shipments of used household goods, operating under the §402(b)(2) exemption, are freight forwarders within the definition in §402(a)(5); however, while there is no impropriety in their using agents for performance of certain functions, a true principal-agent relationship must be maintained, with the forwarder exercising substantial supervision and control over its traffic. Therefore, in view of prior uncertainty as to status of forwarders using such agents, criteria are set forth merly as guidelines to assist exempt forwarders in their future efforts to guard against practices which would cast doubt upon their entitlement to exemption under the statute. Also, regulated motor carriers rendering the same type of containerized services can operate as exempt forwarders, provided they conduct such exempt operations in a manner that will not affect service rendered under their motor carrier authority. Therefore, to eliminate possible undue or unreasonable preferences or advantages and to assure adequate public service, practices set forth must be observed when regulated and unregulated operations are conducted by the same carrier.—Kingpak, Inc., Investigation of Operations, 103 M.C.C. 318 (327-32, 334-6)*.

Freight forwarders exempt from regulation under §402(b)(2) are proper parties to support motor carriers' applications for authority to transport used household goods for such forwarders; protestants' contention that the Department of Defense is the "real shipper in interest" since it accounts for the greatest percentage of goods handled by exempt forwarders, misconceives the nature of the freight forwarder, who is the actual shipper as far as the carrier is concerned. Also, regulated forwarders have traditionally and appropriately supported the applications of those motor carriers necessary to provide service to them, and there is no logical reason why exempt forwarders should be treated differently.—Central Forwarding, Inc., Extension, 107 M.C.C. 706 (714).

Regulations of the Commission

39 FR 3270, Jan. 25, 1974, Part 1085: Freight Forwarders of Household Goods. Amending 49 CFR by addition of Part 1085 concerning certain consumer problems including form to be given to prospective shippers. Effective March 4, 1974.

39 FR 8920, March 7, 1974, Part 1085: Freight Forwarders of Household Goods. Effective date of order published at 39 FR 3270 postponed and fixed at June 3, 1974.

39 FR 18656, May 29, 1974, Part 1085: Freight Forwarders of Household Goods. Effective date of order of Jan. 3, 1974 postponed and fixed as July 1, 1974; and order of Feb. 28, 1974 vacated and set aside.

39 FR 27805, Aug. 1, 1974, Part 1085: Freight Forwarders of Household Goods. Effective date of order of Jan. 3, 1974, postponed and fixed as Aug. 1. 1974; and order of May 22, 1974 is vacated and set aside.

Section 402.(c) [*§1002(c) U.S.C.*] Exemptions.—[Unchanged. See vol. 11, p. 9658.]

Historical notes, vol. 16, p. 12948; vol. 17, p. 13655; vol. 18 p. 14676; vol. 19, p. 15945; vol. 21, p. 17713.

Notes of Decisions

Volume 12—p. 10518; Volume 13—p. 11148; Volume 14—p. 11672; Volume 15—p. 12286; Volume 17—p. 13655; Volume 18—p. 14676; Volume 21—p. 17713;

2. Construction and interpretation.—[Vols. 15, 21].—Respondent offers a service involving consolidation of c.o.d. traffic, moving from multiple consignors to multiple consignees, and undertakes to effect the transportation arrangements and is thus not found to warrant an exemption as its operations are those of a freight forwarder.—Haley Transfer & Storage—Investigation of Operations, 340 I.C.C. 350 (357).

15. Associations of shippers.—[Vols. 12-15, 17, 21].—It is now settled that the mere incorporation of a shippers' association whose consolidating and distributing activities would not otherwise subject it to economic regulation under Part IV does not in and of itself bring the association within the statute's licensing provisions.—New Orleans Shippers Assn., Inc., Investigation, 323 I.C.C. 619 (634).

Since Part IV prohibits the purchase and sale of unlicensed freight forwarding services generally, a lawful shippers' association may act neither as seller of such services, as it would in serving nonmember shippers, nor as a device through which its ostensible members purchase from others a complete forwarding service, as where the service is provided, not by the members themselves acting through their association, but by some independent entrepreneur. And where the freight consolidating and distributing operations are such that persons other than legitimate shipper members of the association either (a) have any right or ability to control, direct, or dominate such operations, or (b) bear the essential risks and burdens thereof, the purported members of the shipper group or association are in reality purchasing transportation from a person or persons unlawfully engaged in operation as an unauthorized freight forwarder.—Id., pp. 634-5.

An essential attribute of a legitimate shippers' association is the quality of subordination. In all its operations in connection with the consolidation, transportation, and distribution of freight it must act solely at the request, under the direction, and for the account and benefit of its members, and, as between the members and their association, the former must always act as principal and the latter as agent. As a corollary, where the association members, though enjoying benefits of a complete transportation service at volume rates, are shown not to have retained effective control over movement of their freight, but instead to have delegated all responsibility therefor to purported agents or employees, they have for all practical purposes invested the latter with the fundamental characteristics of an independent entrepreneur whose operations, if otherwise within the definition of a freight forwarder, are subject to licensing requirements of the Act.—Id., p. 635.

It is abundantly clear that, at least in its physical aspects, the service received by individual shipper members of respondent Association and its predecessor Cooperative is identical with that ordinarily performed by a regulated forwarder; without intervention on their part and merely by directing their suppliers to tender their shipments to respondents' consolidating agents at New York, Philadelphia, and Chicago, the New Orleans members of Cooperative and later of Association have obtained benefit of a complete door-to-door transportation service, the distribution service at New Orleans being performed by one of two successive distributing agents created by respondents. Evidence is equally convincing that the element of subordination has at all times been wholly lacking in respondents' operations; that their consignee members have never exercised any greater control or influence over their successive operations than if they had employed a regulated common-carrier agency; and that such consignees regarded their membership, not in terms of responsibilities assumed, but as a mere formality qualifying them to receive benefit, at an agreed rate, of a pre-existing and self-operating transportation service.—Id., p. 636.

And though there was some shifting of responsibilities following illness and incapacity of individual respondent who organized both Cooperative and Association, the purported members have assumed no greater dominion and control over operations of Association and its agents than existed at inception of those activities. Evidence conclusively demonstrates a total absence of good faith participation by members in Association's conduct and affairs and leaves no doubt that the reason for its existence was to enable respondents to operate unlawfully as freight forwarders. The members have never shared the burdens as well as the benefits of Association's operations and were not consulted in any way respecting its functioning; only a select few attended member meetings, and none possessed the knowledge and interest required to direct activities of the organization to which they merely lent their names. Respondents' combined operations have been unlawful from their inception; cease-and-desist order entered.—Id., p. 638.

While the evidence presented does raise strong inferences tending to show that the shippers' associations in question lack bona fides due to control and direction of their activities by defendants, such inferences are insufficient to support a definitive finding of unlawful operations on the part of these associations, and so far as this record shows, such associations alone perform or provide for the performance of break-bulk and distribution services at destination. It follows therefore, that operations performed by defendants as agent performing only consolidation services within the terminal areas of the involved origin points must be assumed to be performed in lawful compliance with §402(c)(2) of the act. However, defendant's consignment of traffic to itself for however limited a period of time, regardless of the attendant circumstances, was not performed under any reasonable interpretation of the §402(c) provisions, and plainly constituted the performance by defendants of freight forwarding service without appropriate authority.—Natl. Motor Frt. Assn., Inc., v. Vendors Consolidating, 326 I.C.C. 262 (272-73).

Defendant is a bona fide shippers' association. All its services are limited to operations conducted on behalf of members; these services are accomplished under the direction and control of shipper-member representatives, elected by defendant's membership to its board of directors; and the total charges for defendant's services are predicated closely to the actual cost thereof. Notwithstanding this, however, defendant should cease objectionable practices which tend to place defendant in violation of §410(a) of the Act.—Natl. Motor Frt. Traf. Assn. v. Industrial Shippers Assn., 103 M.C.C. 545 (552-3).

In view of pertinent criteria applicable to shippers' associations, discussed in 322 ICC 273, defendant association is found to be a bona fide shippers' association within the meaning of §402(c)(1); record shows that the idea and formation of defendant was shipper motivated, that only shippers are members, and that member-shippers have exercised effective control over the association and the individual who operates as their general agent and, also, have assumed essential risks and burdens incident to operating the association. Additionally, as there is no specific bar thereto, the practice of coloading by separate shippers' associations is consistent with the statute as long as the coloading benefits the members of each association and there is no holding out of service to the general public; however, coloading practiced by shippers' associations must stand or fall according to substantive provisions of §402(c) and is unaffected by "joint loading" provisions of §404(d) which apply only to regulated for-hire forwarders.—Natl. M. Frt. Traffic Assn. v. Columbia Shippers, 105 M.C.C. 846 (849-50, 851-2, 854, 856-7)*.

18. Operations as shipper's agent.—[Vols. 13, 15, 21].—See also Metropolitan Shipping Agents of Ill., Inc. v. United States, §402(a)(5), n. 1.

Applicant's operations are essentially those of a shipper's agent which are exempt from regulation, rather than of a freight forwarder. He is employed by Alaskan firms to schedule delivery of shipments to Seattle and arrange for their movement to Alaska by ocean water carriers, which are selected and paid for by consignees; his services include auditing of freight bills and arranging for assembly and consolidation of traffic at dockside, but no break-bulk and distribution of shipments; and he is paid for his services either on the basis of a retainer or about one half of the savings in the utilization of volume rates. Applicant does not publish tariffs or issue its own bill of lading; on all documents he designates himself as an "agent" for the shipper whose name appears thereon. Nor does he hold himself out to the general public to provide for transportation of property.—Stanley, 323 I.C.C. 499 (500-1).

Record as a whole makes clear that, while petitioner's considered activities may have commenced as result of a shipper's suggestion that a consolidation service be performed for mutual benefit of shippers attending the organizational meeting, the method of accomplishing that end has been performance of a freight forwarder service, although labeled in terms designed to preserve for petitioner the status of a consolidator only, as shippers' agent. The cloak of agency does not conceal the fact that petitioner, though using its own service for pickup and consolidation, uses rail plan III TOFC service for the line-haul to Chicago, and effectually requires all participants to use a single common distributor at Chicago in order that the plan III service can be used at all. Having thus held out and performed for compensation a service having all the elements of freight forwarding, petitioner may not disclaim its forwarder status by labeling itself an agent or consolidator within the terminal area of its operations.—Bab Transfer, Inc., Petition for Declaratory Order, 323 I.C.C. 574 (597, 598).

Although petitioner has identified itself as shippers' agent in its dealings with carriers and shippers, and has obtained from shippers signed agreements and designations of agency, to come within the exclusion of §402(c) its services must be confined to the terminal area in which the operations are conducted. Petitioner, however, has solicited throughout much of New England, leases trailers to provide movement from Springfield, Mass., to Chicago, and is the only moving party in providing for distribution at

Chicago. That the "designation of agent" specifies that its acceptance of shipments is subject to §402(c), or that its physical services are confined to its terminal area, do not exclude it as a mere consolidator from provisions of Part IV. Nor does shippers' device of furnishing two bills of lading have legal effect of separating the entire movement into two parts, one in Springfield and one in Chicago; shippers know from the very beginning that after shipments are turned over to petitioner in Springfield they will be delivered to consignees in Chicago.—Id., p. 599.

Upon further consideration, the Commission found respondent association's practice of coloading freight of its member carriers with freight of another shipper association on a non-profit basis to obtain the benefits of volume rates to be lawful. However, such coloading with nonmembers by for-profit shippers is not within the regulatory exemption of §402(c).—Piggy-Back Shippers Assn. of Florida-Investigation, 332 I.C.C. 349 (350-1)*.

Section 403. (a), (b) [*§1003(a), (b) U.S.C.*]—[Unchanged. See vol. 11, pp. 9658, 9659.]

Historical Note

On August 9, 1973, the Commission recommended to Congress legislation to amend §§12(1), 204(a)(6), 304(a), and 403(a) of the Interstate Commerce Act to enable the Commission to exempt certain transportation from regulation upon a finding that the regulation is not necessary in order to effectuate the National Transportation Policy and that regulation would serve no public purpose. (S. 2458). Annual Report, 1974, p. 84. See also vol. 21, p. 17723.

Section 403. (c), (d) [*§1002(c), (d) U.S.C.*] Security for protection of public.—[Unchanged. See vol. 11, p. 9659.]

Notes of Decisions

Volume 12—p. 10518; Volume 13—p. 11149; Volume 15—p. 12287; Volume 16—p. 12948.

Regulations of the Commission

33 FR 10572, July 25, 1968, Part 1084: Surety Bonds and Policies of Insurance, §1084.3 Limits of liability (a) Cargo, amended effective Jan. 1, 1969.

33 FR 14413, Sept. 25, 1968, Part 1003: List of Forms, §1003.3 Freight Forwarder Forms—(b) Insurance and surety bond forms. FF 43 Freight Forwarder Cargo Liability Surety Bond, revised, effective Jan. 1, 1969.

35 FR 2829, Feb. 11, 1970, Part 1084: Surety Bonds and Policies of Insurance, §1084.8 Forms and procedure*** (f) *Termination by replacement*, effective upon publication in the Federal Register.

39 FR 10254, Mar. 19, 1974, Part 1084: Surety Bonds and Policies of Insurance. Amendment of 49 CFR §1084.3(b) regarding limits of liability, effective July 1, 1974.

39 FR 11891, April 1, 1974, Part 1003: List of Forms. Regulations promulgated as to freight forwarder liability forms, effective July 1, 1974.

39 FR 13159, April 11, 1974, Part 1084: Surety Bonds and Policies of Insurance. Correction of order of Mar. 27, 1974 (39 FR 11891).

Section 403.(e) [*§1003(e) U.S.C.*]—[Unchanged. See vol. 11, pp. 9659.]

Section 403. (f) [*§1003(f) U.S.C.*] Investigation; hearing; enforcement.—[Unchanged. See vol. 11, pp 9660.]

Notes of Decisions

Volume 21—p. 17723.

12. Burden of proof.—In proceedings involving the operations of shippers' associations, a complainant who alleges that such association is conducting unlawful operations has met its initial burden of proof when it shows that association's operations, when viewed in light of the criteria of 322 ICC 273, appear to be subject to regulation. When evidence shows an association is holding out to serve the public or make a profit, that someone other than members direct and control the association, or that the membership has failed to assume the necessary risks and burdens, the association must come forward with rebuttal evidence; defendants or respondents, as the case may be, must negate a complainant's factual showing. In short, while ultimate risk of nonpersuasion remains on complainant throughout the proceeding, burden of proof shifts to defendant once complainant has established a prima facie case. On the record, complainants found to have met their initial burden of proof; esential facts are not disputed; and the record provides an adequate basis for a decision as to defendants' alleged unlawful operations.—Natl. M. Frt. Traffic Assn. v. Columbia Shippers, 105 M.C.C. 846 (847. 850)*.

15. Hearing.—[Vol. 21].—Respondents' petition for further hearing for receipt of additional evidence, on ground that lapse of time since hearings and changes of fact during that time have rendered the record deficient for purpose of determining status of respondents' operations in light of principles of 322 ICC 273, denied. Further hearing for introduction of evidence bearing on changed circumstances is neither necessary nor desirable: as administrative consideration of evidence presented in investigative proceedings must be fair and equitable to all parties, it is necessarily a difficult and time-consuming process, and it is therefore not unusual that a lengthy time passes before a final order is promulgated. If upon issuance of such order or at any time prior thereto litigants could demand rehearings as a matter of right on ground of some new circumstance or newly discovered fact, the administrative process could never achieve a just and effective conclusion.—New Orleans Shippers Assn., Inc., Investigation, 323 I.C.C. 619 (639-40).

20. Evidence.—[Vol. 21].—It is highly significant that petitioner, in seeking a declaratory order that its operations are not those of a freight forwarder as defined in §402(a)(5), refrained from offering as a witness its president, who, in soliciting shippers, offered them a through service to Chicago. It is undisputed that such person was in the city and available when hearing was held, and could have appeared himself to deny doing so if he had not solicited through transportation. Interveners' evidence is convincing in the matter, and therefore exhibit consisting of a document showing petitioner's charges for various services, which might be used in soliciting prospective shippers, is proper and credible evidence in view of other corroborative evidence of record.—Bab Transfer, Inc., Petition for Declaratory Order, 323 I.C.C. 574 (576, 592, 593, 599).

In an effort to refute similar exhibits listing rate information, petitioner offered to furnish as late-filed exhibits the plan II TOFC rates applicable on traffic of shipper intervener, together with an affidavit from that company's traffic manager indicating the proper commodity descriptions of its shipments; but as no such affidavit was received, the late-filed exhibits cannot be considered.—Id., p. 582.

Although examiner, over objection of petitioner's counsel, permitted examination of person who served a subpena on the traffic manager of one shipper concerning their conversation, at conclusion of such testimony he granted petitioner's motion to strike all testimony of that witness except that pertaining to service of the subpena. There is nothing in the examiner's conclusions (which the Commission adopts) that lends any support to petitioner's contentions of bias or of consideration of the testimony objected to, and examiner's denial of request to physically strike such testimony was within his discretionary authority.—Id., pp. 575, 576, 593.

Motion to strike as immaterial, impertinent, and improper all that portion of intervening forwarders' reply referring to evidence adduced in pending complaint against certain respondents to instant investigation, granted. The evidence taken from the other proceeding is prejudicial and was never properly introduced in instant proceeding, and movants have had no opportunity for cross-examination or rebuttal.—New Orleans Shippers Assn., Inc., Investigation, 323 I.C.C. 619 (633).

30. Orders of Commission.—[Vol. 21].—Since petition for a declaratory order that petitioner's operations and services are not those of a freight forwarder as defined in §402(a)(5) does not bring into issue any unlawful operations, entry of an order requiring it to cease and desist from unlawful operations is not within scope of the proceeding. However, deletion of examiner's recommended cease-and-desist order from proposed report otherwise adopted by the Commission as its own does not imply condonation of the operations and practices found by the examiner to be unauthorized freight forwarder operations, and petitioner is admonished to discontinue such operations immediately.—Bab Transfer, Inc., Petition for Declaratory Order, 323 I.C.C. 574 (575-6).

As combined operations of purported shippers' association and its consolidating and distributing agents constituted a single, jointly conducted, common-carrier forwarder service in violation of §410(a), each participant is individually responsible for the unauthorized performance of such service. Therefore, although principal individual respondent, who died before conclusions of the proceeding, and respondent partnership composed of him and his son, which under State law terminated upon his death, are excluded from cease-and-desist order, the son remains subject to the Commission's jurisdiction, and also, in view of his participation in the unlawful operations of the association and the partnership, to the cease-and-desist order entered against all respondents still in existence.—New Orleans Shippers Assn., Inc., Investigation, 323 I.C.C. 619 (639).

Section 404. (a) [*§1004(a) U.S.C.*] Rates, charges, and practices. Duty to establish reasonable rates, etc.; service; classifications, regulations and practices.—[Unchanged. See vol. 11, p. 9660.]

Historical note, vol. 14, p. 11673.

Notes of Decisions

Volume 12—p. 10519; Volume 13—p. 11151; Volume 15—p. 12288; Volume 16—p. 12949; Volume 17—p. 13656; Volume 18—p. 14676; Volume 19—p. 15945; Volume 21—p. 17727.

Rates by Commodities

125. Rates prescribed or approved.—[Vols. 17-19].—Part I, §1(5), n. 350; Part II, §216(b), n. 125; Part III, §305(a), n. 125.

Furniture: Proposed reduced commodity rate on wooden furniture of 225 cents, minimum 30,000 pounds, from El Segundo, Calif., to Chicago, Ill., found compensatory and lawful for the two indicated freight forwarder members of respondent tariff bureau but not lawful for those respondents not submitting cost evidence.—Wooden Furniture, El Segundo, Calif., to Chicago, Ill., 332 I.C.C. 37 (41-42).

Classifications, Class Rates

130. Class rates, ratings, exceptions.—[Vols. 18, 19, 21].—Proposed l.c.l. exceptions ratings on numerous commodities, 2.5 percent lower than corresponding classification ratings, to apply only when the commodities, as packed for shipment, weigh 40 pounds or more per cubic foot and certification to that effect is shown on shipping order and bill of lading, approved as compensatory and not competitively destructive or unfair. Respondent has lost considerable tonnage to private, pool-car, and other unregulated transportation, and in meeting competition common carriers are not required to withhold counteraction until total diversion occurs. Shippers support the proposal as conducive to better packaging, with decreased loss and damage, better use of space, and improved service at lower costs. While revenue effect of the proposal cannot be determined because additional volume that may be attracted is not known, the Commission does not sit in judgment on wisdom of carriers' proposals, but only on their lawfulness in terms of the regulatory statute.—Reduced Exceptions Ratings Based on Density, 323 I.C.C. 341 (342, 345-6).

Section 404. (b) [*§1004(b) U.S.C.*] Undue preferences or prejudices prohibited.—[Unchanged. See vol. 11, p. 9660.]

Notes of Decisions

Volume 12—p. 10521; Volume 13—p. 11151; Volume 15—p. 12289; Volume 16—p. 12950; Volume 17—p. 13657; Volume 18—p. 14680; Volume 19—p. 15951; Volume 21—p. 17728.

Section 404. (c) [*§1004(c) U.S.C.*] Preference or advantage by common carrier.—[Unchanged. See vol. 11, p. 9661.]

Notes of Decisions

Volume 17—p. 13657.

Section 404. (d) [*§1004(d) U.S.C.*] Agreements for joint loading of traffic.—[Unchanged. See vol. 11, p. 9661.]

Notes of Decisions

Volume 13—p. 11152; Volume 14—p. 11673.

10. Joint loading, generally.—[Vols. 13, 14].—While the statute specifically allows regulated forwarders to joint load subject to Commission approval of joint-loading agreements, such joint loading is not restricted to forwarders subject to regulation. Section 404(d) does not preclude those forwarders not subject to the Act from joint loading, and §402(b)(2) specifically exempts forwarders of used household goods from "the provisions of this part" (part IV of the Act) not just the service subject to the part; thus, there is no proper ground for considering joint loading operations of independent forwarders of used household goods in the context of substantive provisions of an act from which they are specifically and totally exempted. However, since joint loading requires a participation by all concerned, whether the manner in which an independent forwarder engages in the practice constitutes such participation is considered and discussed.—Kingpak, Inc., Investigation of Operations, 103 M.C.C. 318 (328-9)*.

Inasmuch as provisions of §404(d) apply only to regulated for-hire forwarders, they do not affect coloading, as practiced by exempt shippers' associations; and whether or not such coloading practice is proper must stand or fall according to substantive provisions of §402(c) since, while §404(d) authorizes forwarders to enter into agreements for "joint loading" of traffic, there is no parallel provision applicable to shippers' associations. Section 404(d) allows a freight forwarder to use the employees and facilities of another forwarder and to engage in other mutual practices under certain conditions; however, provisions thereof apply only to regulated forwarders and neither enlarge nor diminish lawful scope of the operations of persons not subject to regulation.—Natl. M. Frt. Traffic Assn. v. Columbia Shippers, 105 M.C.C. 846 (856-7)*.

Section 405. (a) [*§1005(a) U.S.C.*] Tariffs of freight forwarders; filing, posting.—[Unchanged. See vol 11, p. 9661.]

Notes of Decisions

Volume 13—p. 11153; Volume 14—p. 11673; Volume 15—p. 12289; Volume 16—p. 12951; Volume 18—p. 14681; Volume 19—p. 15952; Volume 21—p. 17729.

Rules and Regulations

84. Liability provisions.—[Vols. 14, 15].—See Loss and Damage Claims, at §6(1), n. 84.

Regulations of the Commission

36 FR 16228, Aug. 20, 1971: Special Permission No. 72-810, Fares, Charges, Etc.; Postponement of Effectiveness of Increases, Reestablishment of Lower Rates. Effective Aug. 16, 1971, rules of various Commission tariff circulars are waived to extent necessary to permit carriers to publish and file tariff supplements mandated by the Executive Order of Aug. 15, 1971 entitled Providing for Stabilization of Prices, Rents, Wages, and Salaries.

36 FR 16228, Aug. 20, 1971: Suspension Docket No. 8664, Stabilization of Rates and Charges, August 1971. Operation of schedules of new increased rates, fares and charges, etc., filed to become effective Aug. 17, 1971, and later, which would be in violation of the Executive Order of Aug. 15, 1971 entitled Providing for Stabilization of Prices, Rents, Wages, and Salaries, is suspended, effective Aug. 16, 1971.

36 FR 16975, Aug. 26, 1971: Suspension docket No. 8664, Sub. No. 1, Stabilization of Rates and Charges, August 1971. Operation of schedules of new increased rates, fares and charges, etc., filed to become effective Aug. 24, 1971, and later, is suspended, effective Aug. 23, 1971.

36 FR 21857, Nov. 16, 1971: Suspension Docket No. 8688, Stabilization of Rates and Charges. Operation of schedules publishing new increased rates, fares and charges, etc., which, if permitted to become effective, would result in rates and charges that would violate Executive Order No. 11627, dated Oct. 15, 1971 (except those currently under suspension and investigation), ordered suspended, and use thereof deferred, for indefinite period pending further Commission order.

36 FR 22300, Nov. 24, 1971, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program, §1311.0 - §1311.5, new Part 1311 added, effective day after date of publication in Federal Register.

36 FR 22341, Nov. 24, 1971: Suspension Docket No. 8688, Sub-No. 2, vacates indefinite suspension of operation of certain schedules, subject to conditions set forth, effective on date of order.

36 FR 23108, Dec. 3, 1971: Suspension Doc. No. 8688 (Sub No. 1) Stabilization of Rates and Charges, certain schedules of increased rates suspended by order of Nov. 19, 1971.

36 FR 23108, Dec. 3, 1971: Suspension Doc. No. 8688 (Sub No. 3) Stabilization of Rates and Charges, certain schedules of increased rates suspended by order of Nov. 24, 1971.

37 FR 1107, Jan. 26, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program, special procedures prescribed by order of Nov. 19, 1971 (36 FR 22300) revised in order to conform to, and implement, §300.16 of the regulations of the Price Commission (37 FR 652), effective on date of order.

37 FR 3354, Feb. 15, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program; Price Commission having deferred until March 10, 1972 public utility rate increases proposed to become effective on or after Feb. 10, 1972, carriers are directed to defer indefinitely the effective dates of all increased rates, fares, charges, etc., proposed to become effective during the Price Commission deferral period, effective on date of order.

37 FR 6149, March 24, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization program. Carriers authorized to cancel indefinite postponement of effective dates of proposed increased rates, fares, charges, etc., required by the order of Feb. 11, 1972, effective on date of order.

37 FR 9399, May 10, 1972, Part 1309: Tariffs and Classifications of Freight Forwarders, §1309.5 Transmission of publications to subscribers, added, effective June 21, 1972.

37 FR 12239, June 21, 1972, Part 1309: Order of May 1, 1972 (37 FR 9398) requiring transmission of tariffs and schedules to subscribers and other interested parties, stayed pending disposition of timely filed petitions for reconsideration, effective on date of order.

37 FR 14308, July 19, 1972, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program, entire Part 1311 revised, effective on day following publication in the Federal Register.

37 FR 18554, Sept. 13, 1972, Part 1309: Tariffs and Classifications of Freight Forwarders, §1309.5 Transmission of publications to subscribers, amended, effective 60 days after publication in Federal Register.

37 FR 25399, Nov. 30, 1972, Part 1309: Tariffs and Classifications of Freight Forwarders, order of Aug. 28, 1972 establishing regulations for transmission of tariff and schedule publications to subscribers and other interested parties, which had been stayed, made effective 30 days after publication of order in Federal Register (11/30/72).

38 FR 2177, Jan. 22, 1973, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program. Pursuant to end of Phase II and beginning of Phase III, mandatory application of regulations is suspended, effective Jan. 11, 1973, until further notice; but such regulations shall be construed as voluntary guidelines.

38 FR 3389, Feb. 6, 1973, Part 1311: Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program, §1311.5 Standards applicable during Phase III of the wage and price stabilization Program, adopted Jan. 30, 1973.

Section 405. (b) [*§1005(b) U.S.C.*] Form of tariffs prescribed by Commission; rejection of tariffs.—[Unchanged. See vol. 11, p. 9662.]

Section 405 (c) [*§1005(c) U.S.C.*] Deviation from rates and regulations enumerated in tariff forbidden; rebates; privileges.—[Unchanged. See vol. 11, p. 9662.]

Notes of Decisions

Volume 13—p. 11153; Volume 14—p. 11674; Volume 15—p. 12290; Volume 16—p. 12951; Volume 17—p. 13658; Volume 18—p. 14682.

Section 405. (d), (e) [*§1005 U.S.C.*]—[Unchanged. See vol. 11, p. 9662.]

Notes of Decisions

§405(d): Volume 18—p. 14682; §405(e): Volume 13—p. 11154.

Section 406. [*§1006(a) U.S.C.*] Complaints to and investigations by Commission. (a) Complaint to Commission of violation of law by freight forwarder; investigation.—[Unchanged. See vol. 11, p. 9663.]

Notes of Decisions

Volume 14—p. 11674; See also §406a, n. 20, v. 15, 16; Volume 18—p. 14683; Volume 19—p. 15953.

Section 406. (b) [*§1006(b) U.S.C.*] Commission empowered to determine and prescribe rates, classifications, etc.—[Unchanged. See vol. 11, p. 9664.]

Notes of Decisions

Volume 15—p. 12291; Volume 18—p. 14683; Volume 19—p. 15953.

Section 406. (c) [*§1006(c) U.S.C.*] Good will, earning power or permit inadmissible in proceedings to determine rates.—[Unchanged. See vol. 11, p. 9664.]

Section 406 (d) [*§1006(d) U.S.C.*] Need of freight-forwarder service and fair return considered in determining rates, etc.—[Unchanged. See vol. 11, p. 9664.]

Historical Notes

Historical notes, see vol. 12, p. 10522, vol. 13, p. 11154.

Notes of Decisions

Volume 12—p. 10522; Volume 13—p. 11154; Volume 14—p. 11675; Volume 15—p. 12291; Volume 16—p. 12952; Volume 17—p. 13659; Volume 18—p. 14683; Volume 19—p. 15954.

Section 406. (e) [*§1006(e) U.S.C.*] New rates; determination of fairness by commission; suspension.—[Unchanged. See vol. 11, p. 9665.]

Notes of Decisions

Volume 12—p. 10522; Volume 16—p. 12953; Volume 17—p. 13659; Volume 18—p. 14684; Volume 19—p. 15954; Volume 21—p. 17730.

20. Evidence.—[Vols. 19, 21].—Increase in rates on transcontinental traffic, which accounts for somewhat more than half of respondents' total traffic, is sought to be justified on the basis of data relating to the respondents' total operating costs. Even assuming that the hearing examiner's adjustments have removed the distortions in the respondents' cost and revenue comparisons, such evidence is of little probative value. There is no showing, nor is it contended, that the transportation conditions surrounding the respondents' transcontinental traffic are similar to those associated with their other traffic. The increase in costs for line-haul motor service cannot reasonably be attributed to the respondents' transcontinental traffic, which is almost exclusively by rail TOFC service. Thus, lacking any showing of the extent that these costs have increased on transcontinental traffic, as distinguished from the respondents' other operations, we have no basis for concluding that these increases result from the respondents' transcontinental movements.—Freight Forwarder Increase, Transcontinental Terr., 326 I.C.C. 437 (447).

25. Burden of proof.—[Vols. 12, 16-19, 21].—Respondent freight forwarder tariff bureau has met the burden of proving reduced rate on wooden furniture from El Segundo, Calif., to Chicago, Ill., just and reasonable by introduction of adequate cost evidence showing reduced rate in excess of respondents' cost by a substantial margin.—Wooden Furniture, El Segundo, Calif., to Chicago, Ill., 332 I.C.C. 37 (39-41).

65. Reasonableness of proposed rates.—[Vols. 17-19, 21].—Proposed reduced rate on wooden furniture from El Segundo, Cal-

if., to Chicago, Ill., found just and reasonable for two indicated respondent members of tariff bureau as such rate has been shown to be compensatory, will not divert traffic from any regulated carrier, and will help to correct an existing traffic imbalance. Such rate is not shown just and reasonable for other respondents.—Wooden Furniture, El Segundo, Calif., to Chicago, Ill., 332 I.C.C. 37 (41).

66. Cost of service.—[Vols. 19, 21].—Respondent's purpose in establishing exceptions ratings on numerous commodity descriptions, based on increased density of packages, is to give fuller recognition to density as an element of cost; increase in density will result in increase of space available for light and bulky freight, and, as total cost varies with density, respondent's costs per trailerload become more economical as weight load increases. Respondent has submitted cost data to show that handling of traffic under increased-density packing would be less expensive than for normal density shipments, and, as class rates under exceptions ratings are involved and no serious contention of noncompensativeness is made, they are found to be compensatory; approved.—Reduced Exceptions Ratings Based on Density, 323 I.C.C. 341 (343, 344, 345).

Commission found it proper for respondent freight forwarders to charge one-half of the one-way charge as the cost of line-haul for each of two trailers loaded on a flatcar. This exception to round-trip basis for costing is justified as respondents pay rail charges based on available cubic feet per flatcar and not on a weight basis.—Wooden Furniture, El Segundo, Calif., to Chicago, Ill., 332 I.C.C. 37 (40-41).

Section 406. (f) [*§1006(f) U.S.C.*] Investigation involving State regulations; conference of State and interstate commissions; prescription of rates, regulations.—[Unchanged. See vol. 11, p. 9665.]

Section 406a. [*§1006a U.S.C.*] Actions for recovery of charges; limitation of actions; definition; effective date.—[Unchanged. See vol. 18, p. 14687, vol. 21, p. 17733.]

Notes of Decisions

Volume 14—p. 11674; Volume 15—p. 12292; Volume 16—p. 12953; Volume 17—p. 13660; Volume 18—p. 14688; Volume 21—p. 17734.

2. Construction and interpretation.—By amendment of §406a in Public Law 89-170, this Commission is specifically denied the jurisdiction to award reparations in contested proceedings. In view of this denial in relation to contested cases the Commission cannot assume jurisdiction in uncontested proceedings for reparations and cannot establish informal procedure for handling such cases. The willingness of a carrier to pay reparations is no substitute for the legislative delegation of authority.—Informal Procedure for Determining Reparation, 335 I.C.C. 403 (412-13).

Section 407. [*§1007 U.S.C.*] Motor carrier rates applicable to small parcel forwarding.—[Unchanged. See vol. 11, p. 9666.]

Section 408. [*§1008 U.S.C.*] Authority for assembling and distribution rates.—[Unchanged. See vol. 11, p. 9667.]

Notes of Decisions

Volume 12—p. 10523; Volume 13—p. 11155; Volume 14—p. 11675; Volume 15—p. 12293; Volume 17—p. 13660; Volume 18—p. 14688; Volume 19—p. 15958; Volume 21—p. 17734.

2. Construction and interpretation.—[Vols. 12-15, 21].—Assembling rates may not be restricted solely to traffic of freight forwarders, but must be made available to others using common carriers' services under like conditions; though the term "freight consolidators" is not used in §408, the physical similarity in carriers' handling of l.t.l. freight for forwarders and consolidators satisfies the requirement of "like conditions." Moreover, except for the carload or truckload requirement, the Act is silent concerning nature of movements beyond the assembly point; the legislative history discloses no intent of Congress to prohibit application of assembling rates on l.t.l. freight transported for a freight consolidator when reshipped by the consolidator in private carriage. Congress apparently intended a liberal interpretation of the class of persons who may utilize assembling rates, and the words "and others" in §408 have been found to include individual shippers and groups or associations. The Act does not prohibit consolidators' use of private carriage, and there is no basis for excluding shippers from benefit of assembling rates solely because they elect to use private carriage beyond the assembly point.—Assembling Rates to Atlanta, Charlotte, Greensboro, 323 I.C.C. 543 (547-8).

However, the movement beyond the assembly point must be as part of a c.l. or t.l. shipment. But though historically a t.l. shipment is one that substantially fills the carrying capacity of a vehicle, the term "truckload" does not lend itself to a definition that would be applicable in all instances; t.l. minima have been established at varying levels, and the circumstances surrounding the movement must be considered. Involved textile products will not move at high minima due to prevalence of any-quantity commodity rates, and suggested 12,000-pound minimum for shipments moving beyond assembly points in private carriage is in line with needs of supporting shipper, whose volume is determined by requirements of its branch stores. In the particular circumstances a minimum of 12,000 pounds is not so low as to constitute a less-than-truckload. Proposed assembling rates on textile products, when moved beyond assembly points by common or private carriage in truckloads of not less than 12,000 pounds, would be lawful under provisions of §408; however, such rates should be limited to traffic of freight consolidators, since §418 precludes use of private carriage by forwarders.—Id., pp. 548, 549. [But see dissent.]

5. Assembling and distribution rates.—[Vols. 13-15, 17-19, 21].—Proposed assembling commodity rates, on level approximating 80 percent of corresponding l.t.l. rates, on l.t.l. shipments of textile products from points in Georgia, the Carolinas, and Virginia to assembly points at Atlanta, Ga., and Charlotte, Greensboro, and Statesville, N.C., for movement beyond in consolidated truckloads by common or private carriers, would be lawful under §408 and otherwise just and reasonable if restricted to traffic moving to freight consolidators, and if made subject to the same t.l. minimum weight for the movement beyond the assembly point by either common or private carrier; suggested 12,000-pound minimum is not too low for the traffic involved and is in line with supporting shipper's requirements. Traffic destined for subsequent movement by both private and common carriers is handled in same manner by respondent, frequently in mixed shipments on one bill of lading, and proposed tariff provisions, amended as indicated, would alleviate rate errors and billing problems.—Assembling Rates to Atlanta, Charlotte, Greensboro, 323 I.C.C. 543 (545, 549).

Section 409. [*§1009 U.S.C.*] Utilization by freight forwarders of services of common carriers by motor vehicle.—[Unchanged. See vol. 15, p. 12294.]

Amendments, see footnotes, vol. 13, p. 11158 (former §409); see also vol. 15, p. 12294, Historical note, vol. 17, p. 13661; vol. 18, p. 14689.

Historical Note

On August 9, 1973, the Commission recommended to Congress legislation to amend §409(a) of the Interstate Commerce Act to authorize freight forwarders to negotiate special contracts with railroads. (S. 2461).—Annual Report, 1974, p. 84.

The Commission recommends that §409 be amended to authorized contracts between freight forwarders and railroads covering rates and services, for an experimental period, to determine the extent to which such contracts will encourage l.c.l. shippers to utilize energy-saving rail service.—Annual Report, 1975, p. 77.

Notes of Decisions

Volume 12—p. 10524; Volume 13—p. 11158; Volume 14—p. 11676; Volume 15—p. 12295; Volume 17—p. 13661; Volume 18—p. 14689; Volume 19—p. 15959; Volume 21—p. 17736.

2. Construction and interpretation.—[Vols. 12-15, 17-19, 21].—To assume the type of responsibility required of it, the forwarder must be closely involved in the details of the movement of goods and not act simply as a conduit for the receipt and placement of orders with other carriers who perform most, if not all, of the transportation independently, and usually without rendition of the traditional and statutory functions of a forwarder.—Services of Forwarders of Household Goods, 117 M.C.C. 523 (531-532).

While a freight forwarder may enter into §409 contracts with household goods motor carriers in appropriate circumstances, it is not free, under the terms of its permit and §404 of the statute, to abrogate its functions and regularly act as little more than a sales agent for another mode even if that mode may be preferred or required by shippers in certain instances. This conclusion is in no manner contrary to the principle recognized in a number of proceedings holding that occasional shipments may be handled by a freight forwarder without the performance of its recognized functions.—Id., pp. 533-34.

5. Agreements.—[Vols. 15, 17-19, 21].—Provisions of §409(a) are permissive and do not require motor carriers to enter into contracts with forwarders for transportation of latter's traffic at less than tariff rates.—All-transport, Inc., 325 I.C.C. 183 (186).

Section 410. (a) [*§1010(a) U.S.C.*] Permit essential to operation; carriers in operation on effective date of section; service to, from, and within Alaska; Hawaii; "grandfather" provisions.—[Unchanged. See vol. 11, p. 9669; vol. 19, p. 15959].

Historical notes, vol. 16, p. 12954, vol. 17, p. 13661, vol. 18, p. 14690.

Notes of Decisions

Volume 21—p. 17736.

2. Construction and interpretation.—[Vol. 21].—Purpose and effect of the "grandfather" amendments to §410(a) were to authorize the extension to Alaska and Hawaii of forwarder service from or to points in the 48 contiguous States; that purpose would be defeated if only service rendered by applicant were to be considered and not those services performed "in conjunction" with those of other carriers. Where applicant accepted goods destined to Alaska and Hawaii in its capacity as a freight forwarder, issued a through bill of lading, selected the ocean carriers, made arrangements for the goods to be delivered to them, and acted as shipper vis-a-vis the ocean carriers, its services and those of the underlying ocean carriers were not separate and distinct from the total service rendered from point of origin to point of destination, but were performed "in conjunction" with each other.—Clipper Carloading Co., 323 I.C.C. 682 (685).

And in view of omission in the "grandfather" amendments to §410(a) of the customary requirement that operations conducted on and after the critical date be "bona fide" in the sense of being substantial, it is not necessary for applicant to demonstrate that operations conducted to points in Alaska and Hawaii were as frequent as those required by previous legislation to support a grant of "grandfather" authority.—Id., p. 685.

While a freight forwarder, as defined in §402(a)(5), is required to transport shipments from point of receipt to ultimate destination, prior to the Alaska Statehood Act forwarders subject to part IV were not regulated insofar as transportation beyond Seattle was concerned. As to such operations, the "grandfather" amendment of §410(a) does not require an applicant to satisfy precisely all elements of the statutory definition, but provides for continuance of operations conducted in conjunction with other carriers; and though water carriers subject to Federal Maritime Commission were specifically mentioned in legislative history of that amendment, the amendment is clearly not so limited, and §418, in designating the carriers a forwarder may use, includes air carriers. Operations of applicant and its predecessors, in handling consolidated shipments from Hawaii and other States to Seattle, where they broke bulk and made arrangements with steamship companies or air carriers for delivery to ultimate consignees in Alaska, billing shippers for the through charges, were such as to entitle them to "grandfather" rights to continue serving Alaska.—Star Forwarders, Inc., 323 I.C.C. 721 (727-8).

Application for permit to operate as a freight forwarder between points in Hawaii and California approved as applicant's past operations and testimony of public witnesses reveal a continuing demand and acceptance of applicant's highly specialized service. Protestants' evidence fails to support contentions that such approval is detrimental to the competitive situation, their operations, or the public interest.—D.C. Andrews & Co. of Illinois, Inc., Ext.—Calif. to Hawaii, 329 I.C.C. 205 (210).

Although the Hawaiian Statehood Act vested jurisdiction over water carriage between ports of that State and other States in the Federal Maritime Commission, the operations of defendant Intermountain were proven to be those of a freight forwarder and as such are within the jurisdiction of this Commission as provided by §33 of the Shipping Act (46 USC 832).—Star Forwarders, Inc. v. Intermountain Fast Frt., 337 I.C.C. 265 (267-8).

10. Cessation of unlawful operations.—[Vol. 21].—See also Natl. Motor Frt. Traf. Ass'n., v. Vendors Consolidating, at §402(a)(5), n.1.

Duty of the court in suit to enjoin and set aside Commission decision and order, ordering plaintiff to cease and desist freight forwarder operations in violation of §410(a), is to decide whether substantial evidence supports the Commission's conclusion that plaintiff is a "freight forwarder," as defined in the Act; that the reviewing court might have reached a different conclusion is irrelevant if the Commission's order is based on adequate findings which are warranted in law and fact. A freight forwarder need not actually perform all functions specified in §402(a)(5); as long as a party proffers all the services described, whether or not performed, it comes within that statutory definition. It is not disputed that plaintiff's operations meet the requirements of assembly and consolidation and the utilization of a regulated carrier; and on the record as a whole, substantial evidence supports the Commission's findings that there is (1) a proffering, or performance, of break-bulk and distribution and (2) an assumption of transportation responsibility. Commission cease-and-desist order, sustained.—Metropolitan Shipping Agents of Ill., Inc. v. United States, 342 F. Supp. 1266 (1268-71)*.

Evidence indicates that applicant's present operations as a shippers' association which shippers utilize as a freight forwarder in order to obtain a volume rate fixed by applicant and by which applicant assumes responsibility for complete transportation service appear to parallel those found unlawful in previous cases herein cited. Commission admonishes applicant to discontinue such operations.—Shippers Consolidating, Inc., Freight Forwarder Applic., 329 I.C.C. 161 (165).

Respondent found to have been engaged in operations as a freight forwarder without appropriate authority. Cease and desist order issued.—Haley Transfer & Storage—Investigation of Operations, 340 I.C.C. 350 (357).

Notwithstanding finding that defendant is a bona fide shippers' association, it must discontinue its objectionable practices which tend to place it in violation of §410(a) of the Act. It should change its telephone listing from that of a freight forwarder to reflect its true status; cease the salary arrangement whereby an affiliate pays the salaries of defendant's executive secretary and assistant treasurer; and furnish the names of the beneficial owners in the bills of lading or, at least, incorporate by reference a document containing such names. Finally in view of fact that considered affiliate serves other shippers and shipper associations and is a motor common carrier, defendant should establish and maintain a complete separation of its working facilities from those of the affiliate in order to insure that the day-to-day control of its operations are not delegated to affiliate. In view of these conclusions complaint dismissed, subject, however, to right of the Commission to reopen this proceeding in order to assure correction of these objectionable items.—Natl. Motor Frt. Traf. Assn. v. Industrial Shippers Assn., 103 M.C.C. 545 (553-4).

50. "Grandfather" clause; past operations.—Inasmuch as record shows that applicant has engaged in forwarding operations of used household goods and used automobiles between points in Hawaii, and between Hawaii and points in continental United States during and since the critical period, and this transportation was not within the §402(b) exemption, it is entitled to a "grandfather" permit authorizing continuance of those operations, but not the transportation of household goods. That applicant held itself out as a forwarder of household goods makes no difference, because the sole criteria for determining "grandfather" rights is the actual operations performed during the critical period.—Bekins Household Shipping Co., 323 I.C.C. 382 (382-384).

Since applicant's past operations have been essentially those of a shipper's agent, which are exempt from regulation by §402(c)(2), he has not been engaged in service on and since the critical date which either would have been subject to part IV or would, in conjunction with services of other carriers, have resulted in transportation of property subject to part IV; "grandfather" application dismissed.—Stanley, 323 I.C.C. 499 (501-2).

In determining territorial scope of authority to be granted a "grandfather" applicant for service between Alaska or Hawaii and the remaining 48 States, it is necessary to establish reasonable parity between applicant's past operations in the forwarding of goods and those authorized for the future, but since operations conducted on and after the critical date need not be "bona fide" in the sense of being substantial, applicant need not demonstrate such frequency of past service as is required under previously enacted "grandfather" provisions. Moreover, because of the nature of freight forwarding, points in States intermediate or adjacent to, or wholly or partially surrounded by, States in the geographical area in which applicant has established that it conducted operations during the critical period will likewise be included in the grant of authority.—Clipper Carloading Co., 323 I.C.C. 682 (685-6).

However, authority will not be granted to serve States for which there is no showing of operations both before and after the critical date and which are not geographically related to those in which such operations were conducted. The 1958 "grandfather" amendments are not comparable to the Freight Forwarder Act as originally enacted, which contained no true "grandfather" provisions, and the criteria enunciated in 323 ICC 195 are controlling. While it is apparent that applicant has engaged on and since the applicable critical dates in transportation of a substantial quantity and wide variety of commodities from points in certain eastern States to points in Alaska and Hawaii, and authority will likewise be granted for certain other States in that general area, there is no justification for authorizing service from points in other States where none was rendered during the critical period, or from certain western States where no shipments were handled both before and after the critical dates and which are not geographically related to the area in which appropriate service was rendered. Granted in part.—Id., p. 686.

Evidence establishes that applicant and its predecessors were, during the critical period, collectively holding out a service between Hawaii and the 48 contiguous States, including the District of Columbia, and that continuance of such service should be authorized. While they were admittedly unable to show that any one of them handled any shipments on and since the critical date between Hawaii and Wyoming or from Delaware, Montana, Nevada, New Mexico, or the Dakotas to Hawaii, those States are intermediate and adjacent to the States from which such operations are shown.—Star Forwarders, Inc., 323 I.C.C. 721 (726-7).

It is likewise clear that both before and since the "grandfather" date applicant and its predecessors accepted shipments destined to Alaska and held out to perform a forwarder service on such shipments, but, except from Hawaii, the only actual service to Alaska was confined to handling of shipments originating in a 7-State area based on St. Louis, and admittedly no operations were performed from Alaska to any other State. "Grandfather" authority to serve Alaska is therefore limited to one-way operations from Hawaii and the 7-State area.—Id., pp. 727,728.

As the Hawaiian Statehood Act contained no provision for "grandfather" or interim operating rights, a state of uncertainty existed as to lawfulness of freight forwarder operations. Under these circumstances of uncertainty, applicant's past operations to and from Hawaii, commencing in October, 1959, without specific authority should not be considered a hindrance or a support as to whether the proposed operations are consistent with public interest.—D.C. Andrews & Co. of Illinois, Inc., Ext.—Calif. to Hawaii, 329 I.C.C. 205 (210).

Section 410. (b) [*§1010(b) U.S.C.*] Application for permit; form and content.—[Unchanged. See vol. 11, p. 9669.]

Historical note, see vol. 21, p. 17737.

Notes of Decisions

Volume 12—p.10525; Volume 13—p. 11158; Volume 14—p. 11676; Volume 15—p. 12296; Volume 16—p. 12954; Volume 17—p. 13661; Volume 18—p. 14690; Volume 19—p.15961; Volume 21—p. 17737.

5. Applications; amendments; parties.—[Vols. 12-15, 17, 19].—Although notice of application incorrectly indicated that applicant proposed to operate as a forwarder of import traffic from Chicago to points in five States, because customs clearance and break-bulk will take place in Chicago on commodities moving by rail from Halifax, N.S., Canada, rather than at points on international boundary, authority is required for all regulated freight forwarding service taking place within United States; therefore, since applicant requires a permit for all operations within United States necessary to perform the service proposed, application is considered in form originally filed, i.e., for authority to perform a forwarding service from Halifax to the five States, insofar as such transportation takes place within United States.—Alltransport Inc., 325 I.C.C. 183 (183-4).

18. Burden of proof.—[Vols. 13, 15, 16, 18, 19, 21].—Although the "public interest" test admits of other factors, adequacy of existing service is still a vital factor and frequently of controlling significance in forwarder application cases; however, this does not mean that part of applicant's basic burden of proof is to establish that existing service cannot adequately meet reasonable transportation needs of the public. Applicant is required to make initial showing of prima facie need for its proposed service; it is then incumbent on protestants to refute such showing by establishing, subject to applicant's rebuttal, their qualifications and willingness to provide the required service.—D.C. Andrews & Co. of Illinois, Inc., Ext. —Baltimore, Md., 326 I.C.C. 743 (755).

Burden of proving the proposed service will be consistent with public interest and the national tranportation policy is upon applicant and substantial evidence showing nature of ommodities to be transported and territory to be served is required to justify a grant of authority. Protestants bear burden of proving such grants will have adverse effect on their operations. Findings of Commission must be supported by very substantial evidence before they will be upheld by the courts.—Brinke Freight Forwarder Application, 335 I.C.C. 861 (867).

Commission, citing 322 ICC 103 and 326 ICC 743, stated that each applicant for freight forwarder authority must establish by substantial evidence a need for the essence of the proposed operation, i.e., nature of commodities to be transported and scope of territory to be served, to justify a grant of authority. Proposed operations must be shown consistent with the public interest and national transportation policy. The public interest criterion is not equivalent to a finding of public convenience and necessity. Protestants must rebut applicant by showing their own qualifications and willingness to provide the required service.—Smyth Worldwide Movers, Inc., F. F. Application, 337 I.C.C. 721 (736-7)*.

The burden of proof is upon an applicant seeking a freight forwarder permit to show that the proposed service is, or will be, consistent with the public interest and the national transportation policy. The "public interest" test is not the equivalent of the more stringent "public convenience and necessity" test which must be met by applicants seeking motor common carrier authority. A forwarder applicant bears the burden of proving by substantial evidence a need for the essence of the operation, i.e., the nature of the commodities to be transported, and the scope of the territory to be served, in order to justify a grant of the authority sought.—Home-Pack Transport, Applic. for Forwarder Permit, 340 I.C.C. 98 (102)*.

Applicant seeking a freight forwarder permit has the burden of showing that proposed service is, or will be, consistent with the public interest and the national transportation policy. Although the "public interest" test is not the more stringent "public convenience and necessity" standard which must be met by applicants for motor common carrier authority, a forwarder applicant bears the burden of proving by substantial evidence a need for the essence of the operation, i.e., nature of the commodities to be transported and scope of the territory to be served, in order to justify grant of the authority sought.—Trans-American World Transit, Inc., Frt. Fwd. Applic., 340 I.C.C. 196 (201)*.

Burden of proof is upon applicant seeking a forwarder permit to show that the proposed service, to extent authorized by permit, is or will be consistent with the public interest and national transportation policy. Applicant must also establish by substantial evidence a need for the essence of the operation, i.e., the nature of commodities to be transported and the scope of the territory to be served. See 326 ICC 743.—KYFI, Inc., Freight Forwarder Application, 341 I.C.C. 725 (729).

22. Evidence.—[Vols. 14, 15, 17-19, 21].—Commission noted that where it has been established either by exhibits or applicant's testimony, that an applicant has transported in the past new articles or those which fall within parts 2 or 3 of "household goods" definition (49 CFR 1056), such evidence is entitled to no weight since such operations could not have been conducted under color of right. Additionally, forwarder applications cannot be granted in those instances where the only support is that of an affiliated company. There must be persuasive evidence presented by public witnesses who demonstrate a genuine need for the proposed service.—International Sea Van Inc., Frt. Forwarder Applic., 339 I.C.C. 408 (417-18).

25. Hearing, generally.—[Vol. 21].—Commission reopened this proceeding in light of the district court's mandate in remanding the instant case, and the lack of a current record. Parties hereto are warned that any further failure to meet their statutory burden will not be tolerated.—Brinke Freight Forwarder Application, 335 I.C.C. 861 (872).

Regulations of the Commission

38 FR 3389, Feb. 6, 1973, Part 1033; List of Forms, §1003.3 Freight Forwarder Forms, amended by revocation of subheads FF 1 and FF 2, and by addition of new subhead OP-FF-10 Application for a freight forwarder permit under §410 of the Act, effective Feb. 12, 1973.

38 FR 3389, Feb. 6, 1973, Part 1150: Applications for Permits, entire Part 1150 revoked in view of prescription of new application Form OP-FF-10, effective Feb. 12, 1973.

Section 410. (c) [*§1010(c) U.S.C.*] Issuance of permit; carriers excluded; applicant controlled by or with common carrier.—[Unchanged. See vol. 11, p. 9669.]

Notes of Decisions

Volume 12—p. 10525; Volume 13—p. 11159; Volume 14—p.11677; Volume 15—p. 12296; Volume 16—p. 12954; Volume 17—p. 13662; Volume 18—p.14691; Volume 19—p. 15962; Volume 21—p. 17738.

2.Construction and interpretation.—[Vols. 12-19, 21].—Review of legislative background and judicial history of §410(d), as amended, supports the conclusion that the "public interest" criterion in §410(c) is not the equivalent of the "public convenience and necessity" test; rather, it is a somewhat less stringent standard which admits of factors other than that relating to adequacy of existing service. Since the 1957 amendment of §410(d), the Commission is no longer precluded from denying new or additional forwarder authority where the sole objection to a grant of authority is that existing service is able adequately to meet shippers' needs; the Commission may, with one exception, look to see whether such a grant would be supported by proof of a public interest factor of equal or dominant importance.—D.C. Andrews & Co. of Illinois, Inc., Ext.—Baltimore, Md., 326 I.C.C. 743 (151-55).

5. Jurisdiction of Commission.—[Vol. 14].—Operations of defendant Intermountain between points in Hawaii and California found to be those of a freight forwarder as defined by §402(a)(5) and subject to regulation by this Commission. Defendant's claim that its operations are those of a non-vessel operating common carrier subject to the jurisdiction of the Federal Maritime Commission has no basis in fact and does not place it outside this Commission's jurisdiction.—Star Forwarders, Inc. v. Intermountain Fast Frt., 337 I.C.C. 265 (268).

7. Competition.—[Vols. 13-19, 21].—Despite the fact that the "public interest" test admits of other factors, adequacy of existing service is still a vital factor, and frequently of controlling significance. This does not mean that a forwarder applicant must establish the negative conclusion that existing service cannot adequately meet the reasonable transportation needs of the shipping public. This would be an onus virtually impossible of accomplishment. Instead, an applicant for forwarder authority is required to make an initial showing of prima facie need for its proposed service, and it is then incumbent upon protestants to refute this showing by establishing, subject to applicant's rebuttal, their qualifications and willingness to provide the required service.—D.C. Andrews & Co., of Illinois, Inc., Ext.—Baltimore, Md., 326 I.C.C. 743 (755).

Protestant's failure to provide the lower rates required by the shippers, whether or not it does establish an embargo of traffic in fact, at least indicates their disinterest in the export traffic here under consideration.—Id., pp. 757-8.

25. Necessity, demand for service.—[Vols. 12-19, 21].—Although applicant's Chicago office handles foreign shipments arriving via St. Lawrence Seaway and the Great Lakes and destined to midwestern points, during the closed season of navigation on the Great Lakes the bulk of such traffic is received at the port of New York, and because of delays and extra expenses entailed in use of New York port facilities applicant seeks to institute a direct freight forwarding service from Halifax, N.S., Canada, including consolidation of shipments at dockside in Halifax, line-haul by bonded rail car to Chicago, and distribution from Chicago to points in a 5-State destination territory. No comparable forwarder service is available, and, as it is Canadian railroads' practice to handle unconsolidated l.c.l. freight from Halifax to Chicago over circuitous routes, whereas shipments consolidated into carloads are routed over the shortest and most expeditious routes available, the proposed service would be beneficial to supporting shippers, who collectively ship a substantial amount of freight, through more expeditious and economical handling of their traffic.—Alltransport Inc., 325 I.C.C. 183 (184-6).

While the bulk of the traffic involved is destined to Chicago and other Illinois points, the majority of supporting shippers also make shipments directly to points in the other four States, and, as a forwarder is required by Part IV to assume responsibility from origin to destination on all shipments it handles and cannot act as a connecting carrier for movement of traffic beyond points it is authorized to serve, to grant authority to serve only Chicago or Illinois points would confront shippers with two undesirable alternatives: either applicant would be precluded from handling their traffic from Halifax to the other States, or they must arrange to receive their shipments at Chicago and provide for any subsequent movement themselves. Therefore, even though the volume that will move to the other States is small compared to the total tonnage anticipated, there will undoubtedly be such traffic, and, in absence of a forwarder service capable of handling it, applicant should be granted territorial authority to do so.—Id., p. 186.

That the bulk of the traffic moving through Chicago to other points may not generally be sufficient to aggregate t.l. lots is immaterial, because the operations to be conducted from the Chicago break-bulk point constitute only a distribution service. Protestant motor carriers clearly cannot provide a service of the character proposed, and their fears that traffic they may handle for applicant will move at contract rates lower than their published tariff rates are not impressive, particularly since the applicable §409 is merely permissive and does not require protestants to enter into such contract rates with applicant. Granted, insofar as proposed transportation takes place within United States.—Id., p. 186.

Evidence of record shows need for applicants' proposed specialized, and materially different, forwarder services devoted exclusively to movement of export traffic from the Midwest to named Atlantic coast ports at rates based on use of rail export rates, which are substantially lower than rates of existing forwarders for domestic rail or motor shipments. The opposing forwarders failed to show their ability and willingness adequately to provide such export services or to demonstrate that grant of permits sought would adversely affect their operations or services; moreover, regardless of whether or not protestants' failure to provide lower rates on export shipments between considered points establishes an embargo of traffic in fact, it indicates their disinterest in considered export traffic. Authority granted both applicants.—D. C. Andrews & Co. of Illinois, Inc., Ext.—Baltimore, Md., 326 I.C.C. 743 (755-59).

Applicant has failed to establish that its proposed service is consistent with public interest as protestant freight forwarders have proven their service ample between the considered points; shippers now utilize protestants' service without substantive complaint; applicant's proof of sufficient resources is his own self-serving statement; and shippers supporting applicant express a mere preference which is no basis for approving a grant of authority in view of the existing, responsive service. Denied.—Shippers Consolidating, Inc., Freight Forwarder Applic., 329 I.C.C. 161 (164-5).

Record warrants grant of authority to applicant (engaged in forwarder service under the §402(b) "used household goods" exemption) to forward used household goods and unaccompanied baggage between United States points. In view of substantial volume of such traffic applicant has handled under color of right, and additional shipper support for the type of forwarder service proposed, it is evident that sufficient freight will be available to ensure stability of proposed operation. Opposing forwarders deal with carriers who do not provide containerized service of the type applicant conducts and for which need is shown; nor do they hold out the needed single-responsibility service to many foreign points applicant will serve. Opposing motor carriers of household goods provide an entirely different type of service; they do not offer the needed containerized-type service and cannot meet the need for separate movement of the baggage; moreover, where motor carriers cannot provide service of the nature proposed, available motor service merits little weight in consideration of a forwarding proposal.—Routed Thru-Pac, Inc., Freight Forwarder Application, 332 I.C.C. 352 (361-2, 363-4)*.

However, pattern of applicant's past operations with respect to handling used automobiles and the other evidence introduced as to shippers' desire for such proposed service fails to establish any need for movement of used automobiles within the United States. Some customers may require applicant to handle their cars at shipside within the port area, but such operations do not involve an interstate movement subject to Commission regulation; thus, as no need is shown for domestic movement of used automobiles, when moving separately from used household goods, authority requested for such forwarding is not granted. Therefore, in accordance with criteria set forth in 326 ICC 743, grant of authority sufficient to allow applicant to continue to forward used household goods and unaccompanied baggage in independent movements would be consistent with the public interest and the national transportation policy; granted in part.—Id., pp. 362, 363-5.

Evidence establishes that many shippers need a forwarder service capable of handling their shipments in a way to alleviate "wear and tear" in long distance driveway movements. Shippers also need a single transportation agency to undertake transportation of their vehicles from shipping point to ultimate destination. In this regard, it is axiomatic that viable freight forwarder service requires broad operating authority. See 285 ICC 641. Sole protestant has failed to rebut applicant's evidence with showing of material adverse effect to itself or proof of its willingness and ability to perform proposed operations. Applications approved.—Auto Trip USA, Inc., Frt. Forwarder Applic., 337 I.C.C. 570 (579-81).

Commission also approved motor carrier authority sought herein because such authority will enable applicant to facilitate and coordinate its service with its forwarder affiliate to and from assembly and break-bulk points. Need has been shown for such coordinated freight forwarder service and protestant has shown neither willingness nor ability to perform it. However, the grant is restricted against traffic moving on Governmental bills of lading and to automobile dealers as no need has been shown.—Id., p. 581.

Commission approved applications, with certain restrictions, herein inasmuch as applicants have established by substantial evidence, especially by supporting testimony of shipping public, a need for the essence of proposed operations. No adequate forwarder service is now available and applicants' past operations under color of right are demonstrative of broad operations of the kind needed.—Smyth Worldwide Movers, Inc., F. F. Application, 337 I.C.C. 721 (737-9)*.

Commission approved 7 of 9 applications as freight forwarders of used household goods, unaccompanied baggage, and used automobiles inasmuch as, in large measure, the proposed services have been performed for substantial time under color of right; supporting shippers' evidence established a need for freight forwarder service and the inherent advantages of such service; and the absence of adequate forwarder service to satisfy shippers' needs. However, the Commission denied the other 2 applications as the essential character of the shipper's needs shown is limited to transportation of used household goods for which no authority is required because of the §402(b) exemption.—International Sea Van, Inc., Frt. Forwarder Applic., 339 I.C.C. 408 (422-26).

Although applicant and its parent company, a certificated motor carrier of household goods, submitted evidence of substantial past service in transportation of household goods, householder's automobiles, and unaccompanied baggage, record in forwarder application proceeding must be analyzed not in terms of what applicant has done as a motor carrier, but in light of what it proposes to do as a part IV forwarder. In this regard, while applicant failed to justify grant of authority to forward used household goods, used automobiles, and unaccompanied baggage in domestic service, the evidence is sufficient to warrant a grant of authority to forward those commodities when moving in import-export traffic. Granted in part.—Trans-American World Transit, Inc., Frt. Fwd. Applic., 340 I.C.C. 196 (200-1, 203)*.

As was pointed out in 337 ICC 721, Department of Defense (DoD) support is not essential to a grant of authority where, as here, there is adequate shipper support for the grant of domestic authority. Nevertheless, we are aware that DoD is a major shipper with wideranging transportation requirements, which often has traffic moving in the same traffic pattern as overseas traffic, and that this domestic traffic could be offered only to a forwarder holding both domestic and import-export authority. A grant of domestic authority is supported by 23 shipper witnesses in this instance and such grant is approved.—Jet Forwarding, Inc., Freight Forwarding Application, 340 I.C.C. 337 (347-48)*.

Considered in light of basic criteria of §410(c), the evidence of record, coupled with evidence of past operations, established a need for applicant's proposed coordinated intermodal service, restricted to forwarding of import shipments having an immediately prior movement by water in applicant's nonvessel-operating (NVO) service.—CTI—Container Transport Internat., Frt. Forwarder Applic., 341 I.C.C. 169 (193-99).

Commission approved sought authority as evidence of record reveals that no refrigerated forwarder service is shown to be available to meet needs of the supporting shippers.—Honolulu Freight Service Ext.—California, 341 I.C.C. 657 (666)*.

Upon reconsideration, the record, updated as required in prior report, 335 ICC 861, demonstrates a clear need for proposed service and applicant's ability and willingness to properly perform the service. Applicant has made substantial investment to provide service and proposes further addition to its facilities and supporting witnesses (appendix A) demonstrated their desire to deal with applicant who meets their requirements and provides flexibility in scope and directional flow of traffic.—Brinke Freight Forwarder Application, 341 I.C.C. 670 (683)*.

Commission's review of evidence herein persuades us that supporting shippers have a need for containerization of small shipments and single-carrier responsibility at Louisville, Ky., a service not presently available from protestants. Evidence convincingly demonstrates that the three supporting shippers would use proposed service. Application approved.—KYFI, Inc., Freight Forwarder Application, 341 I.C.C. 725 (728-29).

26.—Fitness, generally.—[Vols. 12-19, 21].

—Commission found that criteria set forth in §209(b) governing disposition of motor contract-carrier applications for operating authority found too narrow for application for freight forwarder rights as this contention was previously considered by the entire Commission in two separate cases cited herein and was found without merit.—Shippers Consolidating, Inc., Freight Forwarder Applic., 329 I.C.C. 161 (164).

Commission found that applicant has shown ability to perform proposed service as a substantial portion of the shipping public has expressed a need for applicant's improved transportation methods. The applicant, like other forwarders, relies on transportation facilities of its underlying carriers and is not required to show the extent of financial effort required of such carriers.—New England Forwarding Co., Extension, 335 I.C.C. 58 (73)*.

Application for freight forwarder authority denied as approximately six years have elapsed since the initial hearing in this proceeding and the staleness of record herein convinces us that applicant is not shown to be ready, able, or willing to perform proposed service or that such service is consistent with the public interest and the national transportation policy.—Brinke Freight Forwarder Application, 335 I.C.C. 861 (871).

Applicants' limited transportation of commodities not exempted from Commission regulation under §402(b), even though not done in good faith, does not require denial of applications on the basis of unfitness.—International Sea Van, Inc., Frt. Forwarder Applic., 339 I.C.C. 408 (418).

Authority sought granted in part, on a restricted and limited term basis, since applicant failed to persuasively demonstrate its ability to render the nationwide, nonradial service it sought to institute. In addition, the Commission was unable to conclude that applicant had sufficient funds available for an operation as extensive as that sought. See also, §410(e), n.30.—American Delivery Systems, Inc., Frt. Forwarder Applic., 340 I.C.C. 776 (786,787).

Applicant's past operations were conducted before clearly resolved guidelines as to whether and when activities of a Federal Maritime Commission classified nonvessel-operator (NVO) may be those of a part IV freight forwarder subject to our jurisdiction and were not patently unlawful. Although applicant would have demonstrated good faith had it sought authority from this Commission, there is no basis to find that applicant is not ready, able, or willing properly to conduct proposed operations.—CTI—Container Transport Internat., Frt. Forwarder Applic., 341 I.C.C. 169 (192-3).

Applicant's past operations involving rail transportation of trailers in TOFC Plan III conducted under its broker's license were in fact operations as a freight forwarder. However, it was determined that applicant's operations were conducted under a color of right resulting from a misconstruction of its broker's license in part due to error by the Commission and that applicant had not acted in bad faith and no finding of unfitness is warranted but issuance of sought permit will be conditioned upon cancellation of applicant's broker license.—Brinke Freight Forwarder Application, 341 I.C.C. 670 (682-83)*.

30. Extension of operations.—[Vols. 12-19].—On reconsideration, application for extension of authority to operate containerized service on export and import traffic granted. Proposed service offers many improvements over existing services and no comparable service is offered by protestant freight forwarders as proven by testimony of shipper witnesses. Protestants fail to rebut respondent's prima facie by showing no evidence of ability and willingness to provide such service.—New England Forwarding Co., Inc., Extension, 335 I.C.C. 58 (71-2)*.

35. Duplicate operating rights.—[Vol. 14].—The holding by applicant of both a broker's license and a forwarder's permit, where supporting evidence in broker application described operations very similar to those proposed in the instant forwarder application, would tend to raise difficult interpretive problems in the future and be a source of potential confusion and discrimination among shippers; a request by applicant for concurrent cancellation of his broker license will be a condition to the grant of forwarder authority.—Brinke Freight Forwarder Application, 326 I.C.C. 322 (325-26)*

Section 410. (d) [*§1010(d) U.S.C.*] Competition.—[Unchanged. See vol. 18, p. 14693.]

Section 410 (e) [*§1010(e) U.S.C.*] Terms and conditions; territories, restrictions.—[Unchanged. See vol. 11, p. 9670.]

Notes of Decisions

Volume 12—p. 10527; Volume 13—p. 11160; Volume 14—p. 11679; Volume 15—p. 12298; Volume 16—p.12955; Volume 17—p. 13664; Volume 19—p. 15963; Volume 21—p. 17740.

30. Restrictions.—[Vol. 19].—Commission, prior to issuance of a certificate or permit, may impose any restriction on grants of authority which will serve some statutory or useful purpose. The courts have accorded wide discretionary latitude to the Commission when propriety of restriction imposition is questioned even in absence of substantial evidence. Plant site restrictions are imposed only where the exact plant location is unknown or to protect existing carriers from unwarranted competition. Restrictions agreed to by both applicant and protestants will be accepted only if they are necessary for the public interest and also are consistent with practical and effective transportation regulation.—Brinke Freight Forwarder Application, 335 I.C.C. 861 (868-70).

Proposed operations will not be restricted unless protestant shows that lack of considered restriction will materially and adversely affect them and provided that such restriction is required in the public interest and is consistent with practical and effective transportation regulation.—Id., p. 870.

Commission generally reiterated its conclusions in 46 MCC 147, wherein it was recognized that when vehicles being transported are moved with motive power furnished by one or more of such vehicles, the service is driveway. The driveaway limitation thus defines the type of service which common carriers may provide; i.e., the motive power must come from a vehicle being shipped. Accordingly, rail service, in which the motive power is provided by the carrier, may not be utilized by a motor carrier holding only driveaway authority. Further restriction against transportation of traffic having prior movement by rail or water prohibits participation by applicant in a joint service performed under joint rates in connection with either rail (including plan I or V TOFC service) or water.—Auto Trip USA, Inc., Frt. Forwarder Applic., 337 I.C.C. 570, (577-9).

Commission, applying the criteria stated in 335 ICC 861, restricted authorities approved herein so as to exclude movements between points in the United States and Alaska as no need was shown for such movements. Also, Commission found that with respect to domestic traffic the needs shown were not uniform, and, accordingly, authorities granted were not uniform. No need was shown for a restriction on containerized movements.—Smvth Worldwide Movers, Inc., F. F. Application, 337 I.C.C. 721 (739-45)*.

Due to questions concerning applicant's fitness, the Commission imposed a limitation to a term of 3 years to its grant of authority, in addition to the following conditions: applicant was required to enter in a written contract with each agent it appoints and immediately to file with the Commission a verified copy of each such contract (and of each subsequent change therein); and to file a detailed "Performance Report" with the Commission at the end of each of the first 2 years after receipt of the permit, containing information as specified. The permit will expire at the end of the 3-year term unless, within 3 months of the expiration, applicant files a petition, with copies to be served upon the protestants in this proceeding, accompanied by a summary of the material in its two "Performance Reports". See also, §410(c), n.26.—American Delivery System, Inc., Frt. Forwarder Applic., 340 I.C.C. 776 (788).

Commission rejected imposition of a restriction limiting applicant's authority to "commodities requiring refrigeration". Commission affirmed the principles stated in 106 MCC 1, that such a limitation is not proper for use in any type of operating authority issued by this Commission. The term "refrigeration" is susceptible to many varied meanings and the term "requiring" has consistently presented substantial interpretation problems.—Honolulu Freight Service Ext.—California, 341 I.C.C. 657 (667-68)*.

Section 410. (f) [*§1010(f) U.S.C.*] Suspension, change, revocation, of permits.—[Unchanged. See vol. 11, p. 9670.]

Notes of Decisions

Volume 13—p. 11161; Volume 15—p. 12298; Volume 17—p. 13665; Volume 18—p. 14693; Volume 21—p. 17741.

Section 410. (g) [*§1010(g) U.S.C.*] Transfer of permit or operating rights; employees' interest protected.—[Unchanged. See vol. 11, p. 9671.]

Historical note, vol. 21, p. 17741.

Notes of Decisions

Volume 14—p. 11679; Volume 15—p. 12298; Volume 16—p. 12956; Volume 17—p. 13665; Volume 21—p. 17741.

Section 410. (h), (i) [*§1010(h), (i) U.S.C.*]—[Unchanged. See vol. 11, pp. 9671, 9672.]

Notes of Decisions

§410(i): Volume 14—p. 11680.

20. Abandonment, generally.—[Vol. 14].—Where there is no opposition, there is no indication that petitioner, as a carrier-controlled forwarder, has been or is being used to discourage legitimate and normal competition of other forwarders, and the public interest will be served by consolidation of operations of two commonly controlled forwarders into one, a certificate of abandonment of freight forwarding permit granted.—International Forwarding Co. Abandonment of Permit, 339 I.C.C. 462 (463-64).

Section 411. [*§1011 U.S.C.*] Acquisition of control; injunction; supplemental orders.—[Unchanged. See vol. 11, p. 9672.]

Historical notes, see vol. 12, p. 10527, vol. 13, p. 11161, vol. 14, p. 11680, vol. 15, p. 12299, vol. 16, p. 12956, vol. 17, p. 13666, vol. 21, p. 17742.

Notes of Decisions

Volume 12—p. 10528; Volume 13—p. 11161; Volume 14—p. 11680; Volume 15—p. 12299; Volume 16—p. 12956; Volume 17—p. 13666; Volume 18—p. 14694; Volume 19—p. 15965; Volume 21—p. 17742.

2. Construction and interpretation.—[Vols. 12-19, 21].—Though applicant's majority stockholder is also the majority stockholder of a motor carrier holding temporary authority to transport household goods and the three corporations have interlocking boards of directors, such common control does not preclude grant of a freight forwarder permit in the circumstances presented. Where both a motor carrier and a forwarder are directly controlled by another person so that each carrier constitutes the *alter ego* of that person, §411(g) is not violated notwithstanding the prohibitions in §411(c) which are intended to guard against forwarder control of a motor carrier which would be adverse to latter's interest; also, the two individuals holding minority interest in the motor carrier do not hold any stock in the forwarder so as to constitute a violation of §411(c). Therefore, applicant's present ownership and fact that it is under common control do not bar granting it a permit.—Routed Thru-Pac, Inc., Freight Forwarder Application, 332 I.C.C. 352 (369-70)*.

Intervenors' arguments that §§411(c) and (g) are inconsistent with each other and that Congress' intent was to preclude control of freight forwarders by motor carriers is not well taken. These statutory prohibitions are intended only to guard against freight forwarder control of a motor carrier which would be adverse to latter's interest. The affiliation with or subsidiary status to a regulated motor common carrier is not fatal to freight forwarder applications herein.—International Sea Van, Inc., Frt. Forwarder Applic., 339 I.C.C. 408 (414-15).

Although no operations are being conducted under vendee's majority stockholder's outstanding permit as a freight forwarder, and the proposed transaction involves purchase by vendee, a motor carrier subject to Part II, of operating rights of another motor carrier, the proposal would result in acquisition of control of vendors' operations by a forwarder and may not lawfully be accomplished under the exception to the prohibition of §411(a)(1).—Glendenning Motorways, Inc.—Purchase—Moland Bros. Trucking, 93 M.C.C. 194 (196, 199).

Since applicant and Republic Carloading (a freight forwarder) are separate entities controlled by yet a third entity, RIC, and RIC controlled the motor carrier (applicant) prior to obtaining control of the forwarder, the common control is permissible pursuant to §411(g) provisions.—Sullivan Lines, Inc., Extension—Far West, 118 M.C.C. 801 (811-12).

Section 412. [*§1012 U.S.C.*] Accounts, records and reports.—[Unchanged. See vol. 11, p. 9674, vol. 15, p. 12300.]

Amendments, see footnotes, vol. 15, p. 12300; historical notes, see vol. 12, p. 10330, vol. 13, p. 11032, vol. 14, 11543, vol. 21, p. 17742.

Notes of Decisions

Volume 17—p. 13666.

Regulations of the Commission

34 FR 3568, Feb. 27, 1969: Record Retention Guide, XXIV Interstate Commerce Commission [Revised] 1.11 Freight forwarders, 49 CFR Part 1228.

35 FR 3620, Feb. 21, 1970: Record Retention Guide, XXIV Interstate Commerce Commission; 1.11 Freight forwarders, 49 CFR Part 1228.

36 FR 3772, Feb. 26, 1971: Record Retention Guide, XXIV Interstate Commerce Commission; 1.11 Freight forwarders, 49 CFR Part 1228.

37 FR 4671, March 3, 1972: Record Retention Guide, XXX Interstate Commerce Commission; 1.11 Freight forwarders, 49 CFR Part 1228.

37 FR 20695, Oct. 3, 1972, Part 1210: Freight Forwarders, accounting regulations, insofar as they apply to the investment tax credit, amended to bring them into compliance with the Revenue Act of 1971 (Pub. Law 92-178), effective on publication in the Federal Register.

37 FR 25919, Dec. 6, 1972, Part 1210: Freight Forwarders, accounting regulations. Order of Sept. 12, 1972 (37 FR 20695) amending regulations to comply with Revenue Act of 1971, corrected, effective on date of order.

38 FR 1870, Jan. 18, 1973: Record Retention Guide, XXX Interstate Commerce Commission; 1.11 Freight forwarders. 49 CFR Part 1228.

Section 413. [*§1013 U.S.C.*]. Receipts or bills of lading; delivery; application of §20(11), (12).—[Unchanged. See vol. 11, p. 9676.]

Notes of Decisions

Volume 12—p. 10528; Volume 13—p. 11162; Volume 14—p. 11681; Volume 15—p. 12301; Volume 16—p. 12957; Column 18—p. 14694; Volume 21—p. 17743.

10. Issuance of bills of lading.—[Vols. 13, 14, 16, 18, 21].—See International Forwarding Co. v. Bison Freightways, Inc., at §219, n. 33.

115. Actions to enforce liability; in general.—[Vols. 14, 15, 21].—In shipper's suit to recover for damages which occurred during rail piggyback movement of its shipment of electric fans and stands, caused by water leaking through plastic-lined canvas top of trailer furnished by defendant forwarder when a hard-top trailer was not available, record does not support defendant's claim that, when shipper accepted and loaded the trailer and let the shipment move under straight bill of lading which contained a "shippers load and count" notation, its liability as a forwarder was thereby modified. Evidence shows the shipment left shipper's loading platform in good condition and arrived at consignee's warehouse in damaged condition; moreover, fact that bill of lading contained "shippers load and count" notation did not modify defendant's liability because its driver assisted in loading the shipment and receipted for it and, also, because its manager personally inserted the plastic lining after assuring plaintiff that shipment would arrive in good condition. Since all damage to the cargo is attributable to defendant, plaintiff is entitled to recover damages in amount of $7,129.47.—Federated Department Stores, Inc. v. Brinke, 316 F. Supp. 1402 (1405).

Regulations of the Commission

37 FR 4257, March 1, 1972, Part 1005; Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, new Part 1005, §§1005.1-1005.6, added to become effective April 20, 1972.

37 FR 9027, May 4, 1972, Part 1005: Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, effective date of prescribed regulations postponed until July 1, 1972, effective on date of order.

37 FR 20943, Oct. 5, 1972, Part 1005: Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, §§1005.3(b) and 1005.4(c) modified, effective Oct. 16, 1972.

37 FR 23908, Nov. 10, 1972, Part 1005: Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, second paragraph of §1005.3 and §1005.4(c) revised, effective Oct. 16, 1972.

39 FR 11891, April 1, 1974, Part 1003: List of Forms, Regulations promulgated for Freight Forwarder Liability Forms, effective July 1, 1974.

Section 414. [*§1014 U.S.C.*]. Collection of rates and charges.—[Unchanged. See vol. 11, p. 9677.]

Historical Note

By provision of §108 of the Truth in Lending Act, Public Law 90-321, 82 Stat. 146, responsibility for administrative enforcement of that act is assigned to the Commission with respect to any common carrier which it regulates and, for the purpose of enforcing compliance therewith, the Commission may exercise any other authority conferred on it by law. Also, while the Board of Governors of the Federal Reserve System is directed to prescribe regulations to carry out purposes of the Truth in Lending Act (12 CFR Part 226, 34 FR 2002, Feb. 11, 1969), the statute specifically provides that such Board authority does not impair the authority of any other agency responsible for administrative enforcement to make rules respecting its own enforcement and compliance procedures.

Notes of Decisions

Volume 12—p. 10528; Volume 13—p. 11163.

Regulations of the Commission

37 FR 5304, March 14, 1972, Part 1325: Extension of Credit to Candidates for Federal Office or Their Representatives, in implementation of the Federal Election Campaign Act of 1971 (Public Law 92-225), new Part 1325, as set forth, added effective Mav 5. 1972 unless modified or amended by further order of the Commission.

37 FR 10446, May 23, 1972, Part 1325: Extension of Credit to Candidates for Federal Office or Their Representatives. Credit regulations set forth in notice of proposed rule making and order (37 FR 5304) prescribed to become effective May 5, 1972.

Section 415. [*§1015 U.S.C.*] Allowances to shippers for transportation service.—[Unchanged. See vol. 11. p. 9677.]

Notes of Decisions

Volume 12—p. 10529; Volume 15—p. 12302; Volume 19—p. 15966; Volume 21—p. 17744.

Section 416. (a)—(d) [*§1016(a)—(d) U.S.C.*]—[Unchanged. See vol. 11, pp. 9677, 9678.]

Section 417. [*§1017 U.S.C.*] Enforcement and procedure.—(a) The provisions of sections 12 and 17 of part I of this Act, together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions and of the Compulsory Testimony Act (27 Stat. 443) shall apply with full force and effect in the administration and enforcement of this part. (May 16, 1942, c. 318, §417, 56 Stat. 297; Oct. 15, 1970, Public Law 91-452, §243(c), 84 Stat. 931.)

Section 417. (b)—(d) [*§1017(b)-(d) U.S.C.*]—[Unchanged. See vol. 11, pp. 9679, 9680.]

Notes of Decisions

Volume 15—p. 12302; Volume 16—p. 12957.

Section 418. [*§1018 U.S.C.*] Carriers, instrumentalities, to be utilized.—[Unchanged. See vol. 11, p. 9680, vol. 19, p. 15967].

Notes of Decisions

Volume 13—p. 11163; Volume 14—p. 11682; Volume 18—p. 14695; Volume 19—p. 15967; Volume 21—p. 17746.

Section 419. [*§1019 U.S.C.*] Liability for past acts and omissions.—[Unchanged. See vol. 11, p. 9681.]

Notes of Decisions

Volume 12—p. 10529; Volume 13—p. 11164; Volume 17—p. 13667.

Section 420. [*§1020 U.S.C.*] Special powers during time of war or other emergency.—[Unchanged. See vol. 11, p. 9681.]

Historical note, vol. 16, p. 12615.

Regulations of the Commission

36 FR 19721, Oct. 9, 1971: Service Order 1079, C. S.Greene and Co., Inc., rerouting or diversion of traffic because of longshoremen's strike, freight forwarder authorized to route export traffic via non-authorized Canadian and U.S. ports, effective day after date of order.

36 FR 20467, Oct. 22, 1971: Service Order 1080, New England Forwarding Co., Inc., rerouting or diversion of traffic because of longshoremen's strike, freight forwarder authorized to route export traffic via Canadian ports, effective day after date of order.

36 FR 21239, Nov. 4, 1971: Service Order 1080, Amdt. 1, New England Forwarding Co., Inc., rerouting or diversion of traffic, extends expiration date of S. O. 1080, effective on date of order.

36 FR 21015, Nov. 2, 1971: Service Order 1082, Star Forwarders, Inc., rerouting or diversion of traffic because of longshoremen's strike, freight forwarder authorized to route export traffic via Canadian and other ports, effective day after date of order.

36 FR 20808, Oct. 29, 1971: Service Order 1079, Amdt.1, C. S. Greene & Co., Inc., rerouting or diversion of traffic, extends expiration date of S. O. 1079, effective on date of order.

36 FR 22340, Nov. 24, 1971: Service Order 1079; Amdt. 2, C. S. Green & Co., Inc., rerouting or diversion of traffic, extends expiration date of S.O. 1079, effective on date of order.

36 FR 22340, Nov. 24, 1971: Service Order 1080; Amdt. 2, New England Forwarding Co., Inc., rerouting or diversion of traffic. extends expiration date of S.O. 1080, effective on date of S.O. 1080, effective on date of order.

36 FR 2310/, Dec. 3, 1971: Service Order 1082, Amdt. 1, Star Forwarders, Inc., authorized to route traffic through certain Canadian ports, extends expiration date of Service Order 1082, effective on date of order.

36 FR 23422, Dec. 9, 1971: Service Order No. 1079-A, C. S. Greene & Co., Inc., authorized to route traffic through certain Canadian ports, vacates and sets aside Service Order 1079, effective on date of order.

36 FR 23423, Dec. 9, 1971: Service Order No. 1080-A, New England Forwarding Co., Inc., authorized to route traffic through certain Canadian ports, vacates and sets aside Service Order 1080, effective on date of order.

36 FR 23423, Dec. 9, 1971: Service Order No. 1082-A, Star Forwarders, Inc., authorized to route traffic through certain Canadian ports, vacates and sets aside Service Order 1082, effective on date of order.

Sections 421, 422. [*§§1021, 1022 U.S.C.*]—[Unchanged. See vol. 11, pp. 9681-9684.]

Notes of Decisions

§421(g): Volume 18—p. 14695.

PART V

INTERSTATE COMMERCE ACT; LOAN GUARANTIES

Chapter 19, Title 49, U.S. Code

Section 501. [*§1231 U.S.C.*] Purpose.—[Unchanged. See vol. 18, p. 14696.]

Historical note, vol. 21, p. 17747.

Notes of Decisions

Volume 19—p. 15968; Volume 21—p. 17747.

Section 502. [*§1232 U.S.C.*] Definitions.—[Unchanged. See vol. 18, p. 14696.]

Section 503. [*§1233 U.S.C.*] Loan guaranties.—[Unchanged. See vol. 18, p. 14696.]

Section 504. [*§1234 U.S.C.*] Limitations.—[Unchanged except that "twenty-five years" was substituted for "fifteen years" in subsection (a)(3) thereof by act of July 13, 1972, Public Law 92-348, §5, 86 Stat. 463. See vol. 18, p. 14697.]

Notes of Decisions

Volume 18—p. 14698; Volume 19—p. 15970; Volume 21—p. 17748.

Section 505. [*§1235 U.S.C.*] Modifications.—The Commission may consent to the modification of the provisions as to rate of interest, time of payment of interest or principal, security, if any, or other terms and conditions of any guaranty which it shall have entered into pursuant to this part, or the renewal or extension of any such guaranty for any period of time not exceeding twenty-five years from the date of the original guaranty, whenever the Commission shall determine it to be equitable to do so. (Aug. 12, 1958, Public Law 85-625, §2, 72 Stat. 569; July 13, 1972, Public Law 92-348, §5, 86 Stat. 463.)

Section 506. [*§1236 U.S.C.*] Payment of guaranties; action to recover payments made.—[Unchanged. See vol. 18, p. 14697.]

Section 507. [*§1237 U.S.C.*] Guaranty fees.—[Unchanged. See vol. 18, p. 14697.]

Notes of Decisions

Volume 19—p. 15976.

Section 508. [*§1238 U.S.C.*] Assistance of Departments or other agencies.—[Unchanged. See vol. 18, p. 14698.]

Section 509. [*§1239 U.S.C.*] Administrative expenses.—[Unchanged. See vol. 18, p. 14698.]

Section 510. [*§1239a U.S.C.*] Audit by Comptroller General.—(a) In any case in which—

(1) there is outstanding any guaranty by the Commission made under this part; or

(2) the Secretary of the Treasury is required to make any payment as a consequence of any guaranty by the Commission made under this part;

the financial transactions of the common carrier by railroad subject to this Act with respect to which such guaranty was made may be audited by the Comptroler General of the United States under such rules and regulations as he may prescribe. The representatives of the Comptroller General shall have access to all books, accounts, records, reports, files, and other papers, things, or property belonging to or in use by such common carrier by railroad pertaining to its financial transactions and necessary to facilitate the audit, and such representatives shall be afforded full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians.

(b) A report of each such audit shall be made by the Comptroller General to the Congress. The report to the Congress shall contain such comments and information as the Comptroller General may deem necessary to inform the Congress of the financial operations and condition of the common carrier by railroad involved in such audit, together with such recommendations with respect thereto as he may deem advisable. The report shall also show specifically any program, expenditure, or other financial transaction or undertaking observed in the course of the audit, which, in the opinion of the Comptroller General, adversely affects the financial operations or condition of the common carrier by railroad involved in such audit or lessens the protection afforded the United States at the time the original guaranty was made. A copy of each report shall be furnished to the Commission at the time it is submitted to the Congress. (July 13, 1972, Public Law 92-348, §6, 86 Stat. 463.)

Section 511. [*§1240 U.S.C.*] Termination of authority.—[Unchanged except that former §510 was renumbered as §511 by act of July 13, 1972, Public Law 92-348, §6, 86 Stat. 463. See vol. 18, p. 14698, vol. 19, p. 15977.]

SUPPLEMENTAL LEGISLATION

Chapter 2.—ELKINS ACT

Section 41.(1)-(3). Liability, offenses, penalties, jurisdiction; Acts of agents, departures from published rates; receiving rebates.—[Unchanged. See vol. 4, pp. 2748, 2788, 2791.]

Historical note, see vol. 4, p. 2749, vol. 18, p. 14699.

Notes of Decisions

Volume 4—pp. 2751-2788; Volume 7—p. 5891; Volume 10—p. 8257; Volume 11—p. 9686; Volume 12—p. 10530; Volume 13—p. 11164; Volume 14—p. 11683; Volume 15—p. 12303; Volume 16—p. 12958; Volume 17—p. 13668; Volume 18—p. 14699; Volume 19—p. 15977; Volume 21—p. 17749.

Rebates, Concessions, and Discriminations

71. Discrimination; defined.—[Vols. 4, 21].—Proposed tranpsportation of cash letters by a Transcontinental Bus System subsidiary will not violate the Elkins Act merely because it will permit the Transcontinental complex to offer transportation at three different rates, i.e. the passenger carrier's rate, applicant's, and the U.S. mail (which the busline transports under contract). Maintenance of different levels of rates by affiliated companies is not unlawful per se, absent evidence of discriminatory tactics detrimental to the shipping public (318 ICC 157); moreover, service provided by the affiliated carriers under each rate level is so materially different, it cannot be said that one type duplicates either of the others.—Continental Dispatch, Inc., 95 M.C.C. 483 (488).

Departure from Schedules; Devices

87. "Knowingly" as an element of the offense.—(Vols. 4, 10, 17].—Requirement that a shipper must knowingly receive a concession from carrier in order to violate the Elkins Act does not mean that the parties must have intended to violate the act. Thus, when record showed that railroad-vendor had made an interest-free loan to shipper, in connection with latter's acquisition of a construction site, evidence supported district court decision that defendant shipper had knowingly received a concession from carrier in the form of an interest-free, purchase money mortgage loan on construction site so as to violate statute prohibiting a rebate from carrier. Judgment in favor of the government, in civil action for monetary penalties, affirmed.—United States v. Food Fair Stores, Inc., 417 F. 2d 62 (64-5).

98.—Bonus for locating plant adjacent to carrier's line.—[Vols. 4, 10, 11, 18].—The Elkins Act prohibits a carrier from contributing to cost of a construction site for shipper as an inducement for construction of shipper facilities near carrier's right of way; and carrier's assumption of financing costs (by making shipper an interest-free, purchase-money loan) in shipper's acquisition of a construction site is a type of contribution which the statute prohibits. Moreover, in government's civil action to recover monetary penalties for shipper's alleged receipt of a rebate from carrier, the fact that railroad-vendor realized a profit on sale of the land to defendant shipper did not preclude finding that shipper violated the statute by receiving a rebate from carrier in the form of an interest-free, purchase money mortgage loan. District court's judgement in favor of the government affirmed.—United States v. Food Fair Stores, Inc., 417 F. 2d 62 (64-5).

101.—Loan to shipper.—[Vols. 4, 10].—On appeal from district court decision, in government's civil action for penalties, that defendant shipper had violated the Elkins Act by knowingly receiving interest-free loan (for purchase of site for shipper facility) as rebate from carrier, the carrier's assumption of such financing costs is the type of contributing to costs of a construction site for shipper which the act prohibits; and fact that carrier-vendor realized a profit on sale of the land to shipper did not prevent finding that shipper receivied a rebate from carrier. Record showed that carrier was not compensated for shipper's delay in paying balance of purchase price for the construction site; also, requirement that shipper must knowingly receive a concession from carrier does not mean that the parties must have intended to violate the act; thus, evidence supported trial court's finding that shipper had knowingly received a concession from carrier, in form of interest-free, purchase money mortgage loan on construction site, and thereby had violated the act prohibiting rebate from carrier. Judgment in favor of the government, affirmed.—United States v. Food Fair Stores, Inc., 417 F. 2d 62 (64-5).

Section 42. Parties included in proceedings to enforce law.—[Unchanged. See vol. 4, p. 2792.]

Historical note, see vol. 4, p. 2792.

Notes of Decisions

Volume 4—p. 2792; Volume 7—p. 5896; Volume 11—p. 9688; Volume 14—p. 11683; Volume 19—p. 15979; Volume 21—p. 17753.

1. Parties interested in the traffic.—[Vols. 4, 7, 11, 14, 19, 21].—See also Uxbridge Motor Lines, Inc.—Investigation of Operations, §212(a), n. 35.

Since respondent shippers, except two, have been shown to have participated in, and, as stated in §2 of the Elkins Act "are interested in or affected by" the operations of respondent carriers, here found unlawful, they are ordered to cease and desist from participating with respondent carriers in such operation in the future.—Empire Truck U-Drive-It, Inc., Investigation, 96 M.C.C. 29 (45).

Section 43. Proceedings in equity to enforce tariffs, etc.; district attorneys; damages; witnesses; precedence.—[Unchanged except as amended by the act of Dec. 21, 1974, Public Law 93-528, 88 Stat. 1709.] Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the district court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or state, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several United States attorneys, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by sections 41, 42, or 43 of this title shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February 4, 1887, entitled An Act to regulate commerce and the Acts amendatory thereof. And in proceedings under sections 41, 42, or 43 of this title and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction.

Historical note, see vol. 4, p. 2794.

Notes of Decisions

Volume 4—p. 2795; Volume 19—p. 15980; Volume 21—p. 17755.

EXPEDITING ACT

Section 44. [*§44 U.S.C.*] Expedition of actions by United States involving general public importance. [Sec. 1 of the Act of Feb. 11, 1903 (32 Stat. 823) was amended by P. L. 93-528, 88 Stat. 1708 to read as follows:] In any civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, wherein the United States is plaintiff and equitable relief is sought, the Attorney General may file with the court, prior to the entry of final judgment, a certificate that, in his opinion, the case is of a general public importance. Upon filing of such certificate, it shall be the duty of the judge designated to hear and determine the case, or the chief judge of the district court if no judge has as yet been designated, to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. (See vol. 11, p. 9688, vol. 13, p. 11165; and vol. 15, p. 12304.)

Section 45. [*§45 U.S.C.*] Appeals to Supreme Court. [Sec. 2 of the Act of Feb. 11, 1903 (32 Stat. 823) was amended by P. L. 93-528, 88 Stat.1709 to read as follows:] (a) Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of title 28 of the United States Code but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of title 28 of the United States Code.

(b) An appeal from a final judgment pursuant to subsection (a) shall lie directly to the Supreme Court if, upon application of a party filed within fifteen days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such order shall be filed within thirty days after the filing of a notice of appeal. When such an order is filed. the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a). (See vol. 11, p. 9688, vol. 13, p. 11165; and vol. 15, p. 12304).

Notes of Decisions

§44: Volume 4—p. 2802; §45: Volume 4—p. 2804; Volume 19—p. 15980; Volume 21—p. 17756.

Historical Note

Paragraphs (a) and (b) [49 U.S.C. §45], as amended, shall not apply to an action in which a notice of appeal to the Supreme Court has been filed on or before the fifteenth day following the date of enactment of P. L. 93-528, December 21, 1974. Appeal in any such action shall be taken pursuant to the provisions of §2 of the Act of February 11, 1903 (32 Stat. 823), as amended (15 U.S.C. 20; 49 U.S.C. 45) which were in effect on the day preceeding the date of enactment of P. L. 93-528.

COMPULSORY TESTIMONY—IMMUNITY OF WITNESSES

Section[1] 46. Self-incriminating testimony; perjury; refusal to testify.—Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment. (Feb. 11, 1893, ch. 83, 27 Stat. 443; Oct. 15, 1970, Public Law 91-452, title II, §245, 84 Stat. 931.)

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[1] By §245 of the act of Oct. 15, 1970, the first paragraph of this section was repealed.

Cross Reference

Pursuant to §260 of Public Law 91-452, Oct. 15, 1970, 84 Stat. 931-2, the provisions of Part V—Immunity of Witnesses of Title 18, United States Code, added by title II of that act, and the amendments and repeals made thereby, take effect on the sixtieth day following enactment; also, no amendment to or repeal of any law under title II affects any immunity to which any individual is entitled under such law by reason of any testimony or other information given before that day.

Section 47, 48. Repealed by act of Oct. 15, 1970, Public Law 91-452, title II, §§209, 210, 84 Stat. 929.

Historical note, see vol. 4, p. 2806.

Notes of Decisions

§46: Volume 4—p. 2807; Volume 10—p. 8263; Volume 12—p. 10531; Volume 14—p. 11684; Volume 15—p. 12305; Volume 18—p. 14700.
§47: Volume 4—p. 2816; Volume 12—p. 10532; Volume 21—p. 17756.
§48: Volume 4—p. 2820; Volume 13—p. 11166; Volume 14—11685.

MANN-ELKINS ACT

Section 50. Agent in Washington for service; service in default of designation.—[Unchanged. See vol. 4, p. 2828.]

Historical note, see vol. 4, p. 2828.

Notes of Decisions

Volume 7—p. 5899; Volume 11—p. 9689; Volume 12—p. 10532; Volume 13—p. 11166; Volume 14—p. 11685; Volume 15—p. 12305; Volume 16—p. 12958; Volume 17—p. 13669; Volume 18—p. 14700; Volume 21—p. 17757.

PANAMA CANAL ACT

Section 51. Proceedings relating to rail and water routes; orders.—[Unchanged. See vol. 11, p. 9690.]

Amendments, see footnotes, vol. 11, p. 9690.

SUNDRY CIVIL APPROPRIATIONS ACT; CINCINNATI SOUTHERN RY. TRUSTEES ACT

Sections 52, 53.—[Unchanged. See vol. 4, p. 2830, 2831.]

D.C. TRANSIT SYSTEM, INC.

Section 1. (a).—[Unchanged. See vol. 17, p. 13669.]

HOCH-SMITH RESOLUTION

Section 55. Policy in making rate adjustments; investigation of rates authorized.—[Unchanged. See vol. 4, p. 2833.]

Historical notes, see vol. 4, p. 2834, vol. 10, p. 8267.

Notes of Decisions

Volume 4—p. 2835; Volume 7—p. 5901; Volume 10—p. 8267; Volume 11—p. 9690; Volume 13—p. 11167; Volume 15—p. 12306; Volume 16—p. 12959; Volume 17—p. 13669; Volume 18—p. 14701; Volume 19—p. 15982; Volume 21—p. 17758.

RATES ON GOVERNMENT TRAFFIC

GOVERNMENT TO PAY FULL RATES

Section 65. [*§321 as enacted*] Government traffic; rates.—[Unchanged. See vol. 13, p. 11167, vol. 11, par. (b), p. 9691.]

Amendments, see footnotes, vol. 13, p. 11168; historical notes, vol. 11, p. 9691, vol. 12, p. 10533.

Notes of Decisions

Volume 11—p. 9692; Volume 12—p. 10533; Volume 13—p. 11168; Volume 14—p. 11686; Volume 15—p. 12307; Volume 16—p. 12960; Volume 18—p. 14701; Volume 19—p. 15983; Volume 21—p. 17759.

Section 65a. [*§3 as enacted.*] Readjustment of rates, fares, and charges to shippers.—[Unchanged. See vol. 13, p. 11168, vol. 11, p. 9692.]

Amendments, see footnotes, vol. 13, p. 11168.

Notes of Decisions

Volume 14—p. 11688.

Section 66. [*§322 as enacted.*] Government traffic; payment for transportation; deduction of overpayments.—(a) Payment for transportation of persons or property for or on behalf of the United States by any carrier or forwarder shall be made upon presentation of bills therefor prior to audit by the General Services Administration, or his designee. The right is reserved to the United States Government to deduct the amount of any overcharge by any carrier or forwarder from any amount subsequently found to be due such carrier or forwarder. This does not affect the authority of the General Accounting Office to make audits in accordance with the Budget and Accounting Act, 1921, as amended (31 U.S.C. 41), and the Accounting and Auditing Act of 1950, as amended (31 U.S.C. 65). The term 'overcharges' shall be deemed to mean charges for transportation services in excess of those applicable thereto under tariffs lawfully on file with the Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Maritime Commission, and any State transportation regulatory agency, and charges in excess of those applicable thereto under rates, fares, and charges established pursuant to section 22 of the Interstate Commerce Act, as amended, or other equivalent contract, arrangement, or exemption from regulation: *Provided, however*, That such deductions shall be made within three years (not including any time of war) from the time of payment of bills: *Provided further*, That every claim for charges for transportation within the purview of this section shall be forever barred unless such claim shall be received in the General Services Administration, or by his designee within three years (not including any time of war) from the date of (1) accrual of the cause of action thereon, or (2) payment of charges for the transportation involved, or (3) subsequent refund for overpayment of such charges, or (4) deduction made pursuant to this section, whichever is later.

(b) Nothing in subsection (a) hereof shall be deemed to prevent any carrier of forwarder from requesting the Comptroller General to review the action on his claim by the General Services Administration, or his designee. Such request shall be forever barred unless received in the General Accounting Office within six months (not including in time of war) from the date the action was taken or within the periods of limitation specified in the second proviso in subsection (a) of this section, whichever is later.

(c) Pursuant to regulations prescribed by the head of a Government agency or his designee and in conformity with such standards as shall be promulgated jointly by the Secretary of the Treasury and the Comptroller General of the United States, bills for passenger or freight transportation services to be furnished the United States by any carrier or forwarder may be paid in advance of completion of the services, without regard to section 3648 of the Revised Statutes, as amended (31 U.S.C. 529): *Provided*, That such carrier or forwarder has issued the usual ticket, receipt, bill of lading, or equivalent document covering the service involved, subject to later recovery by deduction or otherwise of any payments made for any services not received as ordered by the United States.

(d) The term "head of a Government agency" means any individual or group of individuals having final decisionmaking responsibility for any department, commission, board, service, Government corporation, instrumentality, or other establishment or body in the United States Government. (Sept. 18, 1940, c. 722, §322, 54 Stat. 955; Aug. 26, 1958, Public Law 85-762, 72 Stat. 860, 861; Oct. 25, 1972, Public Law 92-550, 86 Stat. 1163, 1164; Jan. 2, 1975, Public Law 93-604, 88 Stat. 1960.)

Notes of Decisions

Volume 18—p. 14703; Volume 19—p. 15984; Volume 21—p. 17759.

1. In general.—[Vols. 18, 19, 21].—See also T.I.M.E. Freight, Inc. v. United States, §204a, n. 10.

In railroad's action to recover amount of overcharges claimed by the Government, and deducted after post-audit from other bills due plaintiff, on shipments of generator sets mounted on a trailer or a wheel base, the issue as to which tariff is applicable to the shipments, in turn, raises the question of identity or nature of the articles. Government bills of lading describe articles shipped as generator sets mounted on trailers of some sort; pertinent government technical manuals describe the shipments as various types of generator sets mounted on trailers of various types; and primary function of the sets is to provide a mobile source of electrical power where such power is needed but otherwise unavailable. On that basis, shipments in question are found to be, in reality, trailer-mounted generator sets.—Southern Pac. Transp. Co. v. United States, 454 F. 2d 740 (741, 744-5).

Having determined identity of the articles shipped, the proper tariff classification must be ascertained in order to decide on the applicable rate. Since classification Item 34760, a catchall NOIBN item, refers to generator sets but makes no reference to such sets being either mounted or unmounted, whereas Item 73720 expressly refers to generator sets mounted on trailers and is not an NOIBN item, latter item is the more specific and more closely fits the shipments in question. Therefore, applying the classification analogy rule, plaintiff's charges for considered shipments should be computed pursuant to Item 73720; railroad found entitled to recover amount of alleged overcharges on all items at issue.—Id., pp. 743-4, 745-6.

While the statute authorizes deduction of overcharges by any carrier from other amounts due that carrier, an overcharge on government shipments occurs only when carrier submits a bill for services that exceeds the amount properly due it; and as defendant admits, that is quite different from a claim for damages. But contrary to plaintiff's argument, the IC Act did not extinguish the Government's common law right of offset. Thus, in railroad's suit for transportation charges, the Court of Claims can decide the issue of the lawfulness of government deduction of amount set off against moneys owing to plaintiff and claimed as a charge for unauthorized use of government-owned flatcar that was delivered to carrier under straight bill of lading for shipment to an army depot; also, such inherently sound procedure contributes to efficient settling of opposing claims. In instant case, defendant is entitled to payment for reasonable value of the use of its flatcar or similar cars; and since the proper measure of damages is in dispute, case is referred to a trial commissioner to determine the amount of such damages.—Burlington Northern, Inc. v. United States, 462 F. 2d 526 (528-30).

Chapter 5—INLAND WATERWAYS TRANSPORTATION

Section 141-3, 151-2, 153, 154-7.—[Unchanged, except §141, 151-157.—Repealed. Pub. Law 88-67, July 19, 1963, 77 Stat. 81. See vol. 4, pp. 2948-2961; vol. 7, p. 5947; vol. 10, p. 8278; vol. 11, p. 9695; vol. 19, p. 15985.]

Historical Notes, see vol. 13, p. 11170, vol. 16, p. 12961, vol. 17, p. 13671.

Notes of Decisions

§153: Volume 4—p. 2957; Volume 7—p. 5948; Volume 10—p. 8279.

Section 500. [§142 U.S.C.] Development of water transportation; duties of Secretary of Commerce.—[Unchanged. See vol. 4, p. 2936, vol. 14, p. 11689.]

For review of history, see 88 F. Supp. 982.

Notes of Decisions

Volume 4—p. 2937; Volume 7—p. 5933; Volume 10—p. 8276; Volume 11—p. 9695; Volume 12—p. 10535; Volume 13—p. 11171; Volume 17—p. 13671.

MEDALS OF HONOR ACT

Title 49 Chapter 17

Historical Note

The functions, powers, and duties assigned to the Commission by this Act, formerly codified at 45 U.S.C. §§44-46, have been transferred to the Secretary of Transportation, by P.L. 89-670, the Department of Transportation Act [49 U.S.C. §1651] dated Oct. 14, 1966.

Section 1201. Awards for acts of heroism involving railroads or motor vehicles.—[See vol. 18, p. 14772.]

Historical notes, see vol. 4, p. 3315, vol. 11, p. 9775, vol. 12, p. 10589, vol. 13, p. 11229, vol. 14, p. 11751, vol. 15, p. 12371, vol. 16, p. 13015, vol. 17, p. 13736, vol. 18, p. 14773, vol. 21, p. 17818.

Section 1202. Rosettes and ribbons.—[See vol. 4, p. 3318.]

Section 1203. Appropriation.—[See vol. 21, p. 17918.]

Chapter 20.—FEDERAL AVIATION ACT OF 1958

Section 1003 (a)-(e) [§1483 U.S.C.] Joint Boards; through service; jurisdiction.—[Unchanged. See vol. 10, p. 8285, vol. 14, p. 11689.]

Historical note, vol. 10, p. 8286.

DEPARTMENT OF TRANSPORTATION ACT

49 U.S.C. Chapter 23

Sec. 2. *[49 U.S.C. §1651.]* (a) The Congress hereby declares that the general welfare, the economic growth and stability of the Nation and its security require the development of national transportation policies and programs conducive to the provision of fast, safe, efficient, and convenient transportation at the lowest cost consistent therewith and with other national objectives, including the efficient utilization and conservation of the Nation's resources.

(b)(1) The Congress therefore finds that the establishment of a Department of Transportation is necessary in the public interest and to assure the coordinated, effective administration of the transportation programs of the Federal Government; to facilitate the development and improvement of coordinated transportation service, to be provided by private enterprise to the maximum extent feasible; to encourage cooperation of Federal, State, and local governments, carriers, labor, and other interested parties toward the achievement of national transportation objectives; to stimulate technological advances in transportation; to provide general leadership in the identification and solution of transportation problems; and to develop and recommend to the President and the Congress for approval national transportation policies and programs to accomplish these objectives with full and appropriate consideration of the needs of the public, users, carriers, industry, labor, and the national defense.

(2) It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

ESTABLISHMENT OF DEPARTMENT

Sec. 3. *[49 U.S.C. §1652.]* (a) There is hereby established at the seat of government an executive department to be known as the Department of Transportation. (hereafter referred to in this Act as the "Department"). There shall be at the head of the Department a Secretary of Transportation (hereafter referred to in this Act as the "Secretary" who shall be appointed by the President, by and with the advice and consent of the Senate.

(b) There shall be in the Department a Deputy Secretary, who shall be appointed by the President, by and with the advice and consent of the Senate. The Deputy Secretary (or, during the absence or disability of the

Deputy Secretary, or in the event of a vacancy in the office of Deputy Secretary, an Assistant Secretary or the General Counsel, determined according to such order as the Secretary shall prescribe) shall act for, and exercise the powers of the Secretary, during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary. The Deputy secretary shall perform such functions, powers, and duties as the Secretary shall prescribe from time to time.

(c) There shall be in the Department four Assistant Secretaries and a General Counsel, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall perform such functions, powers, and duties as the Secretary shall prescribe from time to time.

(d) There shall be in the Department an Assistant Secretary for Administration, who shall be appointed, with the approval of the President, by the Secretary under the classified civil service who shall perform such functions, powers, and duties as the Secretary shall prescribe from time to time.

(e)(1) There is hereby established within the Department a Federal Highway Administration; a Federal Railroad Administration; and a Federal Aviation Administration. Each of these components shall be headed by an Administrator, and in the case of the Federal Aviation Administration there shall also be a Deputy Administrator. The Administrators and the Deputy Federal Aviation Administrator shall be appointed by the President, by and with the advice and consent of the Senate.

(2) The qualifications of the Administrator of the Federal Aviation Agency specified in section 301(b) of the Federal Aviation Act of 1958, as amended (72 Stat. 744; 49 U.S.C. 1341), and the qualifications and status of the Deputy Administrator specified in section 302(b) of the Federal Aviation Act of 1958, as amended (72 Stat. 744; 49 U.S.C. 1342), shall apply, respectively, to the Administrator and Deputy Administrator of the Federal Aviation Administration. However, nothing in this Act shall be construed to preclude the appointment of the present Administrator of the Federal Aviation Agency as Administrator of the Federal Aviation Administration in accordance with the provisions of the Act of June 22, 1965, as amended (79 Stat. 171).

(3) In addition to such functions, powers, and duties as are specified in this Act to be carried out by the Administrators, the Administrators and the Commandant of the Coast Guard shall carry out such additional functions, powers, and duties as the Secretary may prescribe. The Administrators and the Commandant of the Coast Guard shall report directly to the Secretary.

(4) The functions, powers, and duties specified in this Act to be carried out by each Administrator shall not be transferred elsewhere in the Department unless specifically provided for by reorganization plan

submitted pursuant to provisions of chapter 9 of title 5, United States Code, or by statute.

(f)(1) The Secretary shall carry out the provisions of the National Traffic and Motor Vehicle Safety Act of 1966 (80 Stat. 718) through a National Traffic Safety Bureau (hereafter referred to in this paragraph as "Bureau"), which he shall establish in the Department of Transportation. The Bureau shall be headed by a Director who shall be appointed by the President, by and with the advice and consent of the Senate. All other provisions of the National Traffic and Motor Vehicle Safety Act of 1966 shall apply.

(2) The Secretary shall carry out the provisions of the Highway Safety Act of 1966 (80 Stat. 731) (including chapter 4 of title 23 of the United States Code) through a National Highway Safety Bureau (hereafter referred to in this paragraph as "Bureau"), which he shall establish in the Department of Transportation. The Bureau shall be headed by a Director who shall be appointed by the President, by and with the advice and consent of the Senate. All other provisions of the Highway Safety Act of 1966 shall apply.

(3) The President is authorized, as provided in section 201 of the Highway Safety Act of 1966, to carry out the provisions of the National Traffic and Motor Vehicle Safety Act of 1966 through the Bureau and Director authorized by section 201 of the Highway Safety Act of 1966.

(4) The office of Federal Highway Administrator, created by section 303 of title 23, United States Code, is hereby transferred to and continued within the Department under the title Director of Public Roads. The Director shall be the operating head of the Bureau of Public Roads, or any other agency created within the Department to carry out the primary functions carried out immediately before the effective date of this Act by the Bureau of Public Roads.

GENERAL PROVISIONS

SEC. 4. *[49 U.S.C. §1653]* (a) The Secretary in carrying out the purposes of this Act shall, among his responsibilities, exercise leadership under the direction of the President in transportation matters, including those effecting the national defense and those involving national or regional emergencies; provide leadership in the development of national transportation policies and programs, and make recommendations to the President and the Congress for their consideration and implementation; promote and undertake development, collection, and dissemination of technological, statistical, economic and other information relevant to domestic and international transportation; consult and cooperate with the Secretary of Labor in gathering information regarding the status of labor-management contracts and other labor-management problems and in promoting industrial harmony and stable employment conditions in all modes of transportation; promote and undertake research and development relating to transportation, including noise abatement, with particular attention to aircraft noise; consult with the heads of other Federal departments and agencies on the transportation requirements of the Government, including the procurement of transportation or the operation of their own transport services in order to encourage them to establish and observe policies consistent with the maintenance of a coordinated transportation system; and consult and cooperate with State and local governments, carriers, labor, and other interested parties, including, when appropriate, holding informal public hearings.

(b)(1) In carrying out his duties and responsibilities under this Act, the Secretary shall be governed by all applicable statutes including the policy standards set forth in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301 et seq.); the national transportation policy of the Interstate Commerce Act, as amended (49 U.S.C., preceding §§1, 301, 901, and 1001); title 23, United States Code, relating to Federal-aid highways; and title 14 U.S.C., titles LII and LIII of the Revised Statutes (46 U.S.C., chs. 2A, 7, 11, 14, 15, and 18), the Act of April 25, 1940, as amended (54 Stat. 163; 46 U.S.C. 526-526u), and the Act of September 2, 1958, as amended (72 Stat. 1754; 46 U.S.C. 527-527h), relating to the United States Coast Guard.

(2) Nothing in this Act shall be construed to authorize, without appropriate action by Congress, the adoption, revision, or implementation of—

(A) any transportation policy, or

(B) any investment standards or criteria.

(3) In exercising the functions, powers, and duties conferred on and transferred to the Secretary by this Act, the Secretary shall give full consideration to the need for operational continuity of the functions transferred, to the need for effectiveness and safety in transportation systems, and to the needs of the national defense.

(c) Orders and actions of the Secretary in the exercise of functions, powers, and duties transferred under this Act, and orders and actions of the Administrators pursuant to the functions, powers, and duties specifically assigned to them by this Act, shall be subject to judicial review to the same extent and in the same manner as if such orders and actions had been by the department or agency exercising such functions, powers, and duties immediately preceding their transfer. Any statutory requirements relating to notice, hearings, action upon the record, or administrative review that apply to any functions transferred by this Act shall apply to the exercise of such functions by the Secretary and the Administrators. This subsection shall not apply to functions, powers, and duties transferred to the Secretary from the Interstate Commerce Commission under sections 6 (e)(1) through (4) and section 6(e)(6)(A) of this Act.

(d) In the exercise of the functions, powers, and duties transferred under this Act, the Secretary and the Administrators shall have the same authority as that vested in the department or agency exercising such functions, powers and duties immediately preceding their transfer, and their actions in exercising such functions, powers, and duties shall have the same force and effect as when exercised by such department or agency.

(e) It shall be the duty of the Secretary—

(1) to promptly investigate the safety compliance records in the Department of each applicant seeking operating authority from the Interstate Commerce Commission (referred to in this subsection as the "Commission") and to report his findings to the Commission;

(2) when the safety record of an applicant for permanent operating authority, or for approval of a proposed transaction involving transfer of operating authority, fails to satisfy the Secretary, to intervene and present evidence of such applicant's fitness in Commission proceedings;

(3) to furnish promptly upon request of the Commission a statement regarding the safety record of any applicant seeking temporary operating authority from the Commission; and

(4)(A) to furnish upon request of the Commission a complete report of the safety compliance of any carrier, (B) to have made such additional inspections or safety compliance surveys which the Commission deems necessary or desirable in order to process an application or to determine the fitness of a carrier, and (C) if the Commission so requests, to intervene and present evidence in any proceeding in which a determination of fitness is required.

(f) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, after the effective date of the Federal-Aid Highway Act of 1968.

(g) The Secretary and the Secretary of Housing and Urban Development shall consult and exchange information regarding their respective transportation policies and activities; carry on joint planning, research and other activities; and coordinate assistance for local transportation projects. They shall jointly study how Federal policies and programs can assure that urban transportation systems most effectively serve both national transportation needs and the comprehensively planned development of urban areas. They shall, within one year after the effective date of this Act, and annually thereafter, report to the President, for submission to the Congress, on their studies and other activities under this subsection, including any legislative recommendations which they determine to be desirable. The Secretary and the Secretary of Housing and Urban Development shall study and report within one year after the effective date of this Act to the President and the Congress on the logical and efficient organization and location of urban mass transportation functions in the Executive Branch.

(h)(1) The Secretary is authorized, in consultation with the Secretary of the Interior, to design, plan, and coordinate the construction of a model intermodal transportation terminal at Union Station in the District of Columbia. Such terminal may combine the new railroad passenger station described in paragraph (4) of section 102(a) of Public Law 90-264, as amended, and accommodations for such other modes of transportation as the Secretary deems appropriate. To the extent practicable, the Secretary shall incorporate into the design and plans for such intermodal transportation terminal features which will make such facility a model facility and which will attract private investors willing to undertake the development and construction of the terminal.

(2) Notwithstanding any provision of Public Law 90-264, as amended, in order to facilitate construction of such model intermodal transportation terminal, the Secretary of the Interior shall lease or transfer such space (including air space), which is not required for purposes of the National Visitor Center, as the Secretary of the Interior holds or may acquire north of the Union Station Building to such party or parties and upon such terms and conditions as the Secretary deems appropriate, notwithstanding section 321 of the Act of June 30, 1932 (40 U.S.C. 303(b)). The Secretary and the Secretary of the Interior may, to the extent required to complete a visitor center, agree to joint use of the concourse.

(3) The design and plans for the intermodal terminal shall be completed within 2 years following enactment of this subsection. The construction of the intermodal terminal shall be completed within 5 years following enactment of this subsection.

(4) There is authorized to be appropriated to the Secretary, for the purposes of carrying out this subsection, such sums as are necessary, not to exceed $5,000,000.

(5) Nothing in this subsection (h) shall be construed as relieving the Washington Terminal Company, its successors or assigns, from the obligation to finance and construct a new railroad passenger station in compliance with the terms of paragraph (4) of section 102(a) of Public Law 90-264 (82 Stat. 43).

(i)(1) The Secretary shall provide financial, technical, and advisory assistance in accordance with this subsection for the purpose of (A) promoting on a feasibility demonstration basis the conversion of not less than three railroad passenger terminals into intermodal transportation terminals; (B) preserving railroad passenger terminals that have a reasonable likelihood of being converted or otherwise maintained pending the formulation of plans for reuse; (C) acquiring and utilizing space in suitable buildings of historic or architectural significance, unless the use of such space would not prove feasible and prudent compared with available alternatives; (D) stimulating State and local governments, local and regional transportation authorities, common carriers, philanthropic organizations, and other responsible persons to develop plans for the conversion of railroad passenger terminals into intermodal transportation terminals and civic and cultural activity centers.

(2) Financial assistance for the purpose set forth in paragraph (1)(A) of this subsection shall be granted in accordance with the following criteria: (A) the railroad terminal can be converted to accommodate such other modes of transportation as the Secretary deems appropriate, including motorbus transportation, mass transit (rail or rubber tire), and airline ticket offices and passenger terminal providing direct transportation to area airports; (B) the railroad passenger terminal is listed on the National Register of Historic Places maintained by the Secretary of the Interior; (C) the architectural integrity of the railroad passenger terminal will be preserved and such judgment is concurred in by consultants recommended by the Chairman of the National Endowment of the Arts and the Advisory Council on Historic Preservation and retained for this purpose by the Secretary; (D) to the extent practicable, the use of station facilities for transportation purposes may be combined with use for other civic and cultural activities, especially when such use is recommended by the Advisory Council on Historic Preservation or the Chairman of the National Endowment for the Arts, or the consultants retained by the Secretary upon their recommendation; and (E) the railroad passenger terminal and the conversion project meet such other criteria as the Secretary shall develop and promulgate in consultation with the Chairman of the National Endowment of the Arts and the Advisory Council on Historic Preservation. Any grant made by the Secretary under this paragraph shall not exceed 60 per centum of the total cost of conversion of a railroad passenger terminal into an intermodal transportation terminal.

(3) Financial assistance for the purpose set forth in paragraph (1)(B) of this subsection may be granted in accordance with regulations, to any responsible person (including a governmental entity) who is empowered by applicable law, qualified, prepared, and committed, on an interim basis pending the formulation of plans for reuse, to maintain (and prevent the demolition, dismantling, or further deterioration of) a railroad passenger terminal; *Provided,* That (A) such terminal has, in the opinion of the Secretary, a reasonable likelihood of being converted to or conditioned for reuse as an intermodal transportation terminal, a civic or cultural activities center, or both; and (B) planning activity aimed at conversion or reuse has commenced and is proceeding in a competent manner. Funds appropriated for the purpose of this paragraph and paragraph (1)(B) of this subsection shall be expended in the manner most likely to maximize the preservation of railroad passenger terminals capable reasonably of conversion to intermodal transportation terminals or which are listed in the National Register of Historic Places maintained by the Secretary of the Interior or which are recommended (on the basis of architectural integrity and quality) by the Chairman of

the National Endowment for the Arts or the Advisory Council on Historic Preservation. The amount of the Federal share of any grant under this paragraph shall not exceed 60 per centum of the total cost of such interim maintenance for a period not to exceed five years.

(4) Acquisitions made for the purpose set forth in paragraph (1)(C) of this subsection shall be made only after consultation with the chairman of the National Endowment for the Arts and the Advisory Council on Historic Preservation.

(5) Financial assistance for the purpose set forth in paragraph (1)(D) of this subsection may be granted, in accordance with regulations, to a qualified person (including a governmental entity) who is prepared to develop practicable plans meeting the zoning, land use, and other requirements of the applicable State and local jurisdictions in which the rail passenger terminal is located as well as requirements under this subsection; who shall incorporate into the designs and plans proposed for the conversion of such terminal into an intermodal transportation terminal, a civic or cultural center, or both, features which reasonably appear likely to attract private investors willing to undertake the implementation of such planned conversion and its subsequent maintenance and operation; and who shall complete the designs and plans for such conversion within two years following the approval of the application for Federal financial assistance under this subsection. In making grants under this paragraph, the Secretary shall give preferential consideration to applicants whose completed designs and plans will be implemented and effectuated within three years after the date of completion. Funds appropriated for the purpose of this paragraph and paragraph (1)(C) of this subsection shall be expended in the manner most likely to maximize the conversion and continued public use of railroad passenger terminals which are listed in the National Register of Historic Places maintained by the Secretary of the Interior or which are recommended (on the basis of architectural integrity and quality) by the Advisory Council on Historic Preservation or the Chairman of the National Endowment for the Arts. The amount of the Federal share of any grant under this paragraph shall not exceed 60 per centum of the total cost of the project or undertaking for which the financial assistance is provided.

(6) Within ninety days after the date of enactment of this subsection, the Secretary shall issue, and may from time to time amend, regulations with respect to financial assistance under this subsection and procedures for the award of such assistance. Each application for assistance under this subsection shall be made in writing in such form and with such content and other submissions as the Secretary shall require.

(7) The National Railroad Passenger Corporation shall give preference to using station facilities that would preserve buildings of historical and architectural significance.

(8) Each recipient of financial assistance under this subsection shall keep such records as the Secretary shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance was given or used, the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit. Until the expiration of three years after completion of such project or undertaking, the Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of such receipts which, in the opinion of the Secretary or the Comptroller General, may be related or pertinent to such financial assistance.

(9)(A) There is authorized to be appropriated for the purpose set forth—

(i) in paragraphs (1)(A) and (1)(C) of this subsection not to exceed $15,000,000;

(ii) in paragraphs (1)(A) and (1)(C) of this subsection not to exceed $5,000.000; and

(iii) in paragraph (1)(D) of this subsection, not to exceed $5,000,000.

(B) There shall be available to the National Endowment for the Arts, from the sums available under subparagraphs (A)(6) and (A)(iii) of this paragraph, not to exceed $2,500,000 for planning pursuant to paragraph (1)(D) of this subsection, and not to exceed $2,500,000 for interim maintenance pursuant to paragraph (1)(B) of this subsection.

(C) Sums appropriated for the purposes of this subsection are authorized to remain available until expended.

(10) As used in this subsection, 'civic and cultural activities' include, but are not limited to, libraries, musical and dramatic presentations, art exhibitions, adult education programs, public meeting place for community groups, convention visitors and others, and facilities for carrying on activities supported in whole or in part under Federal law.

(11) Nothing in this subsection shall be construed to invalidate the eligibility of any station for funds designed to assist in its preservation or reuse under any other Federal program or statute.

Historical Note

By the act of Feb. 5, 1976, Pub. L. 94-210, §810 [49 U.S.C. §1653a], 90 Stat. 146, the Secretary of Transportation is required to establish a rail bank consisting of rail trackage and other rail properties "for purposes of preserving existing service in certain areas of the United States in which fossil fuel, natural resources or agricultural production is located."

RAIL SERVICES

Sec. 5. (a) *[49 U.S.C. §1654]* The Secretary may develop and make available to interested persons feasible plans, proposals, and recommendations for mergers, consolidations, reorganizations, and other unification or coordination projects for rail services (including, but not limited to, arrangements for joint use of tracks or other facilities and any acquisition or sale of assets) which the Secretary believes would result in a rail system which is more efficient, consistent with the public interest.

(b) In order to achieve a more efficient, economical, and viable rail system in the private sector, the Secretary may, upon the request of any railroad and in accordance with subsections (a) through (e) of this section, assist in planning, negotiating, and effecting a unification or coordination of operations and facilities with respect to two or more railroads.

(c) The Secretary may conduct such studies as are deemed advisable to determine the potential cost savings and possible improvements in the quality of rail services which are likely to result from unification or coordination with respect to two or more railroads, through the elimination of duplicative or overlapping operations and facilities; the reduction of switching operations; utilization of the shortest, or the most efficient, and economical routes; the exchange of trackage rights; the combining of trackage and of terminal or other facilities; the upgrading of tracks and other facilities used by two or more railroads; reduction of administrative and other expenses; and any other measures likely to reduce costs and improve rail service. For purposes of studies conducted under this section and the study described in section 901 of the Railroad Revitalization and Regulatory Reform Act of 1976, each railroad shall provide such information as may be requested by the Secretary in connection with the performance of functions under this section and such section 901. In furtherance of any of the functions or responsibilities of the Secretary under this section or such section 901, any officer or employee duly designated by the Secretary may obtain, from any railroad, information regarding the nature, kind, quality, origin, destination, consignor, consignee, and routing of property, without the consent of the congisnor or consignee involved, notwithstanding the provisions of section 15(13) of the Interstate Commerce Act (49 U.S.C. 15(13)) and may, to the extent necessary or appropriate, exercise, with respect to any railroad, any of the powers described in section 203(c) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 713(c)), as provided therein, except that subpoenas shall be issued under the signature of the Secretary.

(d) When requested by one or more railroads, the Secretary may also hold conferences with respect to any proposed unification or coordination project. The Secretary may invite officers and directors of all affected railroads; representatives of employees of such railroads who may be affected; the Interstate Commerce Commission; appropriate State and local government officials, shippers, and consumer representatives; and representatives of the Federal Trade Commission and of the Attorney General to one or more such conferences with respect to such a proposal. The Secretary may mediate any dispute which may arise in connection with any proposed unification or coordination project. Persons attending or represented at any such conference shall not be liable under the antitrust laws of the United States with respect to any discussion at such conference and as to any agreements reached at such conference, which are entered into with the approval of the Secretary in order to achieve or determine a plan of action to implement any such unification or coordination project.

(e) Whenever any railroad submits a proposal for a merger or other action the approval of which is subject to the jurisdiction of the Interstate Commerce Commission under section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)), the Secretary may, if he has not already done so, conduct a study of such proposal in order to determine whether or not, in his judgment, such proposal is in accordance with the standards set forth in section 5(2)(c) of such Act (49 U.S.C. 5(2)(c)). Whenever such proposal is the subject of an application and a proceeding before such Commission, the Secretary is authorized to appear before the Commission in any proceeding held with respect to such application.

LOCAL RAIL SERVICE ASSISTANCE

(f) The Secretary shall, in accordance with this section, provide financial assistance to States for rail freight assistance programs that are designed to cover—

(1) the cost of rail service continuation payments;

(2) the cost of purchasing a line of railroad or other rail properties to maintain existing or provide for future rail service;

(3) the cost of rehabilitating and improving rail properties on a line of railroad to the extent necessary to permit adequate and efficient rail freight service on such line; and

(4) the cost of reducing the costs of lost rail service in a manner less expensive than continuing rail service.

(g) The Federal share of the costs of any rail service assistance program shall be as follows: (1) 100 percent for the period from July 1, 1976 to June 30, 1977; (2) 90 percent for the period from July 1, 1977 to June 30, 1978; (3) 80 percent for the period from July 1, 1978 to June 30, 1979; and (4) 70 percent for the period from July 1, 1979 to June 30, 1981. For the period from July 1, 1979 to June 30, 1981, the Secretary may make such adjustments in the percentage level of the Federal share as may be necessary and appropriate so as not to exceed the maximum amount of funds authorized under subsection (o) of this section. The Secretary shall, within 1 year after the date of enactment of this subsection, promulgate standards and procedures under which the State share of such cost may be provided through in-kind benefits such as forgiveness of taxes, trackage rights, and facilities which would not otherwise be provided.

(h) Each State which is, pursuant to subsection (j) of this section, eligible to receive rail service assistance is entitled to an amount equal to the total amount authorized and appropriated for such purpose, multiplied by a fraction whose numerator is the rail mileage in such State which is eligible for rail service assistance under this section and whose denominator is the rail mileage in all of the States which are eligible for rail service assistance under this section. Notwithstanding the provisions of the preceding sentence, the entitlement of each State shall not be less than 1 percent of the funds appropriated. For purposes of this subsection, rail mileage shall be measured by the Secretary, in consultation with the Interstate Commerce Commission. Any portion of the entitlement of any State which is withheld, in accordance with this section, and any such sums which are not used or committed by a State shall be reallocated immediately, to the extent practicable, among the other States, in accordance with the formula set forth in the first sentence of this subsection.

(i) Rail service assistance to which a State is entitled under this section may be allocated by such State to meet the cost of establishing and implementing the State rail plan required by subsection (j) of this section or by section 402(c)(1) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 762(c)(1)). Such grants shall be made available by the Secretary during the course of the State rail planning process, and shall be distributed by the Secretary as needed by the States. The amount of State rail planning grants to which each State (including each State referred to in subsection (n)(1) of this section) is entitled shall be proportionate to the amount of rail service assistance to which such State is entitled under this Act.

(j) A State is eligible to receive rail service assistance from the Secretary if—

(1) such State has established an adequate plan for rail services in such State as part of an overall planning process for all transportation services in such State, including a suitable process for updating, revising, and amending such plan;

(2) such State plan is administered or coordinated by a designated State agency and provides for the equitable distribution of resources;

(3) such State agency (A) has authority and administrative jurisdiction to develop, promote, supervise, and support safe, adequate and efficient rail transportation services, (B) employs or will employ, directly or indirectly, sufficient trained and qualified personnel, (C) maintains or will maintain adequate programs of investigation, research, promotion, and development, with provisions for public participation, and (D)

is designated and directly solely, or in cooperation with other State agencies to take all practicable steps to improve transportation safety and to reduce transportation-related energy utilization and pollution;

(4) such State provides satisfactory assurance that it has or will adopt and maintain adequate procedures for financial control, accounting, and performance evaluation in order to assure proper use of Federal funds; and

(5) such State complies with regulations of the Secretary issued under this section and the Secretary determines that such State meets or exceeds the requirements of paragraphs (1) through (4) of this subsection.

(k) A project is eligible in any year for financial assistance from the applicable rail service assistance program only if—

(1)(A) the Commission has found that the public convenience and necessity permit the abandonment of, or the discontinuance of rail service on, the line of railroad which is related to such project, or (B) the line of railroad or related project was eligible for assistance under title IV of the Regional Rail Reorganization Act of 1973; and

(2) such line, or related projects, has not previously been the subject of Federal rail service assistance under this section for more than 5 fiscal years.

(l) The Secretary shall pay to each eligible State an amount equal to its entitlement under subsection (h) of this section, to be expended or committed to one or more projects which are eligible, pursuant to subsection (k) of this section.

(m)(1) Each recipient of financial assistance under subsections (e) through (o) of this section, whether in the form of grants, subgrants, contracts, subcontracts, or other arrangements, shall keep such records as the Secretary shall prescribe including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance was given or used, the amount of that portion of the cost of the project which was supplied by other sources, and such other records as will facilitate an effective audit. Such records shall be maintained for 3 years after the completion of such a project or undertaking.

(2) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access, for the purpose of audit and examination, to any books, documents, papers, and records of receipts which, in the opinion of the Secretary or of the Comptroller General may be related or pertinent to the grants, contracts, or other arrangements referred to in paragraph (1) of this subsection.

(3) The Secretary and the Comptroller General shall regularly conduct, or cause to be conducted—

(A) a financial audit, in accordance with generally accepted auditing standards; and

(B) a performance audit of the activities and transactions assisted under this section, in accordance with generally accepted management principles.

Such audits may be conducted by independent certified or licensed public accountants and management consultants approved by the Secretary and the Comptroller General, and they shall be conducted in accordance with such rules and regulations as may be prescribed by the Comptroller General.

(n) As used in this section, the term 'State' means—

(1) during the period from the date of enactment of this subsection through the second anniversary of the date on which rail properties are conveyed pursuant to section 303(b)(1) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 743(b)(1)), any State in which a carrier by railroad subject to part I of the Interstate Commerce Act maintains any line of railroad, except that the term shall not include the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan, and Illinois, and the District of Columbia; and

(2) during the period following the second anniversary of the date on which rail properties are conveyed pursuant to such section 303(b)(1), any State in which a carrier by railroad subject to part I of the Interstate Commerce Act maintains any line of railroad.

(o) There are authorized to be appropriated to the Secretary for the purposes of subsections (f) through (o) of this section not to exceed $360,000,000, without fiscal year limitation. Of the foregoing sums, not to exceed $5,000,000 shall be made available for planning grants during each of the 3 fiscal years ending June 30, 1976; September 30, 1977; and September 30, 1978. In addition, any appropriated sums remaining after the repeal of section 402 of the Regional Rail Reorganization Act of 1973 are authorized to remain available to the Secretary for purposes of subsections (f) through (o) of this section. Such sums as are appropriated are authorized to remain available until expended.

Historical Notes

By §901 of Pub. L. 94-210, 90 Stat. 147, the Secretary of Transportation is required to conduct a comprehensive study of the American railway system and to submit to Congress a report setting forth the results of the study.

By §902 of the same act, 90 Stat. 147, the Secretary of Transportation is required to conduct a study of aid to rail transportation and to submit to Congress a report setting forth the results of the study.

TRANSFERS TO DEPARTMENT

Sec. 6. *[49 U.S.C. §1655]* (a) There are hereby transferred to and vested in the Secretary all functions, powers, and duties of the Secretary of Commerce and other offices and officers of the Department of Commerce under—

(1) the following laws and provisions of law relating generally to highways:

(A) Title 23, United States Code, as amended.

(B) The Federal-Aid Highway Act of 1966 (80 Stat. 766).

(C) The Federal-Aid Highway Act of 1962, as amended (76 Stat. 1145; 23 U.S.C. 307 note).

(D) The Act of July 14, 1960, as amended (74 Stat. 526; 23 U.S.C. 313 note).

(E) The Federal-Aid Highway Act of 1954, as amended (68 Stat. 70).

(F) The Act of September 26, 1961, as amended (75 Stat. 670).

(G) The Highway Revenue Act of 1956, as amended (70 Stat. 387; 23 U.S.C. 120 note).

(H) The Highway Beautification Act of 1965, as amended (79 Stat. 1028; 23 U.S.C. 131 et seq. notes).

(I) The Alaska Omnibus Act, as amended (73 Stat. 141; 48 U.S.C. 21 note prec.).

(J) The Joint Resolution of August 28, 1965, as amended (79 Stat. 578; 23 U.S.C. 101 et seq. notes).

(K) Section 502(c) of the General Bridge Act of 1946, as amended (60 Stat. 847; 33 U.S.C. 525(c)).

(L) The Act of April 27, 1962, as amended (76 Stat. 59).

(M) Reorganization Plan No. 7 of 1949 (63 Stat. 1070; 5 U.S.C. 133z-15 note).

(2) the following laws and provisions of law relating generally to ground transportation:

(A) The Act of September 30, 1965, as amended (79 Stat. 893; 49 U.S.C. 1631 et seq.).

(B) The Urban Mass Transportation Act of 1964, as amended (78 Stat. 306, 49 U.S.C. 1607).

(3) the following laws and provisions of law relating generally to aircraft;

(A) The Act of September 7, 1957, as amended (71 Stat. 629; 49 U.S.C. 1324 note).

(B) Section 410 of the Federal Aviation Act of 1958, as amended (72 Stat. 769; 49 U.S.C. 1380).

(C) Title XIII of the Federal Aviation Act of 1958, as amended (72 Stat. 800; 49 U.S.C. 1531 et seq.).

(4) the following law relating generally to pilotage: The Great Lakes Pilotage Act of 1960, as amended (74 Stat. 259; 46 U.S.C. 216 et seq.).

(5) the following law to the extent it authorizes scientific and professional positions which relate primarily to functions transferred by this subsection: The Act of August 1, 1947, as amended (61 Stat. 715; 5 U.S.C. 1161).

(6) the following laws relating generally to traffic and highway safety:

(A) The National Traffic and Motor Vehicle Safety Act of 1966 (80 Stat. 718).

(B) The Highway Safety Act of 1966 (80 Stat. 731).

(b)(1) The Coast Guard is hereby transferred to the Department, and there are hereby transferred to and vested in the Secretary all functions, powers, and duties, relating to the Coast Guard, of the Secretary of the Treasury and of officers and offices of the Department of the Treasury.

(2) Notwithstanding the transfer of the Coast Guard to the Department and the transfer to the Secretary of the functions, powers, and duties, relating to the Coast Guard, of the Secretary of the Treasury and of other officers and offices of the Department of the Treasury, effected by the provisions of paragraph (1) of this subsection, the Coast Guard, together with the functions, powers, and duties relating thereto, shall operate as a part of the Navy, subject to the orders of the Secretary of the Navy, in time of war or when the President shall so direct, as provided in section 3 of title 14, United States Code, as amended.

(3) Notwithstanding any other provision of this Act, the functions, powers, and duties of the General Counsel of the Department of the Treasury set out in chapter 47 of title 10, United States Code, as amended (Uniform Code of Military Justice), are hereby transferred to and vested in the General Counsel of the Department.

(c)(1) There are hereby transferred to and vested in the Secretary all functions, powers, and duties of the Federal Aviation Agency, and of the Administrator and other officers and offices thereof, including the development and construction of a civil supersonic aircraft: *Provided, however,* That there are hereby transferred to the Federal Aviation Administrator, and it shall be his duty to exercise the functions, powers, and duties of the Secretary pertaining to aviation safety (other than those relating to the transportation, packing, marking, or description of hazardous materials) as set forth in sections 306, 307, 308, 309, 312, 313, 314, 1101, 1105, and 1111, and titles VI, VII, IX, and XII of the Federal Aviation Act of 1958, as amended. In exercising these enumerated functions, powers, and duties, the Administrator shall be guided by the declaration of policy in section 103 of the Federal Aviation Act of 1958, as amended. Decisions of the Federal Aviation Administrator made pursuant to the exercise of the functions, powers, and duties enumerated in this subsection to be exercised by the Administrator shall be administratively final, and appeals as authorized by law or this Act shall be taken directly to the National Transportation Safety Board or to the courts, as appropriate.

(2) Nothing in this Act shall affect the power of the President under section 302(c) of the Federal Aviation Act of 1958 (72 Stat. 746, 49 U.S.C. 1343(c)) to transfer, to the Department of Defense in the event of war, any functions transferred by this Act from the Federal Aviation Agency.

(d) There are hereby transferred to and vested in the Secretary all functions, powers, and duties of the Civil Aeronautics Board, and of the Chairman, members, officers, and offices thereof under titles VI (72 Stat. 775; 5 U.S.C. 1421 et seq.) and VII (72 Stat. 781; 49 U.S.C. 1441 et seq.) of the Federal Aviation Act of 1958, as amended: *Provided, however,* That these functions powers, and duties are hereby transferred to and shall be exercised by the National Transportation Safety Board. Decisions of the National Transportation Safety Board made pursuant to the exercise of the functions, powers, and duties enumerated in this subsection shall be administratively final, and appeals as authorized by law or this Act shall be taken directly to the courts.

(e) There are hereby transferred to and vested in the Secretary all functions, powers, and duties of the Interstate Commerce Commission, and of the Chairman, members, officers, and offices thereof, under—

(1) the following laws relating generally to safety appliances and equipment on railroad engines and cars, and protection of employees and travelers:

(A) The Act of March 2, 1893, as amended (27 Stat. 531; 45 U.S.C. 1 et seq.).

(B) The Act of March 2, 1903, as amended (32 Stat. 943; 45 U.S.C. 8 et seq.).

(C) The Act of April 14, 1910, as amended (36 Stat. 298; 45 U.S.C. 11 et seq.).

(D) The Act of May 30, 1908, as amended (35 Stat. 476; 45 U.S.C. 17 et seq.).

(E) The Act of February 17, 1911, as amended (36 Stat. 913; 45 U.S.C. 22 et seq.).

(F) The Act of March 4, 1915, as amended (38 Stat. 1192; 45 U.S.C. 30).

(G) Reorganization Plan No. 3 of 1965 (79 Stat. 1320).

(H) Joint Resolution of June 30, 1906, as amended (34 Stat. 838; 45 U.S.C. 35).

(I) The Act of May 27, 1908, as amended (35 Stat. 325; 45 U.S.C. 36 et seq.).

(J) The Act of March 4, 1909, as amended (35 Stat. 965; 45 U.S.C. 37).

(K) The Act of May 6, 1910, as amended (36 Stat. 350; 45 U.S.C. 38 et seq.).

(2) the following law relating generally to hours of service of employees: The Act of March 4, 1907, as amended (34 Stat. 1415; 45 U.S.C. 61 et seq.).

(3) the following law relating generally to medals for heroism: The Act of February 23, 1905, as amended (33 Stat. 743; 49 U.S.C. 1201 et seq.).

(4) the following provisions of law relating generally to explosives and other dangerous articles: Sections 831-835 of title 18. United States Code, as amended.

(5) the following laws relating generally to standard time zones and daylight saving time:

(A) The Act of March 19, 1918, as amended (40 Stat. 450: 15 U.S.C. 261 et seq.).

(B) The Act of March 4, 1921, as amended (41 Stat. 1446: 15 U.S.C. 265).

(C) The uniform Time Act of 1966, as amended (80 Stat. 107).

(6) the following provisions of the Interstate Commerce Act, as amended—

(A) relating generally to safety appliances methods and systems: Section 25 (49 U.S.C. 26).

(B) relating generally to investigation of motor vehicle sizes, weights, and service of employees: Section 226 (49 U.S.C. 325).

(C) relating generally to qualifications and maximum hours of service of employees and safety of operation and equipment: Sections 204(a)(1) and (2), to the extent that they relate to qualifications and maximum hours of service of employees and safety of operation and equipment; and sections 204(a)(3), (3a), and (5) (49 U.S.C. 304).

(D) to the extent they relate to private carriers of property by motor vehicle and carriers of migrant workers by motor vehicle other than contract carriers: Sections 221(a), 221(c), and 224 (49 U.S.C. 321 et seq.).

(f)(1) Nothing in subsection (e) shall diminish the functions, powers, and duties of the Interstate Commerce Commission under sections 1(6), 206, 207, 209, 210a, 212, and 216 of the Interstate Commerce Act, as amended (49 U.S.C. 1(6), 306 et seq.), or under any other section of that Act not specifically referred to in subsection (e).

(2)(A) With respect to any function which is transferred to the Secretary by subsection (e) and which was vested in the Interstate Commerce Commission preceding such transfer, the Secretary shall have the same administrative powers under the Interstate Commerce Act as the Commission had before such transfer with respect to such transferred function. After such transfer, the Commission may exercise its administrative powers under the Interstate Commerce Act only with respect to those of its functions not transferred by subsection (e).

(B) For purposes of this paragraph—

(i) the term "function" includes power and duty, and

(ii) the term "administrative powers under the Interstate Commerce Act" means any functions under the following provisions of the Interstate Commerce Act, as amended: Sections 12, 13(1), 13(2), 14, 16(12), the last sentence of 18(1), sections 20 (except clauses (3), (4), (11), and (12) thereof), 204(a)(6) and (7), 204(c), 204(d), 205(d), 205(f), 220 (except subsection (c) and the proviso of subsection (a) thereof), 222 (except subsections (b)(2) and (b)(3) thereof), and 417(b)(1) (49 U.S.C. 12 et seq., 304 et seq., and 1017).

(3)(A) The Federal Railroad Administrator shall carry out the functions, powers, and duties of the Secretary pertaining to railroad safety as set forth in the statutes transferred to the Secretary by subsection (e) of this section (other than subsection (e)(4)).

(B) The Federal Highway Administrator shall carry out the functions, powers, and duties of the Secretary pertaining to motor carrier safety as set forth in the statutes transferred to the Secretary by subsection (e) of this section (other than subsection (e)(4)).

(C) Decisions of the Federal Railroad Administrator and the Federal Highway Administrator (i) which are made pursuant to the exercise of the functions, powers, and duties enumerated in subparagraphs (A) and (B) of this paragraph to be carried out by the Administrators, and (ii) which involve notice and hearing required by law, shall be administratively final, and appeals as authorized by law or this Act shall be taken directly to the National Transportation Safety Board or the courts, as appropriate.

(g) There are hereby transferred to and vested in the Secretary all functions, powers, and duties of the Secretary of the Army and other officers and offices of the Department of the Army under—

(1) the following law and provisions of law relating generally to water vessel anchorages:

(A) Section 7 of the Act of March 4, 1915, as amended (38 Stat. 1053; 33 U.S.C. 471).

(B) Article 11 of section 1 of the Act of June 7, 1897, as amended (30 Stat. 98; 33 U.S.C. 180)).

(C) Rule 9 of section 1 of the Act of February 8, 1895, as amended (28 Stat. 647; 33 U.S.C. 258).

(D) Rule numbered 13 of section 4233 of the Revised Statutes, as amended (33 U.S.C. 322).

(2) the following provision of law relating generally to drawbridge operating regulations: Section 5 of the Act of August 18, 1894, as amended (28 Stat. 362; 33 U.S.C. 499).

(3) the following law relating generally to obstructive bridges: The Act of June 21, 1940, as amended (54 Stat. 497; 33 U.S.C. 511 et seq.).

(4) the following laws and provisions of law relating generally to the reasonableness of tolls:

(A) Section 4 of the Act of March 23, 1906, as amended (34 Stat. 85; 33 U.S.C. 494).

(B) Section 503 of the General Bridge Act of 1946, as amended (60 Stat. 847: 33 U.S.C. 526).

(C) Section 17 of the Act of June 10, 1930, as amended (46 Stat. 552: 33 U.S.C. 498a).

(D) The Act of June 27, 1930, as amended (46 Stat. 821; 33 U.S.C. 498b).

(E) The Act of August 21, 1935, as amended (49 Stat. 670; 33 U.S.C. 503 et seq.).

(5) the following law relating to prevention of pollution of the sea by oil: The Oil Pollution Act, 1961, as amended (75 Stat. 402; 33 U.S.C. 1001 et seq.).

(6) the following laws and provisions of law to the extent that they relate generally to the location and clearances of bridges and causeways in the navigable waters of the United States:

(A) Section 9 of the Act of March 3, 1899, as amended, (30 Stat. 1151; 33 U.S.C. 401).

(B) The Act of March 23, 1906, as amended (34 Stat. 84; 33 U.S.C. 491 et seq.).

(C) The General Bridge Act of 1946; as amended (60 Stat. 847; 33 U.S.C. 525 et. seq.).

(h) The provisions of subchapter II of chapter 5 and of chapter 7 of title 5, United States Code, shall be applicable to proceedings by the Department and any of the administrations or boards within the Department established by this Act except that notwithstanding this or any other provision of this Act, the transfer of functions, powers, and duties to the Secretary or any other officer in the Department shall not include functions vested by subchapter II of chapter 5 of title 5, United States Code, in hearing exqminers employed by any department, agency, or component thereof whose functions are transferred under the provisions of this Act.

(i) The administration of the Alaska Railroad, established pursuant to the Act of March 12, 1914, as amended (38 Stat. 308), and all of the functions authorized to be carried out by the Secretary of the Interior pursuant to Executive Order Numbered 11107, April 25, 1963 (28 F.R. 4225), relative to the operation of said Railroad, are hereby transferred to and vested in the Secretary of Transportation who shall exercise the same authority with respect thereto as is now exercised by the Secretary of the Interior pursuant to said Executive order.

TRANSPORTATION INVESTMENT STANDARDS

Sec. 7. [*49 U.S.C. §1656*] (a) The Secretary, subject to the provisions of section 4 of this Act, shall develop and from time to time in the light of experience revise standards and criteria consistent with national transportation policies, for the formulation and economic evaluation of all proposals for the investment of Federal funds in transportation facilities or equipment, except such proposals as are concerned with (1) the acquisition of transportation facilities or equipment by Federal agencies in providing transportation services for their own use; (2) an interoceanic canal located outside the contiguous United States; (3) defense features included at the direction of the Department of Defense in the design and construction of civil air, sea, and land transportation; (4) programs of foreign assistance; (5) water resource projects; or (6) grant-in-aid programs authorized by law. The standards and criteria developed or revised pursuant to this subsection shall be promulgated by the Secretary upon their approval by the Congress.

The standards and criteria for economic evaluation of water resource projects shall be developed by the Water Resources Council established by Public Law 89-80. For the purpose of such standards and criteria, the primary direct navigation benefits of a water resource project are defined as the product of the savings to shippers using the waterway and the estimated traffic that would use the waterway; where the savings to shippers shall be construed to mean the difference between (a) the freight rates or charges prevailing at the time of the study for the movement by the alternative means and (b) those which would be charged on the proposed waterway; and where the estimate of traffic that would use the waterway will be based on such freight rates, taking into account projections of the economic growth of the area.

The Water Resources Council established under section 101 of Public Law 89-80 is hereby expanded to include the Secretary of Transportation on matters pertaining to navigation features of water resource projects.

(b) Every survey, plan, or report formulated by a Federal agency which includes a proposal as to which the Secretary has promulgated standards and criteria pursuant to subsection (a) shall be (1) prepared in accord with such standards and criteria and upon the basis of information furnished by the Secretary with respect to projected growth of transportation needs and traffic in the affected area, the relative efficiency of various modes of transport, the available transportation services in the area, and the general effect of the proposed investment on existing modes, and on the regional and national economy; (2) coordinated by the proposing agency with the Secretary and, as appropriate, with other Federal agencies, States, and local units of government for inclusion of his and their views and comments; and (3) transmitted thereafter by the proposing agency to the President for disposition in accord with law and procedures established by him.

ADMINISTRATIVE PROVISIONS

Sec. 9 *[49 U.S.C. §1657]* (a) In addition to the authority contained in any other Act which is transferred to and vested in Secretary, the National Transportation Safety Board, or any other officer in the Department, the Secretary is authorized, subject to the civil service and classification laws, to select, appoint, employ, and fix the compensation of such officers and employees, including investigators, attorneys, and hearing examiners, as are necessary to carry out the provisions of this Act and to prescribe their authority and duties.

(b) The Secretary may obtain services as authorized by section 3109 of title 5 of the United States Code, but at rates not to exceed $100 per diem for individuals unless otherwise specified in an appropriation Act.

(c) The Secretary is authorized to provide for participation of military personnel in carrying out the functions of the Department. Members of the Army, the Navy, the Air Force, or the Marine Corps may be detailed for service in the Department by the appropriate Secretary, pursuant to cooperative agreements with the Secretary of Transportation.

(d)(1) Appointment, detail, or assignment to, acceptance of, and service in any appointive or other position in the Department under the authority of section 9(c) and section 9(p) shall in no way affect status, office, rank, or grade which officers or enlisted men may occupy or hold or any emolument, perquisite, right, privilege, or benefit incident to or arising out of any such status, office, rank, or grade, nor shall any member so appointed, detailed, or assigned be charged against any statutory limitation on grades or strengths applicable to the Armed Forces. A person so appointed, detailed, or assigned shall not be subject to direction by or control by his armed force or any officer thereof directly or indirectly with respect to the responsibilities exercised in the position to which appointed, detailed, or assigned.

(2) The Secretary shall report annually in writing to the appropriate committees of the Congress on personnel appointed and agreements entered into under subsection (c) of this section, including the number, rank, and positions of members of the armed services detailed pursuant thereto.

(e)(1) Except where this Act vests in any administration, agency or board, specific functions, powers, and duties, the Secretary may, in addition to the authority to delegate and redelegate contained in any other Act in the exercise of the functions transferred to or vested in the Secretary in this Act, delegate any of his residual functions, powers and duties to such officers and employees of the Department as he may designate, may authorize such successive redelegations of such functions, powers, and duties as he may deem desirable, and may make such rules and regulations as may be necessary to carry out his functions, powers, and duties.

(2) In addition to the authority to delegate and redelegate contained in any other Act, in the exercise of the functions transferred to or specified by this Act to be carried out by any officer in the Department, such officer may delegate any of such functions, powers, and duties to such other officers and employees of the Department as he may designate; may authorize such successive redelegations of such functions, powers, and duties as he may deem desirable; and may make such rules and regulationsas may be necessary to carry out such functions, powers, and duties.

(3) The Administrators established by section 3(e) of this Act may not delegate any of the statutory duties and responsibilities specifically assigned to them by this Act outside of their respective administrations.

(f) The personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available or to be made available, of the Federal Aviation Agency, and of the head and other officers and offices thereof, are hereby transferred to the Secretary: *Provided, however,* That the personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available, or to be made available in carrying out the duties and functions transferred by this Act to the Secretary which are specified by this Act to be carried out by the Federal Aviation Administrator shall be assigned by the Secretary to the Federal Aviation Administrator for these purposes.

(g) So much of the positions, personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available or to be made available in connection with the functions, powers, and duties transferred by sections 6 (except section 6(c)) and 8(d) and (e) of this Act as the Director of the Bureau of the Budget shall determine shall be transferred to the Secretary: *Provided, however,* That the positions, personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available, or to be made available, by the Civil Aeronautics Board in carrying out the duties transferred by this Act to be exercised by the National Transportation Safety

Board shall be transferred to the National Transportation Safety Board. Except as provided in subsection (h), personnel engaged in functions, powers, and duties transferred under this Act shall be transferred in accordance with applicable laws and regulations relating to transfer of functions.

(h) The transfer of personnel pursuant to subsections (f) and (g) of this section shall be without reduction in classification or compensation for one year after such transfer.

(i) In any case where all of the functions, powers, and duties of any office or agency, other than the Coast Guard, are transferred pursuant to this Act, such office or agency shall lapse. Any person who, on the effective date of this Act, held a position compensated in accordance with the Executive Schedule, and who, without a break in service, is appointed in the Department to a position having duties comparable to those performed immediately preceding his appointment shall continue to be compensated in his new position at not less than the rate provided for his previous position, for the duration of his service in his new position.

(j) The Secretary is authorized to establish a working capital fund, to be available without fiscal year limitation, for expenses necessary for the maintenance and operation of such common administrative services as he shall find to be desirable in the interest of economy and efficiency in the Department, including such services as a central supply service for stationery and other supplies and equipment for which adequate stocks may be maintained to meet in whole or in part the requirements of the Department and its agencies; central messenger, mail, telephone, and other communications services; office space, central services for document reproduction, and for graphics and visual aids; and a central library service. The capital of the fund shall consist of any appropriations made for the purpose of providing capital (which appropriations are hereby authorized) and the fair and reasonable value of such stocks of supplies, equipment, and other assets and inventories on order as the Secretary may transfer to the fund, less the related liabilities and unpaid obligations. Such funds shall be reimbursed in advance from available funds of agencies and offices in the Department, or from other sources, for supplies and services at rates which will approximate the expense of operation, including the accrual of annual leave and the depreciation of equipment. The fund shall also be credited with receipts from sale or exchange of property and receipts in payment for loss or damage to property owned by the fund. There shall be covered into the United States Treasury as miscellaneous receipts any surplus found in the fund (all assets, liabilities, and prior losses considered) above the amounts transferred or appropriated to establish and maintain said fund.

(k) The Secretary shall cause a seal of office to be made for the Department of such device as he shall approve, and judicial notice shall be taken of such seal.

(l) In addition to the authority contained in any other Act which is transferred to and vested in the Secretary, the National Transportation Safety Board, or other officer in the Department, as necessary, and when not otherwise available, the Secretary is authorized to provide for, construct, or maintain the following for employees and their dependents stationed at remote localities:

(1) Emergency medical services and supplies;

(2) Food and other subsistence supplies;

(3) Messing facilities;

(4) Motion picture equipment and film for recreation and training;

(5) Reimbursement for food, clothing, medicine, and other supplies furnished by such employees in emergencies for the temporary relief of distressed persons; and

(6) Living and working quarters and facilities.

The furnishing of medical treatment under paragraph (1) and the furnishing of services and supplies under paragraphs (2) and (3) of this subsection shall be at prices reflecting reasonable value as determined by the Secretary, and the proceeds therefrom shall be credited to the appropriation from which the expenditure was made.

(m)(1) The Secretary is authorized to accept, hold, administer, and utilize gifts and bequests of property, both real and personal, for the purpose of aiding or facilitating the work of the Department. Gifts and bequests of money and the proceeds from sales of other property received as gifts or bequests shall be deposited in the Treasury in a separate fund and shall be disbursed upon order of the Secretary. Property accepted pursuant to this paragraph, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gift or bequest.

(2) For the purpose of Federal income, estate, and gift taxes, property accepted under paragraph (1) shall be considered as a gift or bequest to or for use of the United States.

(3) Upon the request of the Secretary, the Secretary of the Treasury may invest and reinvest in securities of the United States or in securities guaranteed as to principal and interest by the United States any moneys contained in the fund provided for in paragraph (1). Income accruing from such securities, and from any other property held by the Secretary pursuant to paragraph (1) shall be deposited to the credit of the fund, and shall be disbursed upon order of the Secretary.

(n)(1) The Secretary is authorized, upon the written request of any person, or any State, territory, possession, or political subdivision thereof, to make special statistical studies relating to foreign and domestic transportation, and special studies relating to foreign and domestic transportation, and special studies relating to other matters falling within the province of the Department, to prepare from its records special statistical compilations, and to furnish transcripts of its studies, tables, and other records upon the payment of the actual cost of such work by the person or body requesting it.

(2) All moneys received by the Department in payment of the cost of work under paragraph (1) shall be deposited in a separate account to be administered under the direction of the Secretary. These moneys may be used, in the discretion of the Secretary, for the ordinary expenses incidental to the work and/or to secure in connection therewith the special services of persons who are neither officers nor employees of the United States.

(o) The Secretary is authorized to appoint, without regard to the civil service laws, such advisory committees as shall be appropriate for the purpose of consultation with and advice to the Department in performance of its functions. Members of such committees, other than those regularly employed by the Federal Government, while attending meetings of such committees or otherwise serving at the request of the Secretary, may be paid compensation at rates not exceeding those authorized for individuals under subsection (b) of this section, and while so serving away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

(p)(1) Notwithstanding any provision of this Act or other law, a member of the Coast Guard on active duty may be appointed, detailed, or assigned to any position in the Department other than Secretary, Deputy Secretary, and Assistant Secretary for Administration.

(2) Subject to the provisions of title 5, United States Code, a retired member of the Coast Guard may be appointed to any position in the Department.

(q)(1) The Secretary is authorized to enter into contracts with educational institutions, public or private agencies or organizations, or persons for the conduct of scientific or technological research into any aspect of the problems related to the programs of the Department which are authorized by statute.

(2) The Secretary shall require a showing that the institutions, agencies, organizations, or persons with which he expects to enter into contracts pursuant to this subsection have the capability of doing effective work. He shall furnish such advice and assistance as he believes will best carry out the mission of the Department, participate in coordinating all research initiated under this subsection, indicate the lines of inquiry which seem to him most important, and encourage and assist in the establishment and maintenance of cooperation by and between the institutions, agencies, organizations, or persons and between them and other research organizations, the Department, and other Federal agencies.

(3) The Secretary may from time to time disseminate in the form of reports or publications to public or private agencies or organizations, or individuals such information as he deems pertinent on the research carried out pursuant to this section.

(4) Nothing contained in this subsection is intended to amend, modify, or repeal any provisions of law administered by the Department which authorize the making of contracts for research.

MINORITY RESOURCE CENTER

Sec. 11. *[49 U.S.C. §1647a]* (a) The Secretary shall, within 180 days after the date of enactment of this section, establish a Minority Resource Center (hereafter in this section referred to as the 'Center').

(b) The Center shall have an Advisory Committee, which shall consist of 5 individuals appointed by the Secretary from lists of 3 qualified individuals recommended by minority-dominated trade associations in the minority business community.

(c) The Center is authorized to—

(1) establish and maintain, and disseminate information from, a national information clearinghouse for minority entrepreneurs and businesses, for purposes of furnishing, to such entrepreneurs and businesses, information with respect to business opportunities involving the maintenance, rehabilitation, restructuring, improvement, and revitalization of the Nation's railroads;

(2) assist minority entrepreneurs and businesses in obtaining investment capital and debt financing;

(3) conduct market research, planning, economic and business analyses, and feasibility studies to identify such opportunities;

(4) design and conduct programs to encourage, promote, and assist minority entrepreneurs and businesses to secure contracts, subcontracts, and projects related to the maintenance, rehabilitation, restructuring, improvement, and revitalization of the Nation's railroads;

(5) enter into such contracts, cooperative agreements, or other transactions as may be necessary in the conduct of its functions and duties;

(6) develop support mechanisms, including venture capital, surety and bonding organizations, and management and technical services, which will enable minority entrepreneurs and businesses to take advantage of business opportunities related to the maintenance, rehabilitation, restructuring, improvement, and revitalization of the Nation's railroads; and

(7) participate in, and cooperate with, all Federal programs and other programs designed to provide financial, management, and other forms of support and assistance to minority entrepreneurs and businesses.

(d) The United States Railway Association, the Consolidated Rail Corporation, and the Secretary shall provide the Center with such relevant information, including procurement schedules, bids, and specifications with respect to particular maintenance, rehabilitation, restructuring, improvement, and revitalization projects, as may be requested by the Center in connection with the performance of its functions.

(e) As used in this section, the term 'minority' includes women.

ANNUAL REPORT

Sec. 12. *[49 U.S.C. §1658]* The Secretary shall, as soon as practicable after the end of each fiscal year, make a report in writing to the President for submission to the Congress on the activities of the Department during the preceding fiscal year.

SAVINGS PROVISIONS

Sec. 13. *[49 U.S.C. §1651 note]* (a) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges—

(1) which have been issued, made, granted, or allowed to become effective—

(A) under any provision of law amended by this Act, or

(B) in the exercise of duties, powers, or functions which are transferred under this Act,

by (i) any department or agency, any functions of which are transferred by this Act, or (ii) any court of competent jurisdiction, and

(2) which are in effect at the time this Act takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Secretary, Administrators, Board, or General Counsel (in the exercise of any authority respectively vested in them by this Act), by any court of competent jurisdiction, or by operation of law.

(b) The provisions of this Act shall not affect any proceedings pending at the time this section takes effect before any department or agency (or component thereof), functions of which are transferred by this Act; but such proceedings, to the extent that they relate to functions so transferred, shall be continued before the Department. Such proceedings, to the extent they do not relate to functions so transferred, shall be continued before the department or agency before which they were pending at the time of such transfer. In either case orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this Act had not been enacted; and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or repealed by the Secretary, Administrators, Board, or General Counsel (in the exercise of any authority respectively vested in them by this Act), by a court of competent jurisdiction, or by operation of law.

(c)(1) Except as provided in paragraph (2)—

(A) the provisions of this Act shall not affect suits commenced prior to the date this section takes effect, and

(B) in all such suits proceeding shall be had, appeals taken, and judgments rendered, in the same manner and effect as if this Act had not been enacted.

No suit, action, or other proceeding commenced by or against any officer in his official capacity as an officer of any department or agency, functions of which are transferred by this Act, shall abate by reason of the enactment of this Act. No cause of action by or against any department or agency, functions of which are transferred by this Act, or by or against any officer thereof in his official capacity shall abate by reason of the enactment of this Act. Causes of actions, suits, actions, or other proceedings may be asserted by or against the United States or such official of the Department as may be appropriate and, in any litigation pending when this section takes effect, the court may at any time on its own motion or that of any party, enter an order which will give effect to the provisions of this subsection.

(2) If before the date on which this Act takes effect, any department or agency, or officer thereof in his official capacity, is a party to a suit, and under this Act—

(A) such department or agency is transferred to the Secretary, or

(B) any function of such department, agency, or officer is transferred to the Secretary,

then such suit shall be continued by the Secretary (except in the case of a suit not involving functions transferred to the Secretary, in which case the suit shall be continued by the department, agency, or officer which was a party to the suit prior to the effective date of this Act).

(d) With respect to any function, power, or duty transferred by this Act and exercised after the effective date of this Act, reference in any other Federal law to any department or agency, officer or office so transferred or functions of which are so transferred shall be deemed to mean the officer or agency in which this Act vests such function after such transfer.

SEPARABILITY

Sec. 14. *[49 U.S.C. §1659]* If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of this Act, and the application of such provision to other persons or circumstances shall not be affected thereby.

CODIFICATION

Sec. 15. *[49 U.S.C. §1651 note]* The Secretary is directed to submit to the Congress within two years from the effective date of this Act, a proposed codification of all laws that contain the powers, duties, and functions transferred to or vested in the Secretary or the Department by this Act.

EFFECTIVE DATE; INITIAL APPOINTMENT OF OFFICERS

Sec. 16. *[49 U.S.C. §1651 note]* (a) This Act shall take effect ninety days after the Secretary first takes office, or on such prior date after enactment of this Act as the President shall prescribe and publish in the Federal Register.

(b) Any of the officers provided for in this Act may (notwithstanding subsection (a)) be appointed in the manner provided for in this Act, at any time after the date of enactment of this Act. Such officers shall be compensated from the date they first take office, at the rates provided for in this Act. Such compensation and related expenses of their offices shall be paid from funds available for the functions to be transferred to the Department pursuant to this Act. (The act of Oct. 15, 1966, 80 Stat. 931, as amended by the acts of Sept. 11, 1967, 81 Stat. 224; Aug. 23, 1968, 82 Stat. 824; Aug. 22, 1972, 86 Stat. 617; Oct. 28, 1974, 88 Stat. 1526; Jan. 3, 1975, 88 Stat. 2156; May 26, 1975, 89 Stat. 90; Feb. 5, 1976, 90 Stat. 31; July 8, 1976, 90 Stat. 821)

RULES OF CONSTRUCTION

Title 1 Chapter 1

Section 1-5.—[Unchanged. See vol. 15, p. 12309, vol. 16, p. 12961.]

ADMINISTRATIVE PROCEDURE ACT

[5 USC §§551-559 and *§§701-706]*

CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

[See vol. 13, p. 11171; vol. 21, p. 17764]

Section 551. Definitions. [Unchanged, except that P. L. 94-409, 90 Stat. 1247, September 13, 1976, amended paragraph (12) by striking out "and"; and paragraph (13) by striking out "act" at the end and inserting in lieu thereof "act; and"; and by adding at the end thereof the following new paragraph (14): [See vol. 21, p. 17764.]

> (14) 'ex parte communication' means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

Section 552. *[5 U.S.C. §552].* **PUBLIC INFORMATION; AGENCY RULES; OPINIONS, ORDERS, RECORDS, AND PROCEEDINGS.** [See vol. 21, p. 17765]. [Public Law 93-502, 88 Stat. 1561, Nov. 21, 1974, amended or added the following subsections].

(a)(2): The fourth sentence beginning with "Each agency" was amended to read as follows: Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication.* * *

(a)(3): Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(a)(4): This paragraph has been redesignated as paragraph (5). A new paragraph (4) has been added by Public Law 93-502, Nov. 21, 1974, 88 Stat. 1561.

(a)(4): (A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter do novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the

Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. (New paragraph (a)(4) was added by Public Law 93-502, November 21, 1974, 88 Stat. 1561)

(a)(6): (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request. (New paragraph (a)(6) was added by Public Law 93-502, November 21, 1974, 88 Stat. 1562)

(b)(1): (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order. (Section 552(b)(1) was amended by Public Law 93-502, Nov. 21, 1974, 88 Stat. 1563)

(b)(3): specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; (amended by P.L. 94-409, 90 Stat. 1247, September 13, 1976). [See vol. 21, p. 17766.]

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel; (Paragraph (b)(7) was amended by Public Law 93-502, November 21, 1974, 88 Stat. 1563)

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. (Section 552(b) was amended by adding at the end, the above, by Public Law 93-502, Nov. 21, 1974, 88 Stat. 1564).

(d) and (e): (d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency. (Paragraph (d) and (e) were added by Public Law 93-502, November 21, 1974, 88 Stat. 1564)

Section 552a. Records maintained on individuals

(a) DEFINITIONS.—For purposes of this section—

(1) the term 'agency' means agency as defined in section 552(e) of this title;

(2) the term 'individual' means a citizen of the United States or an alien lawfully admitted for permament residence;

(3) the term 'maintain' includes maintain, collect, use, or disseminate;

(4) the term 'record' means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term 'system of records' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term 'statistical record' means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

(7) the term 'routine use' means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

(b) CONDITIONS OF DISCLOSURE.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Admin-

istrator of General Services or his designee to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(11) pursuant to the order of a court of competent jurisdiction.

(c) ACCOUNTING OF CERTAIN DISCLOSURES.—Each agency, with respect to each system of records under its control, shall—

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) ACCESS TO RECORDS.—Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agen-

cy may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) AGENCY REQUIREMENTS.—Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency

required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

(f) AGENCY RULES.—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special

procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) CIVIL REMEDIES.—Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection:

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) RIGHTS OF LEGAL GUARDIANS.—For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i)(1) CRIMINAL PENALTIES.—Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements ofsubsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) GENERAL EXEMPTIONS.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and if the system of records is—

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) SPECIFIC EXEMPTIONS.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I) and (f) of this section if the system of records is—

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however,* That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of

such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identify of the source would be held in confidence:

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(l)(1) ARCHIVAL RECORDS.—Each agency record which is accepted by the Administrator of General Services for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Administrator of General Services shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m) GOVERNMENT CONTRACTORS.—When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(n) MAILING LISTS.—An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) REPORT ON NEW SYSTEMS.—Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers.

(p) ANNUAL REPORT.—The President shall submit to the Speaker of the House and the President of the Senate, by June 30 of each calendar year, a consolidated report, separately listing for each Federal agency the number of records contained in any system of records which were exempted from the application of this section under the provisions of subsections (j) and (k) of this section during the preceding calendar year, and the reasons for the exemptions, and such other information as indicates efforts to administer fully this section.

(q) EFFECT OF OTHER LAWS.—No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section. (Sec. 552a was added to Title 5 by P.L. 93-579, 88 Stat. 1897, Dec. 31, 1974)

§552b. Open meetings

(a) For purposes of this section—

(1) the term 'agency' means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term 'meeting' means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

(3) the term 'member' means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person:

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law, enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would—

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action,

except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d)(1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a)(1)) votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: *Provided,* That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.

(e)(1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.

(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

(f)(1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9)(A), or (10) of subsection (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

(2) The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion, or testi-

mony as the agency determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting or portion was held, whichever occurs later.

(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any person, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section and to require the promulgation of regulations that are in accord with such subsections.

(h)(1) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (b) through (f) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty days after the service of the complaint. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of the transcript, electronic recording, or minutes of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the parties, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section or ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

(2) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose.

(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

(j) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

(l) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof required by any other provision of law to be open.

(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title. (Section 552b was added by Pub. L. 94-409, Sept. 13, 1976, 90 Stat. 1241.)

SECTION 556. HEARINGS: PRESIDING EMPLOYEES: POWERS AND DUTIES: BURDEN OF PROOF: EVIDENCE: RECORD BASIS OF DECISION. [Unchanged, except that P.L. 94-409, 90 Stat. 1247, was amended by inserting between the third and fourth sentences thereof the following new sentence in paragraph (d): [See vol. 21, p. 17771.]

The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.

SECTION 557. INITIAL DECISIONS: CONCLUSIVENESS: REVIEW BY AGENCY: SUBMISSIONS BY PARTIES: CONTENTS OF DECISIONS: RECORD. [Unchanged, except paragraph (d) as follows was added by P.L. 94-209, 90 Stat. 1246, September 13, 1976.] [See vol. 21, p. 17773.]

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation-and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

Historical note, vol. 21, p. 17777.

Notes of Decisions

Volume 14—p. 11691; Volume 15—p. 12310; Volume 16—p. 12962; Volume 17—p. 13672; Volume 18—p. 14706; Volume 19—p. 15986; Volume 21—p. 17777.

Burden of Proof

On review of Interstate Commerce Commission decision that plaintiff's heavy-hauling certificate did not authorize it to transport 500- and 750-pound bombs, there is no merit in contention that the "Dillner presumption" that class A and B explosives are outside the commodity authority of heavy haulers, as used in the agency proceeding, improperly changed the burden of proof to respondent heavy haulers in violation of the APA and of constitutional due process. Where the facts shown give rise to a presumption, usual function of the presumption is to constitute prima facie proof on issue involved and shift to the other party the burden of going forward with the evidence as to that issue. In instant case, the history, facts, and data before the Commission provided a sound basis for it, in exercising its expertise, to recognize and apply the general rule or rebuttable presumption in question and, thus, place burden on the heavy hauler to produce evidence to overcome hat presumption. The challenged presumption was not created out of thin air; nor did it shift the ultimate burden of proof in the case. Commission decision sustained.—International Transport, Inc. v. United States, 337 F. Supp. 985 (997, 1000-1, 1002)*

Declaratory Orders

Upon application for declaratory order, the Commission determined that undercharges were due to petitioner carrier but as the record contained insufficient detail concerning the nature of individual shipments no determination as to the amount of under charges outstanding could be made. The Commission therefore listed the 7 possible kinds of shipments which could be made and stated the applicable charges for each. In ascertaining such charges, consideration was given to both mixed-package rule of classification and mixed-shipment provisions of governing tariff. There is no statutory authority for any carrier to file a complaint with the Commission against any shipper. Commission therefore considered instant case as a petition for a declaratory order inasmuch as the district court, having jurisdiction over carrier's suit against shipper for undercharges held such suit in abeyance pending determination by the Commission as to the applicable charges.—Arkansas—Best Freight System, Inc. v. Quartet, 332 I.C.C. 877 (880-82).

Where a motor common carrier, possessing both intrastate and interstate authorities, routed l.t.l. shipments originating at and destined to points in the same State through another State, with no attempt to avoid any State regulations and solely for the operating convenience of the carrier whose continuing intention is that such shipment shall be intrastate in nature, the shipper is entitled to whichever is the lower of the two rates, the interstate or intrastate, or the carrier is guilty of misrouting.—Applicable Rates on Intrastate Shipments, 332 I.C.C. 887 (890-91).

Examiners

The statute does not relegate Interstate Commerce Commission to the role of a reviewing court, for it expressly confers on it the right to make its own determinations from the evidence; thus, Commission finding that plaintiff (applicant) failed to sustain its burden of proof as to need for proposed service is not inconsistent with its adoption of the examiner's findings. Commission acceptance of evidence found by the examiner as fact (as to lack of available service to Florida) in no way bound it to accept examiner's conclusions drawn from those facts that requisite "need" had been shown. While the reviewing court's particularly close inspection of evidence in the case may be warranted, there is no requirement that the commission furnish an analysis of each item of evidence before the examiner, nor disclose the mental processes through which its decision was reached. Since the Commission's findings are stated with sufficient particularity to clearly show the basis of its decision, they have fulfilled their purpose and are adequate; complaint dismissed.—Caravelle Express, Inc. v. United States, 287 F. Supp. 585 (587-8)*.

While the statute provides that agency employee who heard the evidence "shall make the recommended or initial decision required * * *," it excepts the case where "he becomes unavailable to the Agency." Thus, when the Hearing Examiner retired after close of the hearing in rail abandonment case, the Commission did not err in permitting an examiner who had not heard the evidence to make the findings and recommended decision. It being undisputed that retirement made the Hearing Examiner unavailable to the Commission, substitution of a new examiner was warranted.—Brooklyn Eastern District Terminal v. United States, 302 F. Supp. 1095 (1105)*.

The Interstate Commerce Commission may reject all or part of its Hearing Examiner's recommended opinion and order, if it does so on consistent grounds, supported by substantial evidence in the record. In instant case, it is not shown to have acted inconsistently when, after adopting the examiner's findings and affirming the recommended limited grant of authority to serve Florida, it reversed his recommendation by granting the applicant authority to serve points in Louisiana. The Commission's statements clearly show that modification of the examiner's recommendations was based on its recognition that (1) some shipments from New Orleans to other Louisiana points would be interstate in nature because of their out-of-state or foreign origin, which the record bears out, and (2) the evidence regarding Florida points was not the same; thus, plaintiffs have shown no fatal inconsistency in the record.—Superior Trucking Co. v. United States, 306 F. Supp. 872 (874, 878)*.

It is a rule of administrative procedure that the hearing officer shall make the initial or recommended decision, unless he becomes unavailable to the agency; and when examiner who conducted the oral hearing on plaintiff's motor carrier application retired before rendering a report, the hearing officer had become unavailable. Therefore, it was proper for the Commission to assign a substitute examiner to furnish an initial report. No questions of credibility were resolved by the substitute examiner—his was a report of uncontroverted fact. Moreover, it is well settled that a substitute examiner may prepare a recommendation for a Commission when the hearing officer dies or retires before preparing his report. Action to set aside Commission order denying a certificate, which was based on substitute examiner's recommendation, dismissed.—Consolidated Carriers Corp. v. United States, 321 F. Supp. 1098 (1099, 1100)*.

In motor carrier's suit to enjoin and invalidate Interstate Commerce Commission orders which subjected household goods authority granted plaintiff to a so-called

"Kingpak" restriction, fact that the Commission did not affirm hearing examiner's findings that an unrestricted certificate should be granted is not important since, under the law, the Commission and not an examiner or employee board has the duty to render a final decision based on the evidence of record. The Commission is charged with responsibility of evaluating public convenience and necessity; also, as pointed out in 275 F. Supp. 98, it is the Commission's duty and obligation to make its decisions, in the final analysis, and in so doing it is free to accept or reject the recommendations of its examiners. Relief sought by plaintiff is denied.—Towne Services Household Goods Transp. Co. v. United States, 329 F. Supp. 815 (820, 822)*.

Participation by the examiner who presided at the continued hearing in making the supplemental report and recommended order, which was prepared by the hearing examiner who received the evidence at the initial hearing and the examiner who conducted the continued hearing, did not violate the Administrative Procedure Act. Although no oral testimony was adduced at the continued hearing, "evidence" is not so limited but may also include pleadings, written stipulation, records, and other documents and exhibits; amendment to the application and telegram withdrawing a protestants' opposition, received by the examiner at the continued hearing, constitute "evidence" within the Commission's Rules of Practice and the APA. Protestant's rights were not prejudiced by the procedure followed, and provisions of APA were in no way infringed.—Skinner Motor Exp., Inc., Extension, 96 M.C.C. 135 (136-37, 140-41).

The hearing, having been adjourned "to another place to be determined by the Commission" was assigned to a different hearing examiner who presided at the reconvened hearing and wrote and submitted the report and recommended order. Objection was taken to this report and order on the basis that the second examiner did not preside at the initial hearing. Objection overruled because the second examiner was a duly qualified officer of the Commission, validly appointed, and can issue, in an initial licensing proceedings such as here, a report and recommended order which evaluates evidence received by another duly qualified officer. Section 5(c) APA allows for this if the proceeding involves an initial license or is a proceeding involving the validity or application of rates, facilities, or practices of public utilities or carriers.—Western Lines, Inc., Extension, 96 M.C.C. 657 (658-9, 664-5).

Examiner's statement of fact is substantially correct and the Commission affirms his recommended partial denial of authority on basis that existing service is "reasonably adequate." However, the Commission disagrees with examiner's recommended partial grant of authority on basis that services of two single-line heavy-hauling carriers are not required; in support of this conclusion the Commission points out that, among other things, interline service between two or even among three carriers cannot be said to be *per se* inadequate particularly where, as here, some very long hauls are involved. In addition, there is no showing of materially unsatisfactory service. Denied.—Leonard Bros. Transfer, Inc., Ext.—California-Texas, 103 M.C.C. 263 (265, 67).

Hearing

Statutory requirements for a trial-type hearing—in other words a hearing "on the record"—were applicable in Interstate Commerce Commission rulemaking proceeding which proposed rules and regulations establishing additional "incentive" per diem charges for freight cars, since the 1917 law to which Congress added the new Commission authority to include an incentive element in the compensation to be paid by railroads for the use of cars not owned by them was a statute which required a "hearing." However, the statute also provides that in rulemaking, when a party will not be prejudiced thereby, an agency may adopt procedures for submission of the evidence in written form; thus, even when rulemaking requires a hearing "on the record," record does not always have to be made in traditional manner. No prejudice to Long Island R., caused by the order prescribing incentive per diem charges for unequipped boxcars, is established; and considering all the circumstances, the Commission's denial of plaintiff's request for oral hearing did not significantly prevent it from fairly presenting its case; complaint dismissed.—Long Island R. Co. v. United States, 318 F. Supp. 490 (495-500)*.

On the other hand, facts in action by the Seaboard and the Florida East Coast, seeking to set aside the same order because the Commission did not afford them an oral hearing, show that those railroads were prejudiced by the summary procedures utilized. Assertions in plaintiffs' statements, which set forth the grounds there urged as requiring oral hearing, demonstrate the prejudice to them arising from the Commission's failure to provide hearings. The court finds in instant case, therefore, that the Commission acted illegally in denying plaintiff railroads a hearing before imposing the incentive per diem charges in issue. Accordingly, enforcement of the Commission's order as to those railroads is enjoined, annulled and set aside, without prejudice to further Commission proceedings, findings, and orders not inconsistent with the court's opinion.—Florida East Coast Ry. Co. v. United States, 322 F. Supp. 725 (728-9, 732-3)*.

Although §7(c) of APA states that "Every party shall have the right * * * to conduct such cross-examination as may be required for a full and true disclosure of the facts," that right—which entails an oral hearing—is dependent on the Commission's determination that cross-examination is necessary, and is based on substantial compliance with rule 53 of the Commission's Rules of Practice. The question of whether a sufficient showing of need for oral hearing has been made is a matter for urgency discretion, and the courts will interfere only if there has been an abuse of discretion; likewise, the right of cross-examination may be subject to reasonable administrative control.—Steel, Inc. v. Chicago, B. & Q. R. Co., 323 I.C.C. 509 (516).

The Administrative Procedure Act contains no requirements that hearings be held upon application for licenses; the statute confines itself to a prescription of the type of hearing to be held where some other statute or due process of law requires a hearing. There is no statutory provision under §208(a) of the Interstate Commerce Act which would demand a hearing in order to impose upon outstanding certificates such terms, conditions or limitations as public convenience and necessity may now require; furthermore, as to due process, the Commission is aware of no constitutional right to an oral hearing in a rulemaking proceeding. In addition, the impact of proposed restriction elimination is future in effect and generally applies to an entire class rather than to particular members of the class; hence there is no need to utilize adjudicative procedures. In this light the procedures followed more than satisfy the requirements for rulemaking established in §4 of the APA.—Removal of Truckload Lot Restrictions, 106 M.C.C. 455 (478-80)*.

Judicial Review

See also Monumental Motor Tours, Inc. v. United States case, §212(b), n. 10; Navajo Freight Lines, Inc. v. United States case, §210a, n. 1, supra; American Movers Conference v. United States case, 28 USC §2325, n. 14; T. J. Claveau Transp., Inc. v. I.C.C. case, 28 USC §2325, n. 7, infra.

Notwithstanding the Commission's broad discretion under 49 USC §5, the absence of required findings is fatal to validity of its order in motor carrier purchase proceeding regardless of whether there may be evidence of record to support proper findings. Though findings on collateral issues need not be made, reviewing courts are not required to speculate as to the basis for administrative agency's conclusions; nor may they accept counsel's *post hoc* rationalization for agency action. Thus, while a Commission decision may be upheld without explaining inconsistency thereof with prior decisions (when findings are adequate to explain the basis), if the court can uphold considered order at all it must be upon the same basis articulated therein by the Commission itself. The court recognizes the Commission's experience and its wide authority to make §5 decisions with a minimum of judicial interference but, in view of the purpose and requirements of the APA, judicial deference to Commission expertise is not boundless and expertise itself is not sufficient to sustain a decision.—Bell Lines, Inc. v. United States, 263 F. Supp. 40 (44-6)*.

Though the Commission found, in proceeding under review, that vendee had the burden of establishing that its service to certain off-route points had remained alive, or, if not, that need existed therefor, it approved proposed purchase without making a positive finding as to dormancy or a need for service at Pittsburgh, Pa., as an off-route point, and restricted vendee's service at that point to traffic to and from four southern States. Since purpose of the APA is to offer a degree of protection from unrestrained and unwarranted bureaucratic action, and since requirements thereof are fundamental to due process, the Commission's denial of competing carrier's (plaintiff) petition for reconsideration, with no affirmative findings on the questions of dormancy or need for service, was prejudicial error. Accordingly, case is remanded to the Commission with directions to make, in accordance with its own standard and the requirements of the APA, clear and precise findings and conclusions on dormancy and need for service at Pittsburgh, as an off-route point.—Id., pp. 43, 46-7.

Applicable standards of judicial review are limited in scope by settled principles of administrative law, both general and statutory, and the standards are to be vigorously enforced. In reviewing an administrative agency's decision, the court must judge its action solely on the basis invoked by the agency and, if the basis is inadequate, the court is powerless to affirm the action. Commission order prescribing new divisions of Official-Southern joint rail rates, on finding that northern lines' higher costs justified a larger share of the revenues, is not based on substantial evidence or supported by reasoned findings within meaning of §8(b) and §10(e) of the statute when, having stated that its standard for new divisions was relevant costs of handling north-south traffic involved, the Commission's use of Rail Form A territorial averages as reflecting northern lines' higher costs is not supported with findings or evidence relating such higher costs to the specific north-south traffic. Order set aside and cause remanded for further proceedings consistent with the court's opinion.—Aberdeen & R. R. Co. v. United States, 270 F. Supp. 695 (700-701, 707-10, 713)*.

The court, in action to set aside Commission order, must uphold the Commission's findings if they are neither arbitrary, capricious nor an abuse of discretion, and are not otherwise unlawful. However, propriety of Commission action must be judged solely by the grounds invoked by it, and if those grounds are inadequate or improper, the court is powerless to affirm its decision. In consolidated proceeding, involving related investigation and tariff dockets, the Commission's finding that plaintiff railroad's holding practice (in connection with c.l. shipments of potatoes from California to Kansas City, Mo., routed over its internal circuitous routes by shippers seeking increased transit time and a more favorable market) constituted a service of delay not provided for in the tariff, rests on a reasonable basis and is not legally erroneous; therefore, the court may not disturb it. Order in the investigation proceeding is affirmed and, as to that order, complaint dismissed.—Atchison, T. & S.F. Ry. Co. v. United States, 282 F. Supp. 430 (431, 433-4, 437)*.

However, in the tariff proceeding, the Commission's ruling that railroad's two proposed tariff rules (one making through rates applicable over its internal circuitous routes and the other authorizing, under its diversion and reconsignment tariff, holding schedules commensurate with those routes) were not shown to be just and reasonable, is not supported by the record; the Commission report does not reflect that consideration was given to any competitive disadvantage of plaintiff railroad, or to any unjust or unreasonable advantage accruing to other carriers with longer rail routes. Furthermore, on the record before the court, the grounds stated by the Commission for disapproving proposed tariff rules do not afford a legally adequate basis for its decision. Accordingly, Commission order in the tariff proceeding is remanded for further proceedings.—Id., pp. 434-7.

In action seeking to set aside and enjoin the Commission's denial of motor carrier plaintiffs' proposed purchase transaction, it is not the function of the reviewing court to act as a fact-finding body, but rather to determine whether the Commission's findings are supported by substantial evidence. Decision of the Commission will not be disturbed, if a rational basis for its conclusions exists. Substantial evidence of record supports the Commission's findings that applicants (plaintiffs) had failed to show that vendor's past service under the purchase rights had been substantial, both as to territory and commodities, and that the purchase transaction as presented was not shown to be consistent with the public interest. There being no error in the Commission's report and orders, plaintiffs' action is dismissed.—Cooper Motor Lines, Inc. v. United States, 284 F. Supp. 754 (756-8)*.

Scope of court review of Commission order, which granted intervenor authority to conduct motor-carrier special and charter party operations, is limited to determining only whether the Commission's findings are supported by substantial evidence on the entire record and whether its conclusion as to convenience and necessity has a rational basis in the facts. Neither is the court concerned with consistency or inconsistency of the Commission's decisions, since its judgment must be exercised in light of the facts in each case. Furthermore, questions of admissibility, probative weight, and credibility of evidence are not within the scope of statutory review; thus, since the Commission is not required to adhere to strict rules of evidence, its admission of evidence which the court would deem incompetent does not invalidate its orders as long as the findings are sustained by competent substantial evidence in the entire record. Thus, the absence of testimony of potential riders, or direct users of the service authorized, does not render considered order of the Commission erroneous as a matter of law; sustained.—Greyhound Lines, Inc. v. United States, 285 F. Supp. 318 (320-21)*.

Since there is no rational foundation of record for the Commission's conclusion, in its investigation proceeding, that terms of the motor carrier certificate in issue were not patently ambiguous (on which finding it decided that it was prohibited from going behind the certificate to determine scope of the authority granted), that finding of no patent ambiguity was arbitrary, capricious, and constituted an abuse of agency discretion. In addition, the Commission's actions in regard to the investigation, and its discontinuance thereof, were procedurally deficient and not in conformity with requirements of the relevant statues; the order under review is set aside and the cause remanded. And the court, exercising its discretion to compel agency action unreasonably withheld, instructs the Commission on remand to (1) examine administrative history of considered certificate to determine scope of authority actually conferred therein, and (2) to consider and decide whether inadvertent issuance of the certificate illegally enlarged the scope of defendant carrier's authority.—Akers Motor Lines, Inc. v. United States, 286 F. Supp. 213 (220-1, 222-6)*.

In action seeking another review of Commission decision and order granting a motor carrier certificate (following the Supreme Court's reversal of reviewing court's former order remanding the case), it is significant that, in spite of everything that has occurred throughout the lengthy proceedings, plaintiffs did not seek an opportunity to produce, or present to the court any other or additional facts which would convince it that the Commission's decision bore any infirmities within the scope of proper court review. Furthermore, when the case was remanded to the Commission, it was not required by that order to take additional evidence of to make its decision anew otherwise than upon the existing record. Defendants' motion to dismiss pursuant to the reversal and remand in United States v. Dixie Highway Exp., Inc., 389 US 409, is sustained.—Dixie Highway Exp., Inc. v. United States, 287 F. Supp. 473 (474-5)*.

In action to set aside portion of the Commission's order denying plaintiff (applicant) authority for proposed operations to certain destination States, particularly Florida, the Commission's conclusion that record did not warrant a grant of authority to the more distant States, without distinguishing between Florida and the others, may rationally be drawn from the evidence; thus, even though evidence that two Florida sales were lost because of lack of suitable shipping facilities was presented to the examiner, the court is not prepared to substitute its own judgment to decide that the Commission's finding is arbitrary and without substantial basis in fact. Also, there is no obligation on the Commission to review and comment upon each item of evidence.—Caravelle Express, Inc. v. United States, 287 F. Supp. 585 (587)*.

Furthermore, the function of the reviewing court is limited to ascertaining whether there is warrant in the law and the facts for the Commission's action. The Commission's conclusion that plaintiff failed to show that public convenience and necessity existed for its proposed Florida operations was a rational conclusion which finds substantial support in the evidence; accordingly, relief sought by plaintiff is denied and the complaint is dismissed.—Id., pp. 588-9.

Scope of judicial review of Commission orders is limited and well defined; judicial function of the reviewing court is fully met when it finds a rational basis for the Commission's conclusions. The agency's action cannot be set aside unless it can be found to be arbitrary, capricious, or an abuse of discretion or not supported by substantial evidence. Record in Commission proceeding on motor carrier application for passenger authority is vast, and a reading of it as a whole does not show show it to be devoid of substantial evidence supporting its conclusions. Though occasionally the record may well support two conflicting points of view, the court cannot determine which is the correct one. Accordingly, the Commission's order granting the authority is sustained.—The Short Line, Inc. v. United States, 290 F. Supp. 939 (941-2)*.

Judicial review of Commission orders is limited to inquiries into issues of constitutional limitations, statutory authority, and sufficiency of evidence to support the agency's findings of fact. The Commission is charged with administration of the Motor Carrier Act, and the delineation of what are transportation services thereunder is particularly within its competence and expertise. Plaintiffs' argument that the Commission lacked substantial evidence on which to base its conclusion and, therefore, its finding that three services (in addition to over-the-road transportation) offered by contract-carrier applicant were "transportation services" should be set aside, overlooks the fact that the finding involves interpretation of critical language in a statutory scheme by the agency charged with its administration. As such the court is bound to accord it great weight; and if agency construction is not wholly incompatible with purpose of the Act, the court must accept it even though it would have reached a different result had the question arisen before it in the first instance. Commission decision sustained.—National Trailer Convoy, Inc. v. United States, 293 F. Supp. 630 (632-4)*.

In action to review, and seeking to enjoin certain aspects of, Commission's report and order disposing of 53 common carrier applications, the court's ambit of review is narrow; determination of public convenience and necessity is for the Commission and a court may not substitute its judgment for that of the administrative tribunal on matters within the agency's discretion. The Commission's determination that public convenience and necessity would be served by grant of authority to 36 of the carriers seeking to provide service to meat-packing houses in vicinity of Sioux City, Iowa, its selection of the carriers to meet the need shown, and its denial of the remaining 17 applications, was rational, based on adequate findings supported by substantial evidence, and in accord with the applicable law. Accordingly, even though the reviewing court might not necessarily reach the same result in every instance at issue, the relief requested is denied; complaints dismissed at plaintiff's cost.—Iowa Beef Packers, Inc. v. United States, 297 F. Supp. 1156 (1157-9)*.

In action seeking review of Commission's decision and order requiring plaintiff to cease and desist from certain unlawful motor carrier operations, overwhelming evidence supports the Commission's conclusion that plaintiff's movement of freight from Pittsburgh to Philadelphia, Pa., areas over highly circuitous routes via New Jersey (by tacking its interstate rights from western Pennsylvania to New Jersey to its rights between New Jersey points and Philadelphia) was essentially intrastate in character, subject to Pennsylvania laws, and, thus, such operations are not authorized by its interstate certificates. Therefore, Commission was warranted in concluding that plaintiff, who holds no intrastate authority, had improperly and illegally used such tacked-on routes as a deliberate expedient to avoid the rightful jurisdiction of the Pennsylvania commission over intrastate commerce; where there is no interstate commerce, there can be no legitimate use of interstate operating rights. The Commission's cease-and-desist order sustained; complaint dismissed.—Leonard Express, Inc. v. United States, 298 F. Supp. 556 (558-60)*.

Scope of judicial review in action to set aside Commission order is governed by the statute, and, in addition, the court must be guided by the well established principles applicable to the review of an administrative agency order. A Commission order is presumed valid; the party attacking it has the burden of showing invalidity; the Commission is authorized to make findings of fact, to draw legitimate inferences therefrom, and to evaluate and determine the weight to be given evidence; and the court's judgment may not be substituted for that of the Commission. The court need only determine whether or not Commission findings are supported by substantial evidence and are arrived at by proper application of relevant legal standards. Therefore, since the Commission's decision is supported by the record, as a whole, the order is sustained.—Alter Trucking and Terminal Corp. v. United States, 299 F. Supp. 819 (822-3, 824)*.

Scope of the court's review of Commission order denying plaintiff's application for a motor carrier certificate is limited to determining, on the record as a whole, whether the Commission's findings are supported by substantial evidence, or whether its findings and conclusions were induced by misapplication of the law; and if the findings are supported by substantial evidence and are in accordance with the law, they must be upheld. Therefore, since full consideration of the record as a whole shows that the Commission's decision is in conformance with the law and supported by substantial evidence on the whole record, plaintiff's complaint is dismissed at its costs.—Jerry Lipps, Inc. v. Interstate Commerce Commission, 299 F. Supp. 942 (944-5, 946)*.

In suit to set aside orders in motor carrier application proceeding and to remand the matter to the Commission for further consideration, scope of the court's review of the orders is limited to determination, on the record as a whole, of whether the Commission's findings are supported by substantial evidence, or whether its findings and conclusions were induced by misapplication of the law; if the findings are supported by substantial evidence and are in accordance with the law, they must be upheld. Therefore, since there is substantial evidence of record to support the Commission's decision granting the authority sought and since the decision is rational and in accordance with the law, the relief prayed for is denied; complaint dismissed, with costs taxed against plaintiff.—Truck Transport, Incorporated v. United States, 300 F. Supp. 159 (161, 162)*.

Judicial review provisions of the statute specifically apply to review of administrative action "except to the extent that * * * agency action is committed to agency discretion by law." Obviously, therefore, the requirements therein that orders contain a statement of findings and conclusions, and the reason or basis therefor, do not apply to Commission's temporary authority orders because, pursuant to 49 USC §310a, the Commission acts in its discretion and largely without hearings or other proceedings in temporary authority cases. Moreover, in its orders granting temporary authority to intervening defendant carrier, the Commission found an immediate and urgent need for the temporary service authorized and, also, that there was no carrier service available capable of meeting such need; thus, the Commission's action is not found "inadequate, incomplete, inconsistent, and erroneous" because of failure to comply with requirements of the APA, as asserted by plaintiffs. —Bell Lines, Inc. v. United States, 306 F. Supp. 209 (212, 214, 217)*.

In suit to set aside and annul Commission's grant of motor carrier authority, the court must be guided by the statutory standards of judicial review requiring "substantial evidence" on the record as a whole. Substantial evidence is something less than the weight of the evidence and has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; it must do more than create a suspicion of existence of a fact to be established; and must be enough to justify, if the trial were to a jury, refusal to direct a verdict when the factual conclusion to be drawn is for the jury. The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's findings from being supported by required substantiality. Therefore, since careful examination of supporting shippers' testimony shows substantial evidence on the record as a whole to support the Commission's finding of need for proposed service, grant of the authority in question is sustained.—Superior Trucking Co. v. United States, 306 F. Supp. 872 (875-6, 879)*.

Court review of a rulemaking proceeding usually is limited to question of whether the agency abused its discretion, acted in excess of delegated powers or failed to comply with procedural requirements; however, in review of Commission's initial choice of the type of proceeding, not the result thereof, such a decision is one within discretion of the agency, reviewable only as an abuse of such discretion. As in judicial review of substantive agency decisions, the court should be reluctant to substitute its own judgment for a procedural decision, within agency expertise, as to most appropriate manner of implementing underlying policy of the statute administered by the agency; and only where an agency has abused its discretion by its choice of rulemaking as the procedure to be followed should the reviewing court order the holding of individual adjudicatory hearings. The Commission did not abuse its discretion by employing rulemaking in its proceeding removing, on a national scale, "truckload lot" restrictions from all existing certificates; sustained.—Regular Common Carrier Conference v. United States, 307 F. Supp. 941 (943-4, 946)*.

In suit to enjoin and set aside Commission decision, ordering plaintiff to cease interstate hauling of sugar on buy-and-sell arrangements that were found to be unlawful for-hire carriage, function of the court is to determine on the "whole record" whether agency's action was arbitrary, capricious, abusive of discretion, or otherwise unlawful; was contrary to law, in excess of agency power, unsupported by substantial evidence, or "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." A close scrutiny of the whole record in instant case shows that (1) hearing procedures were fair and lawful; (2) evidence was received on material issues of fact; (3) findings of fact are supported by substantial evidence; (4) factual findings are adequate to resolve the crucial issues; (5) correct legal standards were applied to determine ultimate issues; and (6) all Commission regulations used were lawful and valid as applied in the case. Therefore, Commission decision and action can lawfully be affirmed; relief prayed for denied, with costs taxed against plaintiff.—Clearfield Cheese Company v. United States, 308 F. Supp. 1072 (1074-80)*.

The reviewing court, in suit to set aside Commission decision denying motor carrier extension applications, should not disturb the Commission's action where there has been an exercise of its valid statutory authority. Moreover, the court may not usurp the Commission's function and substitute its judgment for that of the examiner; nor is the court's function to determine the validity of the examiner's conclusions are based on, and supported by, substantial evidence. The reviewing court will give full effect to the Commission's findings unless it can be shown that such findings are based on an abuse of discretion which is arbitrary, capricious or manifestly prejudicial to the rights of the parties. Upon review of the record and files submitted to the examiner, the court finds that the Commission's decision is in conformity with the evidence submitted; therefore, plaintiffs having failed to sustain their burden of proof to show the contrary, the Commission order is sustained.—Lake Shore Motor Freight Co. v. United States, 310 F. Supp. 957 (959-60, 961)*.

Scope of the reviewing court's function is limited to determining the initial question of whether decision of the Commission is supported by substantial on the record considered as a whole, free from errors of law, and not so arbitrary, capricious or unreasonable as to constitute an abuse of discretion; and the test on judicial review of the Commission's order which granted operating authority to defendant carrier is whether its action is supported by substantial evidence on the record as a whole, and whether its procedures denied plaintiff carriers any substantive rights. There is abundant evidence in the record to support the Commission findings as to applicant's fitness, industrial growth and development in the area it seeks to serve, and the need for proposed single-line service which existing carriers are not able to meet; and upon examination, the record reveals plaintiffs' contentions of denial of due process to be without merit. The court finds no abuse of administrative discretion and, since the Commission's decision is based on adequate facts which are supported by substantial evidence, the order is sustained.—Carolina Freight Carriers Corp. v. United States, 323 F. Supp. 1290 (1293-5, 1297)*.

Judicial review of Commission order is limited in scope by settled principles of administrative law. The Commission is presumed to have properly performed its official duties, and that presumption (which stem from deference due the ICC's expertise in the industry it regulates) supports its actions in absence of clear evidence to the contrary. Unless there is some specific prejudicial departure from the law or an abuse of Commission discretion, the reviewing court may not intervene. The Commission's order may not be set aside on review, if it lies within scope of the applicable statute and is based on adequate findings which are supported by substantial evidence, even though the court may disagree with the Commission's conclusions. Also, as review of the evidence is governed by the "substantial evidence rule," the court is limited to determining whether there is substantial evidence to support the Commission's findings and orders. Findings and orders so supported are conclusive and binding on the court and, absent some error in procedure or in applying the rules of law, may not be set aside.—Feature Film Service, Inc. v. United States, 349 F. Supp. 191 (193-4)*.

In complaint proceeding under review, Commission properly found defendant's (plaintiff) transportation of motion picture film between points in Indiana to be transportation in interstate commerce for which appropriate authority is required, when evidence clearly showed that the film was shipped from outside that State to distributor's exchange at Indianapolis with the understanding and intent that it would not remain there, but would be sent on to individual exhibitors "in a movement as continuous as practicable." Principle to be applied in determining whether a shipment is one in interstate commerce was stated in 195 F. 2d 252; and applying that principle to the facts in instant case, it is clear that notwithstanding the temporary stops in Indianapolis the producer intends its film prints to move beyond that point to the contracting exhibitors and that the transportation from the exchange to exhibitors, and thereafter between exhibitors, is part of a continuous movement in interstate commerce. Therefore, Commission decision in the complaint case is affirmed.—Id., pp. 195-7.

Evidence in Commission's proceeding on plaintiff's application for certificate to transport motion picture film, etc., between points in Indiana, adequately supports the findings that applicant's fitness was "extremely doubtful," and that the record did not show a public need for proposed service. Record shows the Commission considered the various relevant factors in determining the public need, including elements of importance noted in 230 F. Supp. 646; thus, even if it erred in finding plaintiff had not been operating under color of right, that would not vitiate the decision that no public need was shown. The Commission has broad discretionary power to determine, on the facts, whether or not a certificate should be issued. It is not the reviewing court's function to substitute its judgment for that of the Commission on points of fact or mixed questions of fact and law that have been committed by law to agency discretion; nor are agency findings of fact to be disturbed if based on substantial evidence. The Commission applied the correct law, its order is based on adequate findings supported by substantial evidence, and its action was not arbitrary or capricious. Decision denying plaintiff's application, affirmed.—Id., pp. 199-202.

Scope of judicial review of Commission's interpretation of its own certificates is very narrow. Interpretations of such certificates should be made in the first instance by the Commission and, on review, its determination is entitled to be upheld if supported by substantial evidence. Possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Substantial evidence of record supports the Commission's conclusions that plaintiff's authority to serve "points in . . . North Carolina" as off-route points is territorially limited and that it does not authorize any service at Chesapeake, Va., although Chesapeake is within Moyock, N.C., commercial zone. Therefore, Commission cease-and-desist order is upheld, previously entered temporary restraining order is dissolved, and the suit is dismissed with prejudice.—R.C. Motor Lines, Inc. v. United States, 350 F. Supp. 1169 (1170-2, 1174)*.

Governing test for judicial review of Commission's orders granting intervening carrier temporary authority to transport trailers designed to be drawn by passenger vehicles, in initial movements, is the "some evidence" test as set forth in 302 F. Supp. 257, and not, as plaintiff contends, reviewing tests of whether the orders set forth a rational explanation for the grant, whether they departed from established Commission policy, and whether they were based on considerations that Congress could not have intended to make relevant, which have been established by cases construing provisions of the APA. Accordingly, it being abundantly clear on the record that the Commission's orders were entered upon some evidence as shown by the numerous affidavits of shippers, they are sustained; complaint dismissed.—National Trailer Convoy, Inc. v. I.C.C., 352 F. Supp. 945 (946)*.

In reviewing freight classification determinations, the district court determines whether the Commission acted rationally and whether its findings are supported by substantial evidence. Reviewing freight classifications is a fact-finding process and the court will not upset Commission decision because it evaluates evidence differently. In instant case Commission's general statement that shipper seeking classification change has failed to meet its burden of proof without indicating the basis of facts for such findings, is insufficient. Case remanded to Commission for further proceeding.—Dutton-Lainson Company v. United States, 371 F. Supp. 1352 (1355)*.

Notice

Findings that redefinition of Detroit commercial zone is not warranted, and that removal of exemption of §203(b8) as to transportation in foreign commerce between Detroit and the contiguous municipality of Windsor, Ontario, is not necessary to carry out the national transportation policy, make it unnecessary to determine whether notice published in the Federal Register of petition for redefinition of the zone complied sufficiently with §4 of APA; however, such notice made reference to §203(b8) and to the inclusion or exclusion of Windsor, and the Commission's power to remove the exemption in whole or in part has often been considered in proceedings involving §203(b8), which both confers the exemption and provides for its removal.—Commercial Zones and Terminal Areas—Detroit, 96 M.C.C. 709 (714)*.

While the statute guarantees respondents reasonable opportunity to learn the claims made against them and to meet them, a complete and precise bill of particulars is not required where a party is aware of the issues to be tried. There is sufficient notice if a respondent is generally apprised of the issues and investigation into respondent's motor carrier operations and practices; it is not necessary to inform it of every specific instance of unauthorized transportation to be presented [110 F. Supp. 876.] Respondents were given ample and fair notice prior to the hearing by informal communication from the Bureau of Inquiry and Compliance trial attorney; and there are no matters of substance raised at the hearing concerning which they can complain of surprise. Notice given respondents, therefore, was fully in accordance with the law.—Empire Truck U-Drive-It, Inc., Investigation, 96 M.C.C. 29 (37).

The fact that some communications from the Bureau to the respondents advised them of matters to be introduced through a witness as exhibits, which were ruled inadmissible, does not alter the adequacy of notice given. The described communications, together with the order instituting the investigation, fully advised the respondents of matters of fact and law to be introduced at the hearing, and correspond with the matters of fact and law which the Bureau has attempted to prove through the remaining evidence. No justification, therefore, is shown for further hearing for presentation of additional rebuttal testimony.—Id., p. 37.

While failure to give adequate notice of motor carrier application as amended at initial Commission hearing was error, it does not constitute inadvertence (within meaning of Interstate Commerce Act and appropriate decisions) which would permit the certificate issued therein to be revoked or modified because improperly issued. Once duly granted consistent with the Commission's intent, authority should not be revoked, particularly in absence of any certainty that, but for an apparent mistake, a different certificate would have been issued.—Carl Subler Trucking, Inc., Modification of Certificate, 99 M.C.C. 193 (197-8)*; however, the Commission's power to correct an obvious injustice is not so limited. The amendment accepted at initial hearing, though apparently restrictive, greatly broadened scope of the application and resulted in a failure of due process of law, depriving those relying on Federal Register publication of their statutory right to notice and the opportunity to participate in proceedings leading to issuance of questioned certificate. Thus, such certificate, while not void *ab initio*, is voidable by the Commission after appropriate proceedings in which the holder is given due notice of the issues and an opportunity to be heard.—Id., 103 M.C.C. 307 (311-13)*.

Change of form rather than substance in the nature of transaction was not material insofar as notice to public in Federal Register was concerned, particularly as such notice did not even purport to give all details of proposed transaction. Moreover, even if notice were to be considered defective, it was cured by subsequent republication giving notice of amendment after which ample time remained for interested persons to file for intervention. Technical objection held to be de minimum and not warranting further delay or postponement of proceedings.—Chemical Leaman Tank Lines, Inc.—Pur.—Ryder, 104 M.C.C. 686 (697-8).

Titling of an action is purely administrative and is not determinative of the nature of a transaction which may ultimately be approved. Although this application was docketed as a purchase (portion) based on the opening statement, no difference has been shown between this transaction and a true statutory merger, which is what it has been found to be, notwithstanding its title.—Id. p. 708-9.

Procedure

See also Akers Motor Lines, Inc. v. United States case, §204(c), n. 250; Blue Bird Coach Lines, Inc. v. United States case, §207(a), n. 7 *Existing motor carriers;* Kingpak, Inc., Investigation of Operations case, §206(b), n. 15; Removal of Truckload Lot Restrictions case, *Hearing,* supra.

Commission proceedings, prescribing car service rules after notice of proposed rulemaking was published and interested parties had submitted verified statements and legal arguments, satisfied procedure requirements of the APA. Appellees claim the Commission failed to comply with §§556 and 557 of the act but, under §553, those sections govern rulemaking procedure only when rules are required by statute to be made on the record after agency hearing. Proceedings under review were an exercise of legislative rulemaking power rather than adjudicatory hearings and, since the Esch Act which gives the Commission authority to establish reasonable car service rules does not require that such rules "be made on the record," §§556 and 557 were inapplicable. Therefore, procedure in the instant case was governed by §553 of APA; and since the findings and conclusions in the Commission's report fully comply with requirements of that section, nothing more was required by the statute.—United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (746-7, 755-8)*.

In Commission proceeding involving prescription of new divisions of Official-Southern joint rail rates, the Commission's use of its Cost Finding Section to give technical aid in analysis and evaluation of the cost evidence of record was an integral part of the administrative proceeding and violated the rights of no one. Also, issuance of a supplemental report by the Commission (which only changed its outstanding order as to divisions of one railroad, not here challenged) was lawful and proper and constituted sound administrative practice.—Aberdeen & R.R. Co. v. United States, 270 F. Supp. 695 (705)*.

Mandate of the APA for reasoned finding and conclusions on all material issues should not be read as requiring Commission to deal in detailed way with every possibility no matter how unlikely, or as directing a reviewing court to close its eyes to reality in pursuit of academic perfection.—Erie-Lackawanna R. Co. v. United States, 279 F. Supp. 316 (321)*.

Inasmuch as the court's opinion, which remands Commission decision and order in application cases for further proceedings, renders moot plaintiffs' contention that the Commission's procedure denied them due process, no ruling is made thereon. However, that issue was first raised by allegations in the complaint of procedural error because one Commissioner had presided at the hearing and, subsequently, had participated as a member of the Division which affirmed and adopted his recommended report and order; and, since plaintiffs knew that the Commissioner was chairman of the Division which normally would handle the proceedings, but failed timely to file their objections, their cry of prejudice comes too late.—HC&D Moving & Storage Co., Inc. v. United States, 298 F. Supp. 746 (747, 752)*.

There is no merit in plaintiff's argument (in suit to enjoin Commission orders denying rail abandonment application) that, under APA, the Commission erred in allowing the findings and recommended decision to be made by an examiner who had not heard the evidence when, after the hearing closed, the Hearing Examiner retired. While the statute provides that employee who heard the evidence must make required recommended or initial decision, it excepts the case where such employee "becomes unavailable to the Agency"; it is undisputed that retirement made the Hearing Examiner unavailable to the Commission. Also, the cases hold that substitution of hearing officers is permissible where demeanor of witnesses is of little or no consequence; in instant case, there was no material issue of credibility and the only disputed matters were collateral and largely immaterial. Hence, it being responsibility of the agency, not the examiner, to find facts, the Commission's task was to draw inferences from undisputed facts and it can draw whatever inferences the facts permit. The Commission's decision and orders comply with statutory requirements.—Brooklyn Eastern District Terminal v. United States, 302 F. Supp. 1095 (1105-6)*.

In action to review Commission decision removing "truckload lot" restrictions from all existing carrier certificates, the Commission properly used a rulemaking proceeding for that purpose under authority of the APA and 49 USC §308(a). In dealing with the outmoded, confusing restriction enacted in the past and currently serving no public interest, Commission choice of rulemaking procedure to review its past policy of removing truckload restrictions on a case-by-case basis was discretionary. An adjudicatory hearing is required for individual license applications, but it does not follow that an agency must pursue individual *ad hoc* adjudications in an area better suited to broad policy determination through rulemaking; a rulemaking proceeding which affects uniformly the interests of a class of licensees or certificate holders is valid. Commission is the best judge of its policies and has skill and resources to deal with them; it should be allowed broad discretion in choosing the proper method and course of action for that purpose. Rulemaking procedure was carefully observed, regulatory rule issued was reasonable and within the Commission's delegated powers; order sustained.—Regular Common Carrier Conference v. United States, 307 F. Supp. 941 (942-3, 945-6)*.

In application proceedings before Commission, consolidation is permissible when in the discretion of the agency a large part of the evidence adduced applies equally to all applications. The practice of consolidation for the purpose of expeditiously rendering an equitable solution to the problems in multiple and similar applications has been an accepted procedure; moreover, such consolidation serves to accommodate the convenience of all parties and to make available a great deal of relevant testimony, thus leading to a more rational decision based on as much evidence as it is feasible to obtain. In considered proceedings, claims of all the applicants were identical in nature and the evidence adduced had sufficient application to all parties to warrant consolidating the proceedings; such procedure was necessary and correct in assisting the Commission in weighing all the evidence and arriving at an intelligent decision; further, procedures exercised at the hearing by the examiner were in accordance with established administrative practice. Commission order sustained. —Lake Shore Motor Freight Co. v. United States, 310 F. Supp. 957 (961)*.

In considered decision, holding that applicant (plaintiff) failed to show need for proposed truck transportation from Indiana points within the Owensboro, Ky., commercial zone, the Commission considered for the first time whether public convenience and necessity required a grant of such authority. Thus, as that decision as to propriety of granting plaintiff authority to conduct operations under invalid portion of its certificate (which authority it did not seek in its original application) was a determination of an initial-license application, the Commission properly omitted the hearing examiner's recommended report and order pursuant to §8(a) of the statute. Also, in its prior decision, the Commission properly held that plaintiff's authority to originate traffic at Indiana points was invalid for want of proper notice to competing carriers but afforded it the opportunity to apply for such authority, and ordered publication of, and further hearing on question of need for, such proposed operations. The Commission did not abuse its discretion in omitting the hearing examiner's report and plaintiff, who declined to offer further supporting evidence, failed to show it was prejudiced thereby; Commission decisions sustained.—Carl Subler Trucking, Inc. v. United States, 313 F. Supp. 971 (977-8, 979)*.

In action by the Seaboard and the Florida East Coast to set aside I.C.C. order prescribing additional "incentive" per diem charges for unequipped boxcars, because no oral hearings were provided before the order was issued, the Commission's argument that the statute allows the procedure used finds no support in recent decision in 318 F. Supp. 490, when facts in instant case fall within exception expressed therein, as they show that plaintiffs were prejudiced by the Commission's summary procedures. Also, the commission's argument that the order can be sustained, even if plaintiffs prove all they seek an opportunity to prove, is wide of the mark; statutory and constitutional procedural due process does not go into what decision should be made in a given case, but rather deals with the process of decision making. While many unsupported decisions are eventually sustained after being supplemented by further hearings, that does not negate the right of the parties to be heard; and strict adherence to time-honored procedural rights is necessary to insure that informed decisions are made.—Florida East Coast Ry. Co. v. United States, 322 F. Supp. 725 (728-9)*.

Rulemaking proceedings of general public interest, being quasi-legislative, require full notice to the public and full and complete opportunity to participate by all interested persons, whether as active participant or merely as a viewer. Alternative procedure suggested in Association's petition for informal changes in the Commission's handling of certain rulemaking proceedings, under which statements would be served only on persons who filed initial statements instead of on all those filing notice of intent to participate, would discourage public interest and participation and would improperly limit the rights of persons desiring to participate; therefore, the petition is denied. However, in view of valid questions concerning the unnecessary expense that may be incurred by persons desiring to become parties to general rulemaking proceedings wherein, in lieu of oral hearing, written statements are to be filed, the procedure described will be informally instituted within the Commission to facilitate the early specification of a person's particular interest and, thus, to reduce the list of parties upon whom statements need be served.—Petition to Amend Commission's Procedure for Rulemaking, 340 I.C.C. 190 (191-3).

Protestant's rights were in no way prejudiced when, after their motion to strike recommended order of hearing officer who presided at continued (but not at the initial) hearing, on ground that it was not prepared by examiner who presided at reception of the evidence, was denied without prejudice to issuance of a supplemental report and recommended order; both hearing officers were appointed under §11 of APA; evidence was received at both hearings, although oral testimony was not adduced at the continued hearing; provisions of APA have in no way been infringed.—Skinner Motor Exp., Inc., Extension, 96 M.C.C. 135 (136-7, 140-1).

Citing a ruling by the Federal Communications Commission (Muncie, 15 Ad. L. 2d 329, 331-2), (F.C.C. 1964), it was decided that the better view of §8(b) of the APA requires that at every level where a report, either initial, recommended or final, is to be released, the parties be given an opportunity to submit proposed findings, or, if an earlier report has been issued, exceptions to that report. However, failure to comply with this requirement does not ipso facto suggest prejudicial error.—Sofield Transfer Co., Inc., Extension—Containers, 115 M.C.C. 280 (284-285).

Record

Examiner's statement during course of hearing and before protestants offered evidence, to effect that application appeared appropriate to grant without conditions based on evidence thus far adduced, were it not for the qualifying words, would indicate bias and prejudice requiring a rehearing. However, after a complete review of the entire record, Commission concluded that all parties received a fair hearing.—Howard's Exp., Inc.—Purchase—Exchange Trucking Corp., 97 M.C.C. 341 (342).

Records

In suit under the Freedom of Information Act seeking access to government information, where appellee administrative agency [Maritime Subsidy Board] took affirmative action against appellant ship operators by means of a decision which stated that the only basis for the action was a specified 31-page memorandum prepared by the agency's staff, and which set forth the last five pages of that memorandum as agency finding and determination in the matter, the agency could not subsequently refuse to disclose the entire memorandum to parties affected by its action. If the agency did not want to expose the staff memorandum to public scrutiny, it should not have publicly stated in the ruling that its action was based thereon, giving no other reasons or basis therefor; when it chose that method of stating the basis for its action, the memorandum lost its intra-agency status and became a public record, one which must be disclosed to appellants. Since the memorandum is clearly an identifiable record and does not fall within any statutory exemption from discovery, it is being improperly withheld by the Government, and the district court must order that it be produced for public inspection.—American Mail Line, Ltd. v. Gulick, 411 F. 2d 696 (698-703).

Reports of Commission

Plaintiff's objection to the Commission's "DANDO" report and order, whereby it adopted the examiner's findings and conclusions without further hearing or further findings or conclusions of its own, is without merit. The DANDO device has been approved in numerous cases, and its use in instant control and merger proceeding met the APA requirement that an agency decision reflect the reasons and basis for its findings and conclusions, especially in view of the Commission examiner's careful and thorough report. As stated in 238 F. Supp. 859, the Commission, as well as other adjudicatory tribunals, court or administrative, has the right, if not the duty, to exercise imaginative resourcefulness and judicial inventiveness in developing procedures which enable it to stem the tide of ever increasing backlogs. The Commission's DANDO device is certainly permissible; when pursued, of course, the Commission's action must stand or fall with the examiner's report and, from that viewpoint, there is nothing to plaintiff's criticism. Commission order, affirming and adopting the examiner's report and recommended order, sustained.—Tose, Inc. v. United States, 304 F. Supp. 894 (897-8, 900)*.

Provision of the statute that decisions must contain adequate findings and conclusions does not require Commission to furnish an analysis of each item of evidence nor to disclose mental processes by which its decision was reached; Commission findings are adequate when they contain sufficient particulars to inform the parties of purport thereof and the reasons and, also, to enable the court to discern the conclusions and reasons so it can judge whether the agency acted within its statutory authority. In carrier's suit to set aside Commission denial of its extension application, the hearing examiner's decision that plaintiff failed to meet its burden of showing need for proposed operation, which was adopted by the Commission and became its final decision, contains adequate findings on the basic issues; and since the decision is supported by sufficient basic findings of fact to show a rational basis therefor, it provides an adequate basis for exercise of the court's function of judicial review; sustained.—Carl Subler Trucking, Inc. v. United States, 313 F. Supp. 971 (978-9, 980)*.

Use of the "Short Form Decisional Process"—referred to as "DANDO"—is discretionary with Commission and has been held by many courts to be permissible. Thus, when the Commission finds no material error in a hearing examiner's statement of facts and conclusions thereon, it need not prepare a detailed report but may affirm and adopt the examiner's report as its own; however, when such procedure is used, the Commission's action stands or falls upon the examiner's report. Also, while the APA does not require the Commission or the examiner to make full, complete, and precise findings on every issue raised by the parties, the findings must be sufficiently complete to enable the reviewing court to examine with confidence the Commission's conclusions, and underlying reasons, and then to judge whether it acted within its statutory powers. Considered Commission decision is based on adequate facts which are supported by substantial evidence; sustained.—Carolina Freight Carriers Corp. v. United States, 323 F. Supp. 1290 (1296, 1297)*.

In addition to its statutory duty to make basic findings of (1) fitness and (2) public convenience and necessity in an application proceeding, the Commission is also bound by provisions of APA that administrative decisions must include a statement of findings and conclusions, and reasons or basis therefor, on all material issues presented on the record. However, the agency is not required to make the detailed findings of fact required by the Civil Procedure rules; moreover, it is not compelled to annotate to each finding the evidence supporting it, so long as required statutory findings are made. And once such required findings are made the reviewing court must sustain the Commission when its findings are supported by substantial evidence on the record as a whole. Complaint dismissed.—St. Johnsbury Trucking Co. v. United States, 326 F. Supp. 938 (940-1, 943)*.

Hearing examiner's report herein is not violative of APA by failure to "set forth with particularity findings of fact to support conclusions" therein and a failure to make "a specific enumeration of findings" at one place rather than spread throughout the report inasmuch as the report is adequately organized and indexed and is not unwieldy even though it is unusually large and covers a wide range of issues.—Pennsylvania R. Co.—Merger—New York Central R. Co., 327 I.C.C. 475 (482).

See also Atchison, T. & S.F. Ry. v. United States, 334 F. Supp. 651.

FEDERAL ADVISORY COMMITTEE ACT

Appendix—Title 5, U.S.C.

FINDINGS AND PURPOSES

SEC. 2. (a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that—

(1) the need for many existing advisory committees has not been adequately reviewed;

(2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;

(3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;

(4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and

(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

DEFINITIONS

SEC. 3. For the purpose of this Act—

(1) The term "Director" means the Director of the Office of Management and Budget.

(2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Fderal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

(3) The term "agency" has the same meaning as in section 551(1) of title 5, United States Code.

(4) The term "Presidential advisory committee" means an advisory committee which advises the President.

APPLICABILITY

SEC. 4. (a) The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise.

(b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by—

(1) the Central Intelligence Agency; or

(2) the Federal Reserve System.

(c) Nothing in this Act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

RESPONSIBILITIES OF CONGRESSIONAL COMMITTEES

SEC. 5. (a) In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

(b) In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall—

(1) contain a clearly defined purpose for the advisory committee;

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately

influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;

(4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 10 of this Act to be inadequate; and

(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

(c) To the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

RESPONSIBILITIES OF THE PRESIDENT

SEC. 6. (a) The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees.

(b) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the public report.

(c) The President shall, not later than March 31 of each calendar year (after the year in which this Act is enacted), make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding calendar year. The report shall contain the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted, a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total estimated annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abolished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor. The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such report a statement that such information is excluded.

RESPONSIBILITIES OF THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

SEC. 7. (a) The Director shall establish and maintain within the Office of Management and Budget a Committee Management Secretariat, which shall be responsible for all matters relating to advisory committees.

(b) The Director shall, immediately after the enactment of this Act, institute a comprehensive review of the activities and responsibilities of each advisory committee to determine—

(1) whether such committee is carrying out its purpose;

(2) whether, consistent with the provisions of applicable statutes, the responsibilities assigned to it should be revised;

(3) whether it should be merged with other advisory committees; or

(4) whether it should be abolished.

The Director may from time to time request such information as he deems necessary to carry out his functions under this subsection. Upon the completion of the Director's review he shall make recommendations to the President and to either the agency head or the Congress with respect to action he believes should be taken. Thereafter, the Director shall carry out a similar review annually. Agency heads shall cooperate with the Director in making the reviews required by this subsection.

(c) The Director shall prescribe administrative guidelines and management controls applicable to advisory committees, and, to the maximum extent feasible, provide advice, assistance, and guidance to advisory committees to improve their performance. In carrying out his functions under this subsection, the Director shall consider the recommendations of each agency head with respect to means of improving the performance of advisory committees whose duties are related to such agency.

(d)(1) The Director, after study and consultation with the Civil Service Commission, shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors. Such regulations shall provide that—

(A) no member of any advisory committee or of the staff of any advisory committee shall receive compensation at a rate in excess of the rate specified for GS-18 of the General Schedule under section 5332 of title 5, United States Code; and

(B) such members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons employed intermittently in the Government service.

(2) Nothing in this subsection shall prevent—

(A) an individual who (without regard to his service with an advisory committee) is a full-time employee of the United States, or

(B) an individual who immediately before his service with an advisory committee was such an employee,

from receiving compensation at the rate at which he otherwise would be compensated (or was compensated) as a full-time employee of the United States.

(e) The Director shall include in budget recommendations a summary of the amounts he deems necessary for the expenses of advisory committees, including the expenses for publication of reports where appropriate.

RESPONSIBILITIES OF AGENCY HEADS

SEC. 8. (a) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Director under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory committee within its jurisdiction.

(b) The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall—

(1) exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency;

(2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and

(3) carry out, on behalf of that agency, the provisions of section 552 of title 5, United States Code, with respect to such reports, records, and other papers.

ESTABLISHMENT AND PURPOSE OF ADVISORY COMMITTEES

SEC. 9. (a) No advisory committee shall be established unless such establishment is—

(1) specifically authorized by statute or by the President; or

(2) determined as a matter of formal record, by the head of the agency involved after consultation with the Director, with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Director, in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:

(A) the committee's official designation;

(B) the committee's objectives and the scope of its activity;

(C) the period of time necessary for the committee to carry out its purposes;

(D) the agency or official to whom the committee reports;

(E) the agency responsible for providing the necessary support for the committee;

(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(G) the estimated annual operating costs in dollars and manyears for such committee;

(H) the estimated number and frequency of committee meetings;

(I) the committee's termination date, if less than two years from the date of the committee's establishment; and

(J) the date the charter is filed.

A copy of any such charter shall also be furnished to the Library of Congress.

ADVISORY COMMITTEE PROCEDURES

SEC. 10. (a)(1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Director shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Director may prescribe.

(b) Subject to section 552 of title 5. United States Code, the records. reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

(d): Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (e) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of title 5, United States Code.

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.

AVAILABILITY OF TRANSCRIPTS

SEC. 11. (a) Except where prohibited by contractual agreements entered into prior to the effective date of this Act, agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.

(b) As used in this section "agency proceeding" means any proceeding as defined in section 551(12) of title 5, United States Code.

FISCAL AND ADMINISTRATIVE PROVISIONS

SEC. 12. (a) Each agency shall keep records as will fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities. The General Services Administration, or such other agency as the President may designate, shall maintain financial records with respect to Presidential advisory committees. The Comptroller General of the United States, or any of his authorized representatives, shall have access, for the purpose of audit and examination to any such records.

(b) Each agency shall be responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise. Where any such advisory committee reports to more than one agency, only one agency shall be responsible for support services at any one time. In the case of Presidential advisory committees, such services may be provided by the General Services Administration.

RESPONSIBILITIES OF LIBRARY OF CONGRESS

SEC. 13. Subject to section 552 of title 5, United States Code, the Director shall provide for the filing with the Library of Congress of at least eight copies of each report made by every advisory committee and, where appropriate, background papers prepared by consultants. The Librarian of Congress shall establish a depository for such reports and papers where they shall be available to public inspection and use.

TERMINATION OF ADVISORY COMMITTEES

SEC. 14. (a)(1) Each advisory committee which is in existence on the effective date of this Act shall terminate not later than the expiration of the two-year period following such effective date unless—

(A) in the case of an advisory committee established by the President or an officer of the Federal Government, such advisory committee is renewed by the President or that officer by appropriate action prior to the expiration of such two-year period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(2) Each advisory committee established after such effective date shall terminate not later than the expiration of the two-year period beginning on the date of its establishment unless—

(A) in the case of an advisory committee established by the President or an officer of the Federal Government such advisory committee is renewed by the President or such officer by appropriate action prior to the end of such period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(b)(1) Upon the renewal of any advisory committee, such advisory committee shall file a charter in accordance with section 9(c).

(2) Any advisory committee established by an Act of Congress shall file a charter in accordance with such section upon the expiration of each successive two-year period following the date of enactment of the Act establishing such advisory committee.

(3) No advisory committee required under this subsection to file a charter shall take any action (other than preparation and filing of such charter) prior to the date on which such charter is filed.

(c) Any advisory committee which is renewed by the President or any officer of the Federal Government may be continued only for successive two-year periods by appropriate action taken by the President or such officer prior to the date on which such advisory committee would otherwise terminate.

EFFECTIVE DATE

SEC. 15. Except as provided in section 7(b), this Act shall become effective upon the expiration of ninety days following the date of enactment. (Pub. Law 92-463, Oct. 6, 1972, 86 Stat. 770.)

Title 7—AGRICULTURE

Chapter 9.—PACKERS AND STOCKYARDS

Sections 225, 226. Powers of Interstate Commerce Commission unaffected.—[Unchanged. See vol. 4, p. 2973.]

Historical note, see vol. 18, p. 14709.

Chapter 35.—AGRICULTURAL ADJUSTMENT ACT OF 1938

Section 1291. Adjustments in freight rates.—[Unchanged. See vol. 10, p. 8288.]

Chapter 38.—AGRICULTURAL MARKETING ACT

Section 1622(j). Improvement of transportation facilities and rates.—[Unchanged. See vol. 14, p. 11692.]

Notes of Decision

Volume 17—p. 13677.

Title 10—ARMY

Section 758. Transportation of disabled soldiers.—[Unchanged. See vol. 4, p. 2977.)

FEDERAL POSSESSION AND CONTROL ACT

Section 1361. Control of transportation systems in time of war.— [Unchanged. See vol. 4, p. 2978; provision for extension, see Historical Notes, vol. 16, p. 12966.]

Amendment, see footnote, vol. 16, p. 12966; historical notes, vol. 16, p. 12966.

BANKRUPTCY

Chapter 8.—Title 11 U.S.C.

Section 205. [*§77 as enacted*] Reorganization of railroads engaged in interstate commerce.—[Unchanged. See vol. 18, p. 14710, vol. 21, p. 17804.]

Amendments, see footnotes, vol. 10, p. 8310; historical notes, vol. 7, p.6015, vol. 10, p. 8311, vol. 11, p. 9696, vol 12, p. 10536, vol. 14, p. 11692, vol. 15, p. 12313, vol. 16, p. 12967, vol. 17, p. 13678; vol. 18, p. 14710, vol. 21, p. 17806.

Historical Notes

The Regional Rail Reorganization Act of 1973 [Pub. L. 93-236, 87 Stat. 1021, 45 U.S.C. §791] states: "The provisions of the Interstate Commerce Act (49 U.S.C. 1 et. seq.) and the Bankruptcy Act (11 U.S.C. et seq.) are inapplicable to transactions under this Act to the extent necessary to formulate and implement the final system plan whenever a provision of any such Act is inconsistent with this Act."

By §3 of the Emergency Rail Services Act of 1970, Jan. 8, 1971, Public Law 91-663, 84 Stat. 1974, 1975, it is provided: on court-approved application by trustees of any railroad undergoing reorganization, the Secretary of Transportation, after consultation with the Interstate Commerce Commission, is authorized to guarantee trustees' certificates issued pursuant to §77(c)(3) of the Bankruptcy Act upon the required findings in writing, after published notice of intention to make such findings and opportunity for interested persons to submit views, if not waived; that such guarantee shall be conditioned as specified; and that any guaranteed certificate shall be treated as an administration expense and receive the highest lien on debtor's property and priority in payment, except that rights referred to in last sentence of §77(j) of the Bankruptcy Act shall in no way be affected.

Notes of Decisions

Volume 7—p. 6016; Volume 10—p. 8312; Volume 11—p. 9697; Volume 12—p. 10537; Volume 13—p. 11180; Volume 14—p. 11693; Volume 15—p. 12313; Volume 16—p. 12968; Volume 17—p. 13678; Volume 18—p. 14712; Volume 19—15994; Volume 21—p. 17806.

2. Construction and interpretation.—[Vols. 10-17, 19, 21].—Supreme Court held that a reorganization court in a railroad bankruptcy is empowered to reach an "informed, independent judgment of its own" in valuation matters which differs from Commission's valuation findings. Such valuations by reorganization court were also held to be reversible by a higher court only if such decision is clearly erroneous.—New Haven Inclusion Cases, 399 U.S. 392 (431-5)*.

Congressional purpose in enactment of §77, particularly the "exclusive jurisdiction" provision of §77(a), was to eliminate the need for ancillary receivership proceedings in federal courts in every state in which the railroad operated. Overlapping jurisdiction of numerous courts was not conducive to speedy and efficient reorganization of a financially unsound railroad; and, by providing for exclusive jurisdiction in one federal court with nationwide service of process, Congress intended to vest subject matter jurisdiction over the debtor and its property in one federal court which would have absolute power over that property and over administration of the railroad pending submission of a reorganization plan by the Commission and approval of that plan by the court.—In re New York, N.H. & H.R. Co., 457 F. 2d 683 (688)*.

District court held that "fair liquidation value" of a railroad undergoing reorganization would be the property's highest and best use and that, therefore, Commission's order setting sales price for the New York, N. H. & H. R. Co. by reducing predetermined liquidation value due to delay in start of liquidation proceedings and for bulk sales discount violated the statute.—In re New York, New Haven and Hartford Railroad Co., 304 F. Supp. 793 (798-9)*.

There is no language prohibiting Commission's evaluation of a debtor's properties and approval of their sale before approving the restructuring of the debtor. Moreover, "two-step" plans of reorganization have had judicial sanction (see 141 F. 2d. 747) in situations in which debtor's assets were wasting away, either physically or financially.—Pennsylvania R. Co.—Merger—New York Central R. Co., 331 I.C.C. 643 (721-725)*.

Results of ultimate decision of substantive issues raised before first railroad reorganization court must appear to second reorganization court, which was dealing with a railroad that had merged with railroad involved in proceedings before first court, to be consistent with fair and equitable plan for latter railroad. Second court's equitable lien in favor of former railroad is not legally binding determination as to latter railroad.—In re Penn Central Transportation Company, 337 F. Supp. 779 (789-90)*.

In ordinary course of railroad reorganization, a federal court is required to determine amount of an unliquidated debt, decide whether claim is secured or unsecured, and classify various claimants according to the nature of their respective claims and interests for purpose of reorganization plan.— Id., p. 786.

6. Jurisdiction.—[Vols. 10-18, 21].—See also Commonwealth of Pennsylvania v. Penn Central Transp. Co. case, §1(20), n. 19; In re Penn Central Transp. Co. case, 28 USC §1336, n. 2.

Supreme Court held that in this railroad proceeding the three-judge district court should have deferred to the jurisdiction of the reorganization court in reviewing valuation findings of the Commission. Given a conflict between two coordinate courts of concurrent, overlapping jurisdiction, the court which first acquired jurisdiction through possession of the property should hear all controversies relating thereto (see 262 US 77).—New Haven Inclusion Cases, 399 U.S. 392 (423-8)*.

District court had jurisdiction to grant petition of debtor railroad's trustee for authority to appoint an officer of another railroad as operating officer of debtor's estate. Although petition was filed and the court's order was entered prior to the officer's obtaining Interstate Commerce Commission authority to hold such position, trustee's petition was not premature merely because Commission approval had not been obtained when the order was conditioned upon the Commission's approval; under the circumstances, to require that request to the Commission precede petition to the court would be to exalt form over substance. Furthermore, since reorganization has jurisdiction to authorize a trustee for a debtor railroad to employ executive personnel, it necessarily has a right to determine that its authorization is proper; the court's action is justified as an exercise of its sound discretion.—In re Central R. Co. of New Jersey, 411 F. 2d 1178 (1180-81).

Reorganization court did not err in retaining jurisdiction of suit involving discontinuance of debtor railroad's passenger trains between New York City and Chatham, N.Y., when debtor had entered into a contract authorized by the "Amtrack statute" with the National Rail Passenger Corp. and thereafter, pursuant to Order No. 232, the Trustees petitioned that court for leave to discontinue all intercity passenger train service. The Court has previously decided, in 446 F. 2d 1109, that it was proper for the Reorganization Court to retain control of litigation involving such matters and specifically Order No. 232; and appellants have failed to present sound reasoning for transferring instant litigation to another district judge.—In re Penn Central Transp. Co., 457 F. 2d 381 (382, 387)*.

Under §77(a), Connecticut reorganization court lacked subject matter jurisdiction to issue its order asserting an equitable lien on, and a constructive trust on income from, certain property of the New York, N.H. & H.R. because, since debtor's assets had been transferred to Penn Central Transp. Co. when it was included in the Penn-Central rail merger, the property affected is within exclusive jurisdiction of the Pennsylvania court in which Penn Central later filed a petition for reorganization. Because Penn Central had legal title to and actual possession of former New Haven assets when its petition was approved; it was, and trustees are, using those assets and income therefrom to operate its lines and former New Haven lines; and Connecticut court's order could seriously impair the formulation of a workable plan for reorganizing Penn Central and the reorganization court's ability to administer that entire system, of which the New Haven is but a division, only the Pennsylvania reorganization court had subject matter jurisdiction under §77(a) over property in question.—In re New Haven, N.H. & H.R.Co., 457 F. 2d 683 (688-90)*.

Since assets of first railroad, which was included in merger at a time it was in reorganization, were conveyed to debtor free and clear of all liens, including all claims of first estate, and they remained in possession of debtor on date of bankruptcy, filing of debtor's reorganization plan vested jurisdication over such assets in federal district court, making liens upon them jurisdictionally impossible by other courts without approval of the district court.—In re Penn Central Transportation Company, 337 F. Supp. 779 (786-7)*.

Validity of debentures is not a matter under Commission's jurisdiction; but for purposes of considering proposed plan of reorganization, the considered debentures as valid obligations of debtor will be assumed. —Boston & P. R. Corp. Reorganization, 327 I.C.C. 10 (15)*.

The only statutory basis for paying counsel fees by an estate in reorganization is §77 (c)(2), and under that provision, Commission must set reasonable maximum limits for such payment. The nature of the legal work performed does not invalidate Commission's jurisdiction to set such limits.—New York, N.H. and H.R. Co. Reorganization, 342 I.C.C. 632 (637-8).

10. Proceedings, in general.—[Vols. 10-17, 19, 21].—When plan of reorganization of debtor railroad had been approved by the Commission and the district court, and appeal from order of approval by Boston & P. Stockholders Development Group (instant appellant), representing about 10 percent of debtor's stock in the public class, had been dismissed for want of prosecution, the Group could not, under guise of appeal from subsequent court order of confirmation, relitigate issues concerning fairness and equity of the underlying plan that were decided against it by dismissal of its appeal from district court order approving the reorganization. Essence of the statute is that judicial review of both the approval and confirmation be available, not that they both be available after confirmation. Dismissal of an appeal always involves prejudice in the ordinary case and the result should not be different in a railroad reorganization case merely because of the subsequent confirmation; thus, having unsuccessfully appealed from district court order of approval, appellant must be bound by that action.—In re Boston & P. R. Corp., 413 F. 2d 137 (138-40)*.

Pursuant to reorganization procedure established in §77, case involving a jurisdictional conflict between two reorganization courts each claiming jurisdiction to affect interests in certain railroad property over which, under §77(a), only one court has exclusive jurisdiction, must be remanded to the Commission so that a reorganization plan, fair and equitable to all parties, can be formulated. As both the Penn Central and New Haven (included in Penn-Central rail merger) are in reorganization, at least nominally, before different federal courts, the Commission is the common denominator between those courts so far as formulating a plan, or two interrelated plans, is concerned; also, any necessary protection ot the New Haven estate must first be proposed by the Commission in the context of a Penn Central reorganization plan. Upon remand, the Commission can consider terms of the New Haven inclusion as a part of the Penn Central reorganization; and that procedure is a proper method by which the interests of all parties can best be advanced. Reversed and remanded to the Commission. —In re New York, N. H. & H. R. Co., 457 F. 2d 683 (691)*.

Inasmuch as divergence exists in a number of important respects between railroad owning approximately 49 per cent of debtor's outstanding common stock and debtor; and, hence, railroad's interests as a stockholder differ from those of nonrailroad stockholders, it would be beneficial in proceedings before the Commission or in the courts concerning debtor's reorganization to have representation of stockholders whose interests lie with debtor as opposed to its railroad stockholder. Authority granted to applicants, as a protective committee, to solicit authorizations to represent nonrailroad stockholders, subject to certain conditions. —Central R. Co. of New Jersey Reorganization, 330 I.C.C. 769 (773, 776, 778).

18. Injunction.—[Vols. 10-13. 15, 16, 18]. —In appeal from reorganization court order refusing further to extend as a preliminary injunction its temporary restraining order, which required operation of debtor's New York City-Chatham, N. Y., passenger trains pending Commission's decision and report as to "intercity" or "commuter" nature of those trains, the critical question is whether the court abused its discretion in denying a preliminary injunction when it had not actually ruled on validity of the Commission finding that service of trains involved was intercity not commuter service. The parties briefed the validity of agency reports in "intercity-commuter" matters which the court had referred to the Commission, but those cases were never finally disposed of in the reorganization court. However, the issue on appeal from an order denying a preliminary injunction is whether the court abused its discretion; appellants have the burden of showing an abuse of discretion by the court, and any direct attack on merits of the Commission report is clearly improper and beyond the legitimate scope of instant appeal.—In re Penn Central Transp. Co., 457 F. 2d 381 (382, 384)*.

Measured against the standards governing issuance of a preliminary injunction in a public utility case, enumerated in 259 F. 2d 921 and 326 F. Supp. 68, evidence presented by appellants is insufficient to show an abuse of discretion by the reorganization court in refusing to grant the preliminary injunction. Although direct attack on the agency report is premature and improper, the main thrust of appellants' argument is against weight of the evidence in support of the Commission's finding; furthermore, appellants' arguments afford no basis for a showing of likelihood of success in the district court. In addition, appellants failed to show that without requested injunction they will be irreparably injured, and that other interested parties will not be substantially harmed by issuance thereof. Accordingly, in light of the amount of traffic on considered trains, degree of affected communities' dependence thereon, and the other attendant circumstances, record is convincing that the district judge did not abuse his discretion, and that the public interest supports denial of the preliminary injunction. Order affirmed.—Id., pp. 385-7.

30. Plan of reorganization.—[Vols. 10-19, 21].—Plan of reorganization of debtor railroad, approved in the Commission's seventh supplemental report, provides for transfer of substantially all debtor's assets, properties and franchises to the New Haven and ultimate liquidation of debtor, mutual cancellation by the railroads and trustees of each of their claims against each other (except for debtor's debentures), and for compensation of creditors and stockholders; for amendment of debtor's charter to relieve it from obligations as to use of Boston South Station; and for appointment of four reorganization managers to carry out the plan, one each by the Government, the B&P Stockholders Committee, the New Haven Trustees, and debtor's trustee. No reorganization plan can satisfy completely all the interested parties, but plan before the court is a result of years of litigation, negotiation and compromise and presents a solution which all interested parties, except small dissident minority, are willing to accept as fair and reasonable. The plan is fair and equitable, affords due recognition to rights of bond and stock holders, and otherwise fully complies with the statute; approved.—In re Boston & P. R. Corp., 260 F. Supp. 415 (417-9, 422-3)*.

Railroad reorganization plan considered herein was approved in part, modified in part, and remanded to the Commission pending a determination of the price to be paid by the railroad that was to receive the assets of debtor railroad.—In re New York, New Haven and Hartford Railroad Co., 304 F. Supp. 1136 (1137)*.

See also Boston & P. R. Corp. Reorganization case, n. 61 below.

Commission authorized a reorganization plan for the New York, N. H. & H. R. Co., a railroad included in this merger, which provides for the creation of an investment company and issuance of securities by it in exchange for debtor's securities. Such method is most feasible means for effectuating reorganization and is consistent with congressional intent as well as language of §77. —Pennsylvania R. Co.—Merger—New York Central R. Co., 334 I.C.C. 25 (103)*.

35. Classification of claims and interests, creditors.—[Vols. 10-16, 18, 21].—See Boston & P. R. Corp. Reorganization case, n. 90, infra.

55. Accounts; separation by parts of a system; severance studies.—[Vols. 10, 11, 13, 14, 16, 17]—Commission found that applicant is no longer under common control and management of Penn Central since that railroad is now involved in its own reorganization and cannot control applicant in any practical sense. Therefore, applicant is no longer required to include "off branch" revenues accruing to Penn Central in computing branch revenues for abandonment purposes. —Lehigh Valley Railroad Company Abandonment, 338 I.C.C. 793 (800-802).

61. Valuation; earnings.—[Vols. 11-18, 21].—Valuation of property of debtor railroad in reorganization is a function of the Commission; and review of its determination by the court is limited to question of whether conclusions of the Commission are in accordance with legal standards and supported by substantial evidence. From the Commission's decision, and the examiner's report on valuation, it is clear that careful consideration was given to all the relevant elements of value and, in particular, to the earning power of the property. Uncontradicted evidence adequately supports Commission conclusions that debtor lines' unprofitable operation has contributed a material share of operating losses of the New Haven system of which it is operated as an integral part (under lease) and that, after re-examining the plan in light of 49 USC§15(6), there was no justification for requiring the New Haven to make greater contributions to debtor's revenues. Projections of objector to the plan as to debtor's potential earnings are optimistic speculations and, in view of its experience and specialized knowledge, the Commission did not err in giving them no more weight than it did.—In re Boston & P. R. Corp., 260 F. Supp. 415 (419-20)*.

Also, because of challenge as to debenture's validity, the Commission did not err in approving reorganization plan on the assumption that debentures issued by debtor under provisions of its lease to the New Haven (which lessee later purchased from the holder and pledged to the United States as collateral) were valid; litigation of validity of the debentures undoubtedly would be protracted, and New Haven's current financial condition is such that unduly long litigation might defeat the whole plan. Approval of a plan does not require that validity of every disputed claim be litigated; certainly in instant case, it is best for interests of all the parties to compromise their differences; and Commission approval of a compromise treatment of the debentures was proper. The commission fixed a compromise value for all unadjucated claims which, being supported by the evidence and not contrary to law, is binding on the court. Procedure of treating the debentures as valid, as they appear on their face to be, but of paying the United States (pledgee) only part of face value of its claim, was proper; and, in light of plan's overall provisions, such treatment is equitable; approved.—Id., pp. 420-2.

Under §77(e), determination of value is a function of the Commission without necessity of court approval. Since valuation for reorganization purposes is made up of many imponderable factors which cannot be reduced to a fixed formula, precise findings as to value are not necessary. In addition to debtor's earning capacity, other relevant but less important factors of valuation include evidence of original cost of debtor's properties, cost of reproduction new and depreciated, present fair market value of debtor's real estate, potential liquidating value of debtor's non-operating property, debtor's strategic value to the New Haven system, and the agreement between New Haven and the stockholder's committee relating to price to be paid for stock.—Boston & P. R. Corp. Reorganization, 327 I.C.C. 10 (18, 20)*.

§77(c)(6), as amended, affords to a former lessor (such as debtor) the right to receive a just division of revenues accruing from operations over its line in accordance with criteria prescribed by §15(6) of the Interstate Commerce Act. Among other things, §15(6) requires that consideration be given to: (1) efficiency of operations of carriers concerned, (2) revenue requirements necessary to pay operating expenses, (3) taxes and fair return on transportation property of respective carriers, (4) importance of transportation service to public, and (5) whether any participating carrier is an originating, intermediate, or delivering carrier. After giving full effect to the prescribed criteria and applying them in light most favorable to debtor, record is convincing that debtor's present earnings result in substantial loss and that debtor has little or no earning power independent of the New Haven system.—Id., pp. 19-20.

66. Consolidation; acquisition; operation; construction; sale.—[Vols. 10-19, 21].—See Industrial Corp. of S. Hackensack, N. J. case, 49 USC §13(1), n. 3, supra.

68. Taxes.—[Vols. 10-19].—Prebankruptcy tax penalties are not favored, and the doctrine that such penalties, although liened, are not allowable in ordinary bankruptcy should be applicable in railroad reorganization. Also, the principle that bankrupt estate is subject to postbankruptcy penalties where trustee does not discharge postbankruptcy taxes is not applicable in railroad reorganization where trustees do not have ability to pay taxes and keep railroad operational.—In re New York, New Haven and Hartford Railroad Co., 304 F. Supp. 1121 (1134-5)*; district court remanded plan of reorganization of this railroad to the Commission for the purpose of modifying the plan's provisions for unilateral extension of certificate maturity; rate of interest; sinking fund; payment of counsel fees by installment notes; and the claims of mortgage holders.—Id., p. 1121.

90. Stock and stockholders.—[Vols. 10-17, 19, 21].—It is unnecessary to decide the exact nature of New Haven's relationship to debtor's public stockholders, since the New Haven and its trustees have been operating debtor's property, not as a fiduciary but pursuant to court order issued under the Bankruptcy Act. As operator, it has a duty to debtor to conduct such operations in a fair and impartial manner. Regardless whether New Haven is a fiduciary in relation to debtor's public stockholders, record does not indicate it will realize a profit out of considered transaction. Moreover, such a relationship, even if it exists, would not preclude New Haven from purchasing debtor's assets, subject to Commission's approval and confirmation by the court.—Boston & P. R. Corp. Reorganization, 327 I.C.C. 10 (22)*.

In addition to cash payment of $110 a share, all holders of debtor's stock will receive Certificates of Contingent Beneficial Interest (one CCBI for each share of stock), which enable stockholders to participate in net proceeds of the sale or other disposition of debtor's property in transactions of $500,000 or more. And, inasmuch as issuance of CCBI's to New Haven on the basis of 3,272 sinking fund shares and 40 treasury shares should help to expedite retirement of the new bonds, which was obviously a factor in the Government's decision to accept an amount less than that to which it was otherwise entitled as senior creditor, the plan is fair and equitable and in accordance with law.—Id., pp. 14, 16.

See also Central R. Co. of New Jersey Reorganization case, n. 135, below.

115. Counsel; compensation.—[Vols. 10-18, 21].—Counsel for indenture trustees and other creditor interests involved in the reorganization plan herein would not be required to accept installment notes rather than cash in payment of their fees.—In re New York, New Haven and Hartford Railroad Co., 304 F. Supp. 1121 (1126-27)*.

In fixing the maximum limits of compensation, Commission reviews time spent by counsel, nature and complexity of the work, need and relative importance in relation to other estate needs, benefit to estate, availability of estate funds, individuals performing the service, and fixed and variable expenses involved in rendering service.—New York, N.H. and H.R. Co. Reorganization, 342 I.C.C. 632 (639).

Maximum limits for compensation of petitioner herein set at $627, 017.90. Petitioning counsel and his associates rendered 8,756 hours of service in arbitration proceedings designed to determine the fair market value of a subsidiary railroad to be sold by debtor-railroad's estate which service resulted in a distinct and extraordinary benefit to said estate in that the final award exceeded the original offer for the subsidiary line by $14,038,896.—Boston & Maine Corp., Reorganization, 342 I.C.C. 760 (762-4).

Commission herein modified maximum limits of compensation and reimbursement for services rendered in connection with debtor railroad's reorganization previously set by the Administrative Law Judge. In basing counsel's compensation upon the standard of "wages of federal government attorneys" the Judge did not consider other factors, set forth in 228 ICC 499 (504), nor did he consider the economic risks facing private attorneys or the fringe benefits a government attorney receives.—Boston & P. R. Corp. Reorganization, 342 I.C.C. 859 (868-69).

However, the Commission affirmed the Judge's finding that activities of Mr. Herring to be legislative in nature, and as such, not compensable. We have previously found that such activities have insufficient connection with the proceedings and plan to warrant recompense from debtor's estate (see 295 ICC 169). Not only is the service itself remote to the proceeding and plan, but the value of such service, if any, would be nearly impossible to determine.—Id., p. 869-70.

Also, efforts by Mr. Rood for which compensation is sought have failed to produce any definable benefit to debtor's estate. Only where services have conferred measurable benefits to estate, and to success of reorganization, should estate bear the cost (see 434 F. 2d 804). Unsuccessful challenges to approval plan do not constitute a compensable benefit and are undertaken at challenger's risk. Efforts on behalf of a limited group of stockholders cannot be construed as increasing benefits to all parties of estate.—Id., p. 871-72.

The Commission takes the position that under §77 it is required to set the maximum limit of compensation for all outside counsel employed by railroads in reorganization. While recognizing inflationary pressures, the Commission has in general set maximum limits of compensation well below that requested by the parties, but sufficient to permit their retention.—Annual Report, 1975, pp. 14-15.

120. Reimbursement, expenses in general.—[Vols. 10-15, 17].—In determining maximum limits of allowance for compensation for services of, and expenses incurred by, interested parties in reorganization proceeding, value of services received by debtor's estate must be measured by the length of time taken to resolve bankrupt railroad's reorganization plan in addition to the final award itself. Moreover, the primary importance of individual parties is their contribution to the ultimate plan rather than their degree of opposition, which while justified, may have hampered the reaching of an equitable early solution. Thus, advantages achieved through prolonged proceedings should be counterbalanced by loss to the estate resulting from such prolongation.—Boston & P. R. Corp. Reorganization, 333 I.C.C. 614 (621-2)*.

135. Reorganization managers; proxies; protective committees.—[Vols. 10-18, 21].—An analysis of the Bankruptcy Act confirms conclusion expressed by the chief judge in the district court that Commission orders under §77(p) are reviewable only in the bankruptcy proceedings by the presiding judge. The Commission's determination respecting which committee or committees shall be allowed to participate in railraod reorganization proceedings in a representative capacity bears substantially, albeit indirectly, on the reorganization court's jurisdiction over debtor's property; and this suggests the propriety of review of such orders by that court. Commission order under §77(p) concerning who should have permission to represent and act for a particular class of bondholders in railroad reorganization proceeding is reviewable only by the bankruptcy court judge and not by a three-judge court; therefore, the district court's dismissal of plaintiff-appellant's suit for want of jurisdiction over the subject matter is affirmed.—Bondholders Protective Committee v. I.C.C., 432 F. 2d 268 (270, 271-2).

In view of divergence of interest existing in a number of important respects between railroad owning approximately 49 per cent of debtor's outstanding common stock and debtor; and, thus, railroad's interests as a stockholder differ from those of nonrailroad stockholders, it would be beneficial for nonrailroad stockholders to have representation in proceedings before the Commission or in courts in connection with reorganization of debtor. All circumstances considered, however, authority granted to applicants, as a protective committee, to solicit authorizations to represent nonrailroad stockholders, is made subject to certain conditions.—Central R. Co. of New Jersey Reorganization, 330 I.C.C. 769 (773, 776, 778).

Since the three members comprising applicant protective committee and the immediate interests they represent have substantial holdings in stockholder railroad and hold only 1 per cent of debtor's outstanding nonrailroad-owned stock, approval of authority is conditioned on: (1) enlargement of committee membership from three to at least five in order to permit a majority thereof to be members individually representing holdings in debtor which exceed in value similarly represented holdings in stockholder railroad; (2) modification of Protective Agreement to provide that committee membership shall be on application by any nonrailroad stockholder and approval thereof by the Commission alone; and (3) that the provision in proposed agreement authorizing a committee member to designate any other person—whether or not a stockholder or committee member—to act as his proxy be eliminated, since public interest required that committee action proceed from proposals approved by a majority of the committee members themselves, all of whom have had Commission approval.—Id., pp. 776-8.

In proceeding to determine maximum limits of allowance for compensation for services of, and expenses incurred by, interested parties in connection with bankrupt railroad's estate, since the Bankruptcy Act allows individual stockholders or other groups to act in their own interests and to be compensated for reasonable services of value, a protective committee (which, in order to be authorized by the Commission to represent creditors or security holders, must subject itself to limitations as to compensation and expenses) should have assurance that its itemized and necessary expenses will be substantially allowed along with fair compensation for its services of value; however, in the interest of avoiding excessive cost to debtor's estate, independent individuals or groups should not expect compensation or reimbursement for services which duplicate those of a protective committee representing the bulk of stockholders or creditors.—Boston & P. R. Corp. Reorganization, 333 I.C.C. 614 (622)*.

Section 208. (a), (b). Petition subsequent to certification of reorganization plan; Duty of Commission to report changes, etc., to court; Supplemental report and order, etc.—[Unchanged. See vol. 14, p. 11712, vol. 16, p. 12979.]

Historical notes, see vol. 14, p. 11714.

Notes of Decisions

Volume 16—p. 12979; Volume 17—p. 13694

Chapter 10—CORPORATE REORGANIZATIONS

Subchapters II, VII, XI

Sections 506, 516, 577, 579, 624.—Administration of estate; plan; hearing; confirmation, consummation.—[See vol. 10, p. 8380. Section 229(a), July 7, 1952, Pub. L. 456, 66 Stat. 431, prescribes terms for consummation of plan.]

(6) Notwithstanding any other provisions of this chapter, the title of any owner, whether as trustee or otherwise, to vessels (as the term is defined in the Ship Mortgage Act, 1920, as now in effect or hereafter amended) leased, subleased, or conditionally sold to any water carrier which holds a certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission, and any right of such owner or of any other lessor to such water carrier to take possession of such property in compliance with the provisions of any such lease or conditional sale contract shall not be affected by the provisions of this chapter if the terms of such lease or conditional sale so provide. (Paragraph (6) was added to §516 by act of October 17, 1968, Pub. Law 90-586, 82 Stat. 1150).

Historical note, vol. 11, p. 9745.

Notes of Decisions

Volume 12—p. 10566; Volume 13—p. 11204; Volume 14—p. 11715; Volume 15—p. 12331; Volume 16—p. 12983; Volume 17—p. 13695; Volume 18—p. 14720; Volume 21—p. 17815.

ANTITRUST ACTS

Chapter 1.—Title 15

SHERMAN ACT

Section 1. Trusts, etc., in restraint of trade illegal; exception of resale agreements; penalty.—[Amended by striking out the colon preceding the first proviso in the first sentence and all that follows down through the end of such sentence and inserting in lieu thereof a period. Public Law 94-145, 89 Stat. 801, Dec. 12, 1975. See vol. 4, p. 3032, vol. 11, p. 9756, vol. 17, p. 13696.]

Historical note, see vol. 4, p. 3032.

Notes of Decisions

Volume 4—p. 3033; Volume 7—p. 6024; Volume 10—p. 8395: Volume 11—p. 9756; Volume 12—p. 10568; Volume 13—p. 11206; Volume 14—p. 11715; Volume 15—p. 12332; Volume 16—p. 12983; Volume 17—p. 13696; Volume 18—p. 14772; Volume 19—p. 15999; Volume 21—p. 17817.

11. Purpose; interpretation generally.—[Vols. 4, 12, 13, 18, 19, 21].—As a part of the right to petition protected by the First Amendment, any carrrier has the right of access to administrative agencies and courts to defeat a competitor's application for motor carrier operating authority, and its purpose to eliminate applicant as a competitor may be implicit in such opposition; however, its First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates the antitrust laws. Complaint alleges that petitioners combined to harass and deter respondents from having "free and unlimited" access to agencies and the courts, and to defeat that right by massive, concerted, and purposeful activities of the group; if those alleged facts are proved, a violation of the antitrust laws has been established; and if the end result is unlawful, it matters not that the means used in violation may be lawful. Case remanded for trial.—California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (511-16)*.

Section 2, 3.—[Unchanged] [See vol. 4, pp. 3046-3047; Vol. 21, p. 17819.]

Notes of Decisions

§2: Volume 4—p. 3046; Volume 12—p. 10569; Volume 13—p. 11207; Volume 14—p. 11716; Volume 15—p. 12333; Volume 18—p. 14725; Volume 19—p. 16005; Volume 21—p. 17819.

§3: Volume 7—p. 6025.

1. Monopolies and unreasonable restraints of trade contrasted.—[Vols. 12-15, 19].—See The Short Line, Inc. v. United States case, NTP, n. 5 *Applications, operating rights.*

Section 4. Jurisdiction of courts; duty of district attorneys; procedure.—[Unchanged. See vol. 4, p. 3048.]

Historical note, see vol. 4, p. 3048

Notes of Decisions

Volume 4—p. 3048; Volume 7—p. 6026; Volume 11—p. 9756; Volume 12—p. 10570; Volume 13—p. 11208; Volume 17—p. 13697; Volume 18—p. 14726; Volume 21—p. 17819.

Sections 5-7. Bringing in additional parties; forfeiture of property in transit; "person" defined.—[Unchanged. See vol. 4, pp. 3055, 3056.]

Historical notes, see vol. 4, pp. 3032, 3055, 3056.

Notes of Decisions

§6: Volume 4—p. 3055.

CLAYTON ACT

Section 12. Words defined.—[Unchanged. See vol. 4, p. 3057.]

Historical note, see vol. 4, p. 3057.

Notes of Decisions

Volume 4—p. 3058; Volume 19—p. 16006; Volume 21—p. 17820.

Sections 13-15. [Unchanged. Editorial comment, vol. 4, p. 3059.]

Section 16. Judgment in favor of Government as evidence; suspension of limitations.—[Section 16 was amended by P. L. 93-528, 88 Stat. 1706, December 21, 1974, by redesignating subsection (b) as (i) and inserting new subsections (b) through (h) immediately after subsection (a). Editorial comment, vol. 4. page 3059.]

(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or in behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

(b) Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

(1) the nature and purpose of the proceeding;

(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

(c) The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—

(i) a summary of the terms of the proposal for the consent judgment,

(ii) a summary of the competitive impact statement filed under subsection (b),

(iii) and a list of the materials and documents under subsection (b) which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

(d) During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b). The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

(e) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(f) In making its determination under subsection (e), the court may—

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate.

(4) review any comments including any objections filed with the United States under subsection (d) concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

(g) Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b), each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

(h) Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 4A of this Act nor constitute a basis for the introduction of the consent judgement as prima facie evidence against such defendant in any such action of proceeding.

(i) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

Section 17.—[Unchanged, Editorial comment, vol. 4, p. 3059.]

Section 18. Acquisition by one corporation of stock of another.—[Unchanged. See vol. 15, p. 12334.]

Notes of Decisions

Volume 4—p. 3061; Volume 7—p. 6028; Volume 10—p. 8397; Volume 12—p. 10570; Volume 15—p. 12335; Volume 17—p. 13698; Volume 18—p. 14726; Volume 21—p. 17820.

13. Stock acquisition prohibited.—[Vols. 4, 7, 10, 21].—See United States v. Navajo Freight Lines, Inc. case, 15 USC §21, n. 3.

Section 19. Interlocking directorates and officers.—[Editorial comment, vol. 4, p. 3065; Vol. 15, p. 12335.]

See historical note to §21, vol. 21, p. 17822.

Section 20. Purchases by common carriers in the case of interlocking directors, etc.—[Unchanged. See vol. 4, p. 3067.]

Historical note, see vol. 4, p. 3068, vol. 18, p. 14727.

Notes of Decisions

Volume 4—p. 3068; Volume 7—p. 6033; Volume 10—p. 8398; Volume 12—p. 10571; Volume 16—p. 12984; Volume 17—p. 13698; Volume 19—p. 16007; Volume 21—p. 17821.

1. In general.—[Vols. 4, 7, 10, 12, 19, 21]. —Defendants' motion for summary judgment, in derivative action by Reading Co. stockholders seeking treble damages from Baltimore & O. R. Co. in connection with Reading's sale to B&O (whose directorates were interlocking) of notes and stock in joint terminal facility without competitive bidding, denied. Notwithstanding the claim that the Clayton Act would not have applied if transaction had been accomplished by some other method, defendant railroad's sale of the notes and stock to codefendant constituted "dealing in securities" within meaning of the statute. While "securities" is nowhere defined for Clayton Act purposes, notes and stock in question fall within any normal meaning of that word; moreover, they are "articles of commerce" in the sense of their transferability to third parties. The Clayton Act prescribes public bidding on certain dealings in securities, supplies, or other articles of commerce and, for purposes of §10 thereof, considered transaction is not different merely because the notes and stock were sold to owner of the other half of the terminal facility.—Klinger v. Rose, 291 F. Supp. 456 (458-9)*.

Provisions of the statute relating to purchases by common carriers having interlocking directorates are applicable to an interlock between two railroads; and competitive bidding requirements thereof can be complied with by railroads where, as in instant case, one dominates the other to extent of holding 42 percent of its common stock, if the dominated carrier alone obtains public bids. Also, though defendants argue that the statute is applicable only to securities issued by the carrier itself, legislative history is not convincing that word "securities" therein means only the carrier's own securities. Furthermore, since §4 of the Clayton Act provides a cause of action where a person has been injured by a violation of antitrust laws and the Supreme Court has held that

§10 is an "antitrust law" (361 US 173), §10 of that act may be enforced by a private suit under §4 thereof.—Id., pp. 459-61.

While Commission does not condone any unauthorized interlocking directorates, the mere possibility of a violation of the Clayton Act on that score does not warrant denial of merger application herein in view of the remedies available under the law (see 361 US 173).—Pennsylvania R. Co.—Merger—New York Central R. Co., 328 I. C. C. 304 (310)*.

Section 21. [*§11 as enacted.*] Enforcement provisions; procedure.—[Unchanged. See vol. 18, p. 14727.]

Historical notes, see vol. 18, p. 14732; vol. 21, p. 17822.

Notes of Decisions

Volume 4—p. 3072; Volume 7—p. 6034; Volume 10—p. 8399; Volume 18—p. 14732; Volume 19—p. 16008; Volume 21—p. 17822.

3. Jurisdiction of Federal Trade and Interstate Commerce Commissions.—[Vols. 4, 7, 19, 21].—Interstate Commerce Commission's dismissal of anti-trust complaint, filed by plaintiff during pendency of control proceedings under §5 of Interstate Commerce Act, was not an abdication of its responsibility under the Clayton Act, as plaintiff claims. The Commission's duties under the Clayton Act cannot be viewed apart from provisions of §5; and it could examine the transaction on carrier's application for authority to issue stock in connection with proposed control, and at that time discharge its duties under the Clayton Act. Moreover, principles of the National Transportation Policy are the dominant yardstick for measuring consolidations in the transportation industry; also, §5 of the Interstate Commerce Act authorizes the Commission to approve a transaction even though it might otherwise be contrary to goals of the anti-trust laws. Giving proper effect to necessary interaction between the Clayton and Interstate Commerce Acts, the Commission acted well within its discretion in dismissing the anti-trust complaint since matters raised were fully considered under correct legal standards in the control proceedings; an agency is not required to cover the same ground twice.—Interstate Investors, Inc. v. United States, 287 F. Supp. 374 (377, 389-90)*.

The doctrine of primary jurisdiction is properly applied in action alleging violations of the Clayton Act, due to one motor carrier's acquisition of stock of another, where there is a clear possibility that the regulatory agency may immunize the precise conduct on which the complaint is based, or where the agency is empowered to remedy anti-competitive practices under its own statute while immunizing some others (even though its powers do not extend precisely to the conduct in question), and is entrusted with enforcement of the antitrust laws themselves. Since, in addition to its regulatory powers over motor carriers, the Interstate Commerce Commission has been entrusted with enforcement of, and is required to enforce, the antitrust laws, that agency has primary jurisdiction of civil action alleging Clayton Act violations resulting from defendants' acquisition of stock in another motor carrier. Defendants' motion to dismiss for lack of jurisdiction, on ground that ICC has primary jurisdiction with respect to all questions involved, granted.—United States v. Navajo Freight Lines, Inc., 339 F. Supp. 554 (555, 565-6)*.

Sections 24, 25. Liability of directors and agents; restraining violations.—[Unchanged. See vol. 4. p. 3074.]

Historical notes, see vol. 4, p. 3075.

Notes of Decisions

§24: Volume 4—p. 3074.

Section 26. Injunctive relief for private parties; exception.—[Unchanged. See vol. 4, p. 3076; vol. 11, p. 9757.]

Historical notes, see vol. 4, pp. 3075, 3076.

Notes of Decisions

Volume 4—p. 3076; Volume 7—p. 6037; Volume 10—p. 8400; Volume 13—p. 11209; Volume 16—p. 12985; Volume 17—p. 13699; Volume 21—p. 17823.

Section 27. Effect of partial invalidity.[Unchanged. See vol. 4, p. 3082, vol. 11, p. 9758.]

Historical note, see vol. 4, p. 3082.

PANAMA CANAL ACT

Section 31.—[Unchanged. See vol. 4, p. 3083, vol. 11, p. 9758.]

FEDERAL TRADE COMMISSION ACT

Sections 45, 46. Unfair methods of competition unlawful, etc.

Historical note, see vol. 18, p. 14733:

Section 51.—[Unchanged. See vol. 4, p. 3084]

Chapter 6.—STANDARD TIME ACT

Section 261. Zones for standard time.—[Unchanged. See vol. 4, p. 3085.]

Historical notes, see vol. 4, p. 3085; vol. 11, p. 9758; vol 12, p. 10571; vol. 13, p. 11210; vol. 14, p. 11717; vol. 15, p. 12340; vol. 19, p. 16008; vol. 21, p. 17823.

Historical Note

Functions, powers, and duties under the Standard Time Act, 15 USC 261 and 265 were transferred from the Commission to the Department of Transportation by P.L. 89-670.

Notes of Decisions

Volume 4—p. 3086; Volume 7—p. 6040; Volume 10—p. 8402; Volume 11—p. 9758; Volume 12—p. 10572; Volume 14—p. 11718; Volume 15—p. 12340; Volume 17—p. 13699; Volume 19—p. 16009; Volume 21—p. 17824.

Section 262. Duty to observe standard time zones.—[Unchanged. See vol. 4, p. 3088, vol. 11, p. 9758.]

Notes of Decisions

Volume 4—p. 3088; Volume 10—p. 8404; Volume 14—p. 11718; Volume 15—p. 12341; Volume 19—p. 16013.

Sections 263-265.—[Unchanged. See vol. 4, p. 3088, vol. 14, p. 11719; vol. 4, p. 3090.]

Notes of Decisions

§264: Volume 4—p. 3089.

CRIMES AND CRIMINAL PROCEDURE

EMBEZZLEMENT AND THEFT

Chapter 31.—Title 18

Section 660. Carrier's funds derived from commerce; State prosecutions.—[Unchanged. See vol. 14, p. 11721.]

Cross reference, vol. 14, p. 11721, vol. 15, p. 12342, vol. 18, p. 14733.

EXPLOSIVES AND OTHER DANGEROUS ARTICLES

Chapter 39.—Title 18

Section 831. Definitions.—[Unchanged. See vol. 19, 16014.]

Section 832. Transportation of explosives, radioactive materials, etiologic agents, and other dangerous articles.—[Unchanged. See Vol. 19, p. 16015.]

Notes of Decisions

Former §382: Volume 4—p. 3096.

Section 833. Marking packages containing explosives and other dangerous articles.—[Unchanged. See vol. 19, p. 16016.]

Section 834. Regulations by Interstate Commerce Commission.—[Unchanged. See vol. 19, p. 16016.]

Historical Note

Powers, functions, and duties under 18 USC 831-835 were transferred from the Commission to the Department of Transportation by P. L. 89-670, October 15, 1966. [See also vol. 14, p. 11724; vol. 15, p. 12343; vol. 16, p. 12986; vol. 17, p. 13700; vol. 18, p. 14734; vol. 21, p. 17825.

Notes of Decisions

(Former §383): Volume 4—p. 3099; Volume 7—p. 6072; Volume 10—p. 8419; Volume 11—p. 9763; Volume 13—p. 11212; (Former §835); Volume 14—p. 11724; Volume 15—p. 12843; Volume 16—p. 12987; Volume 17—p. 13701; Volume 18—p. 14734; Volume 19—p. 16017; Volume 21—p. 17825.

12. Violations; penalties.—[Vols. 17, 19, 21].—Violations of safety regulations prescribed in 329 ICC 376 in respect to transportation of explosives and other dangerous articles by private carriers shall be prosecuted as violations of the Interstate Commerce Act only, although statutory authority to promulgate such rules is conferred by both the Transportation of Explosives Act and the Interstate Commerce Act. This modification will equalize the treatment as between private and regulated. carriers since the regulated carriers are not parties to this proceeding and consequently the Commission has no basis herein for imposing against them the heavier penalties provided under the Transportation of Explosives Act.—Transportation of Explosives—Private Motor Carriers, 329 I.C.C. 411 (413).

15. Motor-vehicle transportation.—[Vols. 10, 11, 14-17, 19, 21].—Provisions of the Explosives Transportation Act apply to all carriers engaged in interstate commerce, including private carriers, and their employees; hence the Commission's regulations governing transportation of explosives are binding on such carriers and their employees. When private carrier's agent and driver left a trailer laden with a cargo of nitro-carbo-nitrate, dynamite, and blasting caps totally unattended and without explosives placards adjacent to a public highway, upon discovering that a trailer tire had become heated, both failure to maintain the signs on the vehicle and leaving it unattended were clear violations of those regulations. The circumstances and severe consequences of the ensuing fire and explosion demonstrate the extreme importance of adopting measures, in the public interest, designed as fully as possible to avoid the circumstances, conditions, and practices present in the instant case.—Accident Near Marshalls Creek, Pa., 96 M.C.C. 783 (794-5).

Testimony of explosive experts justifies conclusion that nitro-carbo- nitrate should be reclassified as an explosive for purposes of transportation; it is used as a blasting agent and when transported is necessarily accumulated in considerable volume in a vehicle which provides confinement. Commercial vehicles are frequently involved in fires, some of which are extremely hard to combat, and conclusion is inescapable that N-C-N should no longer be classified merely as an oxidizing material, but should be clearly designated an explosive and subjected to those regulatory requirements which now are or may in future be prescribed for transportation of explosives. Moreover, it is clear that transportation of any explosive or blasting agent by motor vehicle is constantly subject to fire hazards from several potential sources, including the tires of the vehicle itself. These facts amply justify implementation, after consultation with interested parties, of the requirements relative to vehicles and drivers recommended by the Chief of the Section of Motor Carrier Safety.—Id., p. 795.

See also Explosives Supply Co., Inc., Exemption Application case, §204(a)(4a), n. 1, supra.

Section 835. Administration.—[Unchanged except that, by act of Oct. 15, 1970, Public Law 91-452, title II, §222, subsection (b) was amended by striking the third sentence thereof. See vol. 19, p. 16019.]

Part V.—IMMUNITY OF WITNESSES

Sec.
6001. Definitions.
6002. Immunity generally
6003. Court and grand jury proceedings.
6004. Certain administrative proceedings.
6005. Congressional proceedings.

Historical Note

By act of Oct. 15, 1970, Public Law 91-452, §260, the provisions of Title 18 U.S.C., Part V, added by title II of the act, and amendments and repeals made by title II, take effect on the sixtieth day following date of enactment; however, no amendment to or repeal of any provision of law under title II affects any immunity to which any individual is entitled under such provision by reason of any testimony or information given before that day. Also, §259 of the act provides that, in addition to statutes specifically amended or repealed by title II, any other provision of law inconsistent with the provisions of Part V is to that extent amended or repealed.

Section 6001. Definitions.—As used in this part—(a) "agency of the United States" means any executive department as defined in section 101 of title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, the Atomic Energy Commission, the China Trade Act registrar appointed under 53 Stat. 1432 (15 U.S.C. sec. 143), the Civil Aeronautics Board, the Federal Communications Commissions, the Federal Deposit Insurance Corporation, the Federal Maritime

Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the National Transportation Safety Board, the Railroad Retirement Board, an arbitration board established under 48 Stat. 1193 (45 U.S.C. sec. 157), the Securities and Exchange Commission, the Subversive Activities Control Board, or a board established under 49 Stat. 31 (15 U.S.C. sec. 715d);

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpenas and to take testimony or receive other information from witnesses under oath; and

(4) "court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the United States Court of Customs and Patent Appeals, the Tax Court of the United States, the Customs Court, and the Court of Military Appeals.

Section 6002. Immunity generally.—Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with the order.

Section 6003. Court and grand jury proceedings.—(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United

States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Section 6004. Certain Administrative proceedings.—(a) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) An agency of the United States may issue an order under subsection (a) of this section only if in its judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Section 6005. Congressional proceedings.—(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that—

(1) in the case of a proceeding before either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that House;

(2) in the case of a proceeding before a committee or a sub-committee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request tne order

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify. (Oct. 15, 1970, Public Law 91-452, title II, 84 Stat. 926-932.)

INTERNAL REVENUE CODE OF 1954

26 USC §3231

RAILROAD RETIREMENT TAX ACT

Section 3231. Definitions.—[Unchanged. See vol. 17, p. 13702.]

Notes of Decisions

[1934 Act: Volume 7—p. 6198]; Volume 10—p. 8502; Volume 11—p. 9778; Volume 12—p. 10592; Volume 13—p. 11233; Volume 14—p. 11754; Volume 15—p. 12374.

Regulations of Commission

38 FR 20623, Aug. 2, 1973, Part 1107: Requirements and Procedures Relating to Railroad Rate Adjustment Act of 1973, sets forth procedures for petitions for adjustment of interstate freight rates because of increased expenses due to increased taxes, effective Aug. 1, 1973

38 FR 22125, Aug. 16, 1973, Part 1107: Requirements and Procedures Relating to Railroad Rate Adjustment Act of 1973, a correction to rules promulgated at 38 FR 20623.

JUDICIARY AND JUDICIAL PROCEDURE

Title 28 U.S.C.

Historical notes; see vol. 14, p. 11726; vol. 15, p. 12344.

THE SUPREME COURT

Chapter 81.—Title 28

Section 1253. Direct appeals from decisions of three-judge courts.—[Unchanged. See vol. 14, p. 11727.]

Notes of Decisions

Volume 15—p. 12345; Volume 19—p. 16020; Volume 21—p. 17828.

2. Maintenance of status quo pending appeal.—[Vols. 4, 7, 11, 15, 19.] The three-judge district court having denied a stay pending appeal of its preliminary injunction against implementation of Commission orders approving interim 2.5 percent surcharge on nearly all rail freight charges, to extent the surcharge relates to goods shipped for recycling purposes, the criteria for granting a stay of that court's judgment are stringent —at least when the necessity for a stay turns upon a refined evaluation of its effect. The district court's action cannot be equated with an abuse of discretion because it decided that there was a danger to the environment (if railroads were allowed to collect the surcharge on recyclable goods) outweighing the loss of income and consequent financial threat to the railroads. Therefore, notwithstanding doubts as to correctness of that court action, the circuit justice, acting alone on requested stay of the preliminary injunction, defers to the three-judge court's collective evaluation and balancing of the equities. Applications for stay pending appeal, denied.—Aberdeen & R.R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP), 409 U.S. 1207 (1217-8)*.

Section 1254. Courts of appeals; certiorari; appeal; certified questions.—[Unchanged. See Vol. 14, p. 11727.]

Notes of Decisions

Volume 15—p. 12345; Volume 16—p. 12989; Volume 17—p. 13704; Volume 18—p. 14735; Volume 19—p. 16021.

COURTS OF APPEALS

Chapter 83.—Title 28

Section 1291. Final decisions of district courts.—[Unchanged. See vol. 18, p. 14736.]

Section 1292. Interlocutory decisions.—[Unchanged. See vol. 18, p. 14736.]

Notes of Decisions

Volume 14—p. 11728; Volume 15—p.12345; Volume 16—p. 12889; Volume 17—p. 13704; Volume 18—p. 14737; Volume 19—p. 16021; Volume 21—p. 17829.

1. Appeals to Court of Appeals.—[Vols. 7, 10, 13-19, 21].—In appeal, by creditor of railroad currently undergoing reorganization, from district court order granting petition of debtor's trustee for authority to appoint officer of another railroad as operating officer of debtor's estate, the court of appeals does not have jurisdiction to review the order of Commission granting appellant-creditor permission to intervene in proceeding seeking its authority to hold the position as debtor's officer, but denying its petition for reconsideration of Commission order granting that authority.—In re Central R. Co. of New Jersey, 411 F. 2d 1178 (1180).

DISTRICT COURTS; JURISDICTION

Chapter 85.—Title 28

Section 1331. Federal question; amount in controversy; costs.—[Unchanged. See vol. 18, p. 14737.]

Notes of Decisions

Volume 16—p. 12990; Volume 17—p. 13704; Volume 18—p. 14738; Volume 19—p. 16022; Volume 21—p. 17830.

Section 1332. Diversity of citizenship; amount in controversy; costs.—[Unchanged. See vol. 18, p. 14738; vol. 21, p. 17833.]

Notes of Decisions

Volume 4—p. 3121; Volume 11—p. 9767; Volume 12—p. 10576; Volume 13—p. 11214; Volume 14—p. 11729; Volume 15—p. 12346; Volume 16—p. 12991; Volume 17—p. 13705; Volume 18—p. 14379; Volume 19—p. 16023; Volume 21—p. 17833.

3. Citizenship of parties and amount in controversy.—[Vols. 4, 11-19, 21].—See also Land O'Lakes, Inc. v. United-Buckingham Frgt. Lines, Inc. case, 28 USC §1336, n. 2.

Inasmuch as, in shipper's diversity action against a railroad and a motor carrier, liability is asserted against both defendants in all four claims for damages to fresh meat shipments (though no one claim exceeds $10,000), aggregate value of the claims against defendants jointly is the proper measure for determining whether the amount in controversy requirement of the statute is met. In instant case, therefore, since aggregate amount of plaintiff's claims is more than $16,000, the district court had subject matter jurisdiction.—Litvak Meat Co. v. Baker, 446 F. 2d 329 (333-4).

There being diversity of citizenship of the parties, the district court has jurisdiction in local cab company's action to enjoin operation of interstate carrier's limousine service on the grounds of Moisant airport at New Orleans, following removal thereof from State court where suit was filed. While defendant urges that a three-judge court should be convened, pursuant to 28 USC §§2123-2325, the Commission order granting him passenger authority has not been attacked directly by any party, nor has the United States been sued or made a party to the action. Also, collateral attacks cannot be permitted; and until held invalid, after proper attack, the Commission's order must be respected by the court. Therefore, in the present state of the record, the case is not one for a statutory court.—Toye Bros. Yellow Cab Co. v. Irby, 305 F. Supp. 905 (907)*.

Section 1334. Bankruptcy matters and proceedings.—[Unchanged. See vol. 16, p. 12991.]

Section 1336. Interstate Commerce Commission's orders.—(a) Except as provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures. (Paragraph (a) was amended by P.L. 93-584, 88 Stat. 1917, Jan. 2, 1975.) [See vol. 14, p. 11730; vol. 21, p. 17835.]

Notes of Decisions

Volume 15—p. 12346; Volume 16—p. 12991; Volume 17—p. 13706; Volume 18—p. 14739; Volume 19—p. 16023; Volume 21—p. 17835.

2. Construction and interpretation.—[Vols. 15-19, 21.]

District court holding that Commission decisions terminating investigations of passenger train discontinuances under 49 USC §13a are not "orders" within meaning of the statute, on the theory that since "the statute is self-implementing," only an "order" requiring action is reviewable, reversed. Whether the Commission should investigate a §13a(1) discontinuance is a matter within its discretion, which is not reviewable; but once it undertakes to investigate, it is required by law to make a written report therein and, since decision to investigate indicates existence of a substantial question under the legal standards, the Commission's report deals with the merits. Technical form of the order is irrelevant when, in each case, the Commission is deciding the merits. Therefore, in accordance with 307 US 125, Commission orders discontinuing its investigations in two §13a(1) proceedings are judicially reviewable on the complaint of aggrieved persons.—City of Chicago v. United States, 396 U.S. 162 (163-7)*.

Amendment to the statute, which provides that when a district court or the court of claims refers a question to the Commission for determination, the referring court shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, or annul Commission order arising from the referral, has resulted in more modern procedure for judicial review of questions involving primary jurisdiction of the Commission and referred to it for preliminary determination. Since no changes were made in substantive law except to fix jurisdiction and venue in the referring court, the prerequisites for judicial review remain the same; when a mat-

ter has been referred to the Commission, it must be prosecuted there until a final order is issued; and only after administrative remedies have been exhausted may the case proceed to judgment in the court.—McLean Trucking Co. v. United States, 387 F. 2d 657 (659-60)*.

After motor carrier's action for recovery of freight charges allegedly due on government shipments was commenced in the court of claims, an issue requiring interpretation of items in the governing tariff was referred to the Commission for determination; the Commission decided the question in carrier's favor and denied the Government's subsequent petition for reconsideration; thus, prerequisites for judicial review having been met, matter is properly before the court of claims on the Government's motion to enjoin, set aside and suspend the Commission order. Words "civil action" in the amended statute do not require that party challenging the order institute a new action against the Commission in the referring court, and pursue it to conclusion, before reopening the original case; Congress used the term "civil action" simply to distinguish it from a "criminal action" and nothing more should be inferred therefrom; thus, challenging party need only file in the court a pleading setting forth the requested action and specifically stating the grounds therefor.—Id., pp. 659, 660.

Prior to amendment of the statute, however, a suit to set aside a Commission order in judicial reference cases was ordinarily filed against the United States and the Commission and, when the United States brought suit to set aside a Commission order, the agency was customarily named as defendant. Instant case is the first one brought under the new statutory pattern and, although the Commission was invited to (and did) file a brief, it is the court's opinion that the Commission is a necessary party whenever its decision on a referred case is attacked. Therefore, the court of claims will not entertain a motion or other action to set aside an order of the Commission unless it is made a party, duly served, and thus given an opportunity to defend its decision; in all such cases, challenging party should follow the procedure in the court's Rule 23 and as provided therein, a motion to make the Commission a party may be filed with the pleading attacking its decision.—Id., p. 660.

The Commission's primary jurisdiction having been invoked on the question of the meaning of "destination" in Note 1 to minimum-charge rule in carrier's tariff, the scope of the court of claims' review is narrow. As the courts have often held, unless the Commission's findings are contrary to law, arbitrary, capricious, or unsupported by substantial evidence, they may not be set aside; also, the judicial function is exhausted when a rational basis for the Commission's conclusions is found. After reviewing the record and weighing defendant's contentions in light of those well established precepts, the court finds a rational basis for the Commission's conclusions and findings on the question referred; accordingly, carrier is entitled to recover freight charges on considered government shipments in accordance with the decision of the Commission.—Id., pp. 660-2.

Legislative history of the Urgent Deficiencies Act, which abolished the Commerce Court and transferred its jurisdiction to three-judge district courts, makes clear that purpose thereof was to provide a forum for expeditious review of Commission orders of national or general public importance. Thus, since Commission order under §77(p) of the Bankruptcy Act denying plaintiff-appellant (and granting rival committee) permission to solicit authorizations to represent and act for a class of bondholders in railroad reorganization proceeding was not one possessing national or general public significance, it was reviewable only by the single judge presiding in the bankruptcy court and not by a three-judge court under the Urgent Deficiencies Act. Accordingly, contrary to appellant's argument that, under express terms of 28 USC §§1336(a), 2321 and 2325, the order should be reviewed by a three-judge court, the district court's dismissal of the action for want of jurisdiction over the subject matter is affirmed.—Bondholders Protective Committee v. I.C.C., 432 F. 2d 268 (269, 270-1).

The statute explicitly gives district courts jurisdiction to enforce orders of the Commission and, since rights of plaintiffs, if any, are founded on such an order, the court has jurisdiction of subject matter of suit by members of railroad-employee union to recover damages allegedly resulting from defendant railroad's alleged violation of employee-protective conditions imposed by the Commission in order approving defendant's purchase of "Sandusky Line" of Connecting Ry. Co., and to enjoin further violations of the Commission's order. Since union members had attempted in vain to invoke arbitration clause of agreement between the railroad and the union, plaintiffs were not required to exhaust any other remedies before bringing the court action; the doctrine of exhaustion of administrative remedies presupposes the existence of adequate efficient remedies. However, allegations concerning whether plaintiffs intended to accept amounts already received as settlement of (or as partial payment of) their claims under the employee-protective conditions raised substantial issues of fact which preclude issuance of summary judgment.—Nemitz v. Norfolk & W. Ry. Co., 287 F. Supp. 221 (229-31)*.

District courts are not courts of general jurisdiction, and have only such powers as Congress has prescribed; moreover, jurisdiction of district courts is never presumed but must appear affirmatively on the record. Congress has entrusted interstate transportation matters to the Commission, and district courts' role is limited to enforcing, suspending, enjoining, annulling, or setting aside the Commission's orders. Thus, when State court common-law action for breach of contract between two carriers had been removed to the district court, and defendant's removal petition showed it apparently would raise invalidity of the contract under Commission regulations as a defense, but there was no existing Commission order on the contract in question, federal district court had no jurisdiction in the matter. Action remanded to State court.—Robertson Motor Freight, Inc. v. Brady Motorfrate, Inc. (Pa.), 287 F. Supp. 449 (451-2).

The court's task in reviewing actions of the Commission is limited and well-defined. If assailed orders are within scope of statutes which the Commission is empowered to administer and enforce, the court may not set aside or modify them, even though it might have decided differently originally and even though the orders may be against weight of the evidence. More than substantial evidence of record supports the Commission's conclusion that considered "cast iron buttons" (having average iron content of 82 percent) are iron bearing slag, properly classified as "iron or steel scrap, having value for remelting purposes only" under governing rail tariffs, and not slag bearing recoverable iron classifiable as "slag" as plaintiff contended. Courts should pay great deference to such findings since they involve not only the exercise of Commission expertise but include questions of judgment governing the interpretation of classification. The Commission's findings are supported by the record and its conclusions have a rational basis and are in accord with applicable law; orders complained of, sustained.—Price-Watson Company v. I.C.C., 287 F. Supp. 872 (874-6)*.

Language of exclusive jurisdiction and venue statutes is broad enough to apply to suits to set aside Commission orders entered following notice and stay mechanism embodied in 49 USC §322(b)(3), and nothing peculiar to §322(b)(2) "self-help" suits is persuasive that those statutes should not apply. And when the Commission notified the court, in which munitions carriers filed a "self-help" suit to enjoin heavy hauler's carriage of explosives, that it would consider question of the scope of heavy hauler's authority, thus requiring a stay of the court suit, the issue so raised was "referred" to the Commission and the order deciding it was one "arising from such referrals," within meaning of the statutes. Only difference in methods of referring issues to the Commission prior to, and after, 1965 amendment to §322(b) is procedural; and considerations which prompted 1964 enactment of the exclusive jurisdiction and venue statutes have no relation to procedural nicety of whether the court or Commission takes the initiative in having an issue first decided by the Commission.—Leonard Bros. Trucking Co. v. United States, 301 F. Supp. 893 (896-8)*.

Therefore, since one of the two Commission orders under consideration in instant action was its decision on an issue "referred" to the Commission by the Missouri district court, and jurisdiction and venue are proper only in that district, plaintiff's suit will be transferred to that court to the extent it seeks to set that order aside; but the Florida court retains jurisdiction and venue in the action insofar as it seeks to set aside Commission order in another, but interrelated, proceeding which does not appear to fall within the policies underlying exclusiveness of jurisdiction and venue under governing statutes. However, because of interrelationships of the two orders and the questions to be determined by the Missouri court upon the partial transfer of instant action, a stay of the proceedings remaining in the Florida court pending final outcome of parallel litigation in the court to which action is transferred, in part, is deemed proper.—Id., pp. 898-9.

Though the Commission has wide statutory discretion in granting motor carrier temporary authority, and the Administrative Procedure Act precludes judicial review of action committed to agency discretion, in view of the district courts' jurisdiction over actions involving "any order" of the Commission, judicial review may be exercised in suit to enjoin and set aside Commission orders granting temporary authority to defendant carrier. However, scope of the court's review is limited; and, as the record is sufficient if there is any evidence to support the order, the court need find only some evidence in the record, so it cannot be said the Commission acted arbitrarily and capriciously or abused its discretion; substantial evidence is simply not required to uphold grant of temporary authority. Some evidence in the record supports the Commission's findings of an "immediate and urgent need" for defendant carrier's service "within a territory having no carrier service capable of meeting such need," and its decision was not arbitrary, capricious, or contrary to law; sustained.—Superior Trucking Co. v. United States, 302 F. Supp. 257 (259-62,266)*.

The 1964 amendment to §§1336 and 1398, giving the referring court exclusive jurisdiction to review Commission order resulting from the referral, was designed to overcome "cumbersome and inefficient" procedure under prior statutory provisions for judicial review of Commission orders by a three-judge court or, as stated in 387 F. 2d 651, to provide a more streamlined procedure for judicial review of questions that involve primary jurisdiction of the Commission and are referred to it for preliminary determination; thus, since the amendment was enacted, the court of claims or a district court referring an issue to the Commission for resolution, rather than a three-judge court, has reviewed the Commission's order resulting from the referral because of its exclusive jurisdiction. Therefore, plaintiff's action for review by the three-judge court of Commission reports and orders, deciding issues referred to it for initial determination by a one-judge district court, is remanded to the referring court for disposition.—Keller Industries, Inc. v. United States, 304 F. Supp. 852 (854-5).

Where motor carriers filed detailed schedule of proposed new small shipment rates to which shippers made extremely specific objections, where Commission suspended such tariff for the full statutory period and conducted a detailed investigation which found that such rates were just and reasonable, and where such findings were not subject to further challenge before Commission in a reparation proceeding, such report and order were subject to judicial review.—National Small Shipments Traf. Conf. v. United States, 321 F. Supp. 500 (500)*.

It is reasonably clear from provisions of the Amtrack Statute (P.L. 91-518) that neither a court nor the Commission has jurisdiction to review the basic system of intercity passenger trains to be operated by the Corporation which, presumably. includes designation of specific "intercity" trains within the basic system; but whether the Commission or a court has jurisdiction to review a Corporation determination that "new service" trains are intercity is difficult to determine from language of that statute. However, it is certainly essential that uniform standards be applied in determining whether a given train is an intercity, or a commuter train; and the Commission has already made such determinations in at least one decision. Moreover, it is important that standards to be applied for jurisdictional purposes should be consistent with those applied in "avoidable loss" determinations under that statute, a matter that is expressly within the Commission's jurisdiction in event of a dispute; and categorization of train service in this context is obviously within the Commission's expertise.—In re Penn Central Transp. Co., 329 F. Supp. 572 (576-7).

Furthermore, in litigation involving discontinuance of intercity passenger service by railroad undergoing reorganization and bankruptcy which, in accordance with orders of the court, entered into an Amtrack contract and has petitioned for leave to discontinue operation of all its intercity passenger trains, the parties indicate no objection to the court's referring jurisdictional issues now before it to the Commission for initial study and determination; and §1336(b) clearly contemplates such references. Accordingly, the question of whether debtor's passenger trains between Philadelphia and Harrisburg, Pa., and between Philadelphia and New York City (all of which are included in the Amtrack contract) would be operated as intercity trains by the Corporation, or as commuter trains by debtor railroad, will be referred to the Commission for initial determination. No deadline for such initial determination is fixed; however, since debtor will be required to operate some lines at a loss in the interim, a prompt decision should be made.—Id., pp. 577-8.

Despite defendants' contentions to the contrary, the court has jurisdiction of shipper's suits against 19 motor carriers seeking a refund of freight charges ordered by the Commission by virtue of 49 USC §§16(2), 304a, and 305(g) and 28 USC §§1336 and 1398. While there is no diversity of citizenship in at least some of the cases and the prayers for relief in none of the suits reaches the jurisdictional amount of $10,000, a suit to enforce or recover on the basis of a Commission order or statute needs no jurisdictional amount.—Land O'Lakes, Inc. v. United-Buckingham Frgt. Lines, Inc., 351 F. Supp. 103 (108-9).

The scope of judicial review does not extend to matters within primary jurisdiction of the Commission. In suit to enforce Commission order authorizing abandonment of 18-mile segment of debtor railroad's line, conditioned on sale of the properties involved within 60 days "to any responsible person for the purpose of continued operation," the court is not reviewing question of whether the Commission abused its discretion in permitting the abandonment; the only question presented for review is construction of the meaning of the condition imposed by the Commission. The sole issue involved—whether plaintiff comes within the purview and ambit of that condition—is not beyond the court's understanding unassisted by expert guidance; and resolution thereof does not depend upon expert knowledge in the transportation industry. Thus, construction of the condition present a purely legal issue for the court's determination.—Reed v. Meserve, 353 F. Supp. 141 (144-5).

Clear purpose of the Commission, in imposing the condition, was to preserve the line as an operating railroad and to prevent its dismantlement; and nowhere in the proceedings is it suggested that a sale to plaintiff of northern 8.5-mile segment of the line for planned operation of a scenic excursion railroad providing passenger service would not be "for the purpose of continued operation." Also, plain meaning of the words "continued operation" is to continue operation of a railroad over the abandoned line; if the Commission had intended that phrase to mean both a freight and passenger operation, it could have used those words to signify such intention. Therefore, since plaintiff would be a "responsible person" acquiring a segment of the abandoned rail line "for the purpose of continued operation." within meaning of the condition attached to the Commission order permitting abandonment, it is entitled to preferential consideration for a 60-day period from date of the court's decision before defendant trustees may proceed with free transfer of title to the segment of line in question.—Id., pp. 147-8.

Under its duty to prevent unlawful discrimination, power of Commission would extend to any person used by any common carrier, subject to Commission jurisdiction, to implement a pattern of unlawful discrimination prohibited by the Act, but such authority would not extend to authorizing Commission to regulate persons or transactions which are not shown to involve unlaw-

ful discrimination.—Middle Atlantic Conference v. United States, 353 F. Supp. 1109 (1125)*.

Section 1337. Commerce and anti-trust regulations.—[Unchanged. See vol. 15, p. 12347.]

Notes of Decisions

Volume 4—p. 3121; Volume 7—p. 6080; Volume 10—p. 8425; Volume 11—p. 9767; Volume 12—p. 10576; Volume 13—p. 11214; Volume 14—p. 11729; Volume 15—p. 12347; Volume 16—p. 12991; Volume 17—p. 13706; Volume 18—p. 14740; Volume 19—p. 16026; Volume 21—p. 17836.

1. Suits arising under laws regulating commerce.—[Vols. 4, 7, 10, 12, 13, 15-19, 21].—See also Nemitz v. Norfolk & W. Ry. Co. case, §1336, n. 2, supra.

Federal courts have only the jurisdiction conferred on them by Congress; subject matter jurisdiction cannot be conferred by consent. Thus, while jurisdiction is not challenged, the trial court lacked subject matter jurisdiction of railroad's suit against motor carrier for storage and detention charges incurred in joint transportation of freight (in plan I TOFC service at motor carrier's tariff rates for entire movement) as provided in an agreement between the carriers for division of joint transportation charges. Such division agreements are not tariffs and are not treated as such by the Commission, and the railroad has not tariff on file which authorizes collection of storage and detention charges claimed; therefore, plaintiff's cause of action rests solely on the divisional agreement, not upon interpretation of a statute regulating commerce or any Commission tariff or regulation. Contract agreement of the parties resulted from negotiations and determines the basis of divisions between them; §1337 confers no jurisdiction of private contract actions such as instant suit. Case remanded to lower court with direction to dismiss for want of jurisdiction.—Baker v. Riss & Co., 444 F. 2d 257 (258-60)*.

Plaintiffs' argument, that unique provisions of rail "rent-a-train" tariff in issue render it "not a tariff" and thus, *per se*, illegal, is obviously an ingenious but invalid attempt to circumvent provisions of Interstate Commerce Act which give that Commission primary jurisdiction to determine legality of any rate tariff. Even accepting the idea that, since the complaint presents a controversy arising under a law regulating commerce, there might be theoretical concurrent jurisdiction because of §1337, the court should not take jurisdiction over action seeking a court decree holding the tariff to be illegal, *per se*, and compelling the Commission to strike it from Commission files. To do so would by-pass the administrative plan established by Congress, which gives the Commission first consideration of rate-making matters, subject thereafter to judicial review; therefore, though a scholarly argument can be made that such power exists, the court is unwilling to assert the power to take jurisdiction. Complaints dismissed.—Rardin Grain Co. v. Illinois Central R. Co., 288 F. Supp. 813 (815-6)*.

A federal court must be assured of its jurisdiction over subject matter involved before it may decide a case brought before it; and though plaintiff challenges neither the removal of its suit from state to federal court, nor the supporting jurisdiction, the court has a duty on its own to examine its authority to decide the case. Since the amount in controversy is less than $10,000 and there is no diversity of citizenship, jurisdiction, if any, must be under §1337 which provides for original jurisdiction of any civil action arising under laws regulating commerce and requires no jurisdictional amount. In determining whether the action is one arising under a law regulating commerce, and thereby within the district court's original jurisdiction, it may be significant whether dominant aspect thereof is state or federal; therefore, consideration should be given to the question of whether social area which the litigation most closely touches is one in which federal interest and concomitant need of uniformity predominates, and artificial division of jurisdiction should be avoided where practicable.—Eickhof Construction Co. v. Great Northern R. Co., 291 F. Supp. 44 (45-7).

For a federal district court to have original jurisdiction of a civil action arising under laws regulating commerce, mere existence of a question of federal law somewhere within the controversy is not enough; the basis for jurisdiction must appear from well pleaded facts complained of, standing alone and unaided by expected defenses, the answer to the complaint, or a petition for removal. Accordingly, the court has no jurisdiction under this statute of action (originally brought in a state court) for loss arising out of defendant carrier's misquotation of freight rates when (1) federal jurisdiction is not alleged in the complaint, (2) such jurisdiction is not established, and (3) though federal law established the applicable rate and compelled plaintiff to pay full rate, notwithstanding its good faith reliance on defendant's lower quotation, plaintiff's payment of the full lawful rate fulfilled immediate demands of the federal law. Case remanded to state court from which it had been removed.—Id., pp. 47-9.

General rule is that a plaintiff must include all amounts due and owing on the date it files suit; but that rule relates to amounts due and owing on a single obligation such as a lease or contract. Further, it is clearly the law that each shipment order and waybill constitutes a distinct and separate order to ship; thus, prima facie, railroad has a separate and distinct cause of action on each order and waybill for movement of defendant's 67 shipments of furniture. Therefore, railroad's suit to collect additional freight charges on those shipments, in amount of the difference between charges at published tariff rate (properly charged and billed) and charges at lower rate paid by defendant (claiming tariff rate was unlawful), is not barred by res judicata in that, since shipments moved before third amendment of railroad's complaint in a prior suit to recover other freight charges, they should have been included therein. Railroad is entitled to sue on instant shipments without splitting its cause of action; shipper's defenses of res judicata and unlawfulness of rate charged are without merit; plaintiff is entitled to recover amount claimed, with interest and costs.—Chicago, R.I. & P.R. Co. v. Furniture Forwarders of St. Louis, Inc., 294 F. Supp. 417 (418-9)*.

However, under doctrine of primary jurisdiction which is deeply embedded in law, and which seeks an accommodation of the role of the courts and administrative agencies, the issue of reasonableness of the rail rate involved is a subject for initial determination by the Commission. Therefore, the Commission having reopened it complaint proceeding involving reasonableness of the rate charged on considered shipments (several months after its original order of dismissal and, also, after entry of the lower court's opinion and judgment), the court should stay its hand until there is a final Commission determination on that issue. Although the district judge's opinion was undoubtedly correct based on the record before him at the time, and the delay is unfortunate, under the plain teachings of the Supreme Court in numerous decisions the case must be remanded to the district court with instructions to retain jurisdiction and withhold final decision on issue of reasonableness pending final Commission determination of the litigation before it. Affirmed in part and remanded in part.—Id., 420 F. 2d 385 (386-9, 390)*.

District court is without jurisdiction over subject matter of suit by company that owns and controls a motor carrier alleging that it would be unlawful for defendant (owning and controlling a railroad) to acquire control of plaintiff and, through it, of its motor carrier without first obtaining Commission approval and, also, seeking an injunction (preliminary and permanent) prohibiting acquisition of control until Commission authority is secured. Key word in 49 USC §5(2) and(4), on which the case is based, is "control" and, unless defendant controls the railroad and obtains control of the motor carrier by purchasing a majority of complainant's voting stock, Commission approval is not required. Furthermore, the statutory scheme makes it abundantly clear that, because of expertise of the regulatory agency, Congress intended to create exclusive primary jurisdiction in the Commission in such "control" matters. Accordingly, since merits of the case are not pending before the Commission, and the court lacks subject matter jurisdiction, plaintiff's action is dismissed.—B. F. Goodrich Co. v. Northwest Industries, Inc., 303 F. Supp. 53 (55-7,60)*.

District court does not have jurisdiction over railroad's suit against consignee for demurrage charges of $2,160 on freight cars, since amount in controversy is not sufficient to create jurisdiction based on diversity of citizenship and the only link that considered intrastate shipments had with interstate commerce was that they were moved by a carrier engaged in interstate, as well as intrastate, commerce. The mere fact that plaintiff was engaged in both interstate and intrastate commerce does not, of itself, give the court jurisdiction over subject matter of the suit under §1337. Accordingly, since all parties agree that shipments involved were entirely intrastate in nature, and since concededly diversity jurisdiction is not present, the court lacks necessary jurisdiction to hear plaintiff's case; suit dismissed.—Louisiana & A. Ry. Co. v. Shells, Inc., 348 F. Supp. 751 (752).

Section 1339. Postal matters.—[Unchanged. See vol. 15, p. 12348.]

Notes of Decision

Volume 17—p. 13707; Volume 21—p. 17839.

Section 1398. Interstate Commerce Commission's orders.—(a) Except as otherwise provided by law, a civil action brought under section 1336(a) of this title shall be brought only in a judicial district in which any of the parties bringing the action resides or has its principal office. (Paragraph (a) was amended by P. L. 93-584, 88 Stat. 1917, Jan. 2, 1975) [See vol. 14, p. 11730; vol. 21, p. 17839.]

Notes of Decisions

Volume 4—p. 3126; Volume 7—p. 6081; Volume 10—p. 8427; Volume 12—p. 10577; Volume 14—p. 11731; Volume 15—p. 12348; Volume 16—p. 12993; Volume 18—p. 14740; Volume 21—p. 17839.

2.Suits to enforce, suspend, or set aside orders of Commission.—[Vols. 4, 12, 18, 21]. —See also Keller Industries, Inc. v. United States case, and Leonard Bros. Trucking Co. v. United States case, §1336, n. 2, supra.

Amendment to the statute, providing that when a district court of the court of claims refers a matter to Commission for determination, the referring court shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, or annul Commission order arising from the referral, has resulted in more streamlined procedure for judicial review of questions involving the Commission's primary jurisdiction and referred to it for preliminary determination. Since no changes were made in substantive law except to fix venue and jurisdiction in the referring court, prerequisites of judicial review remain the same; a matter, once referred to the Commission, must be prosecuted there until a final order is issued; only after administrative remedies have been exhausted may the case proceed in the court. However, use of words "civil action" in the amendment does not create a requirment that party challenging the order institute an entirely new action against the Commission in the referring court, and pursue it to conclusion, before the original case may proceed.—McLean Trucking Co. v. United States. 387 F. 2d 657 (659-60)*.

In action by Illinois corporation having its principal place of business at Chicago and licensed to do business in Missouri, where suit to enforce a Commission order for refund of motor carrier rates was brought, defendants' objection to venue appears well-taken. Under provisions of §1398, such action must be brought in the judicial district where plaintiff resides; and it was held in 209 F. Supp. 597 that a corporation "resides" only the judicial district of state of its incorporation, and that venue is not proper in a district where neither the plaintiff is incorporated nor its principal place of business located. The general venue statute, providing for venue against a corporate defendant in any district in which it is incorporated, licensed, or doing business, does not apply to plaintiffs. Moreover, in light of 321 F. Supp. 353 (aff'd 404 US 802), holding that the Commission had power to make the refund order relied on, plaintiff's action can only be judged as one to enforce a Commission order within meaning of §1398, even if brought as a suit for "reparations" under the reparations statutes.—Montgomery Ward & Co. v. Anderson Motor Service, Inc., 339 F. Supp. 713 (716-8).

Furthermore, in its brief, plaintiff states that it has no particular objection to transfer of the litigation to the Illinois court, and that if defendants press their venue contention, and the court agrees, the case should be transferred. Therefore, even assuming that venue is proper in Missouri district where complaint was filed, the cause should be transferred to the Northern District of Illinois under provisions of §1404(a) for a change of venue for the convenience of parties and witnesses in the interest of justice, and, alternatively, under the statute permitting transfer to a district of proper venue in instances in which venue is improper where the case is filed, in the discretion of the court. Cause transferred.—Id., p. 718.

4. District of residence of party upon whose petition order was made.—[Vols. 4, 14-16, 21].—See Montgomery Ward & Co. v. Anderson Motor Service, Inc. case, n. 2, above.

Section 1404. Change of venue.—[Unchanged. See vol. 16, p. 12993.]

Notes of Decisions

Volume 16—p. 12993; Volume 17—p. 13707; Volume 18—p. 14740; Volume 19—p. 16028; Volume 21—p. 17840.

1. Transfer of actions.—[Vols. 16-19, 21]. —Action to enforce a Commission order for refund of motor carrier rates, brought in Missouri court by an Illinois corporation having its principal place of business at Chicago, should be transferred to the Illinois court since plaintiff states that it does not object to transfer of the litigation, and defendants move to dismiss for lack of jurisdiction and for improper venue. Plaintiff's statement that either the Missouri or the Illinois district is "equally convenient" for it, and defendants' preference for another forum professed in their venue objection, establish a sufficient "balance of convenience" to enable the court to transfer the cause, under §1404(a), for the convenience of the parties and witnesses in the interest of justice, even though venue may be proper where the case is filed, as well as under the statute permitting transfer to a district of proper venue in cases in which venue is improper where action is brought, in the court's discretion. Cause transferred. —Montgomery Ward & Co. v. Anderson Motor Service, Inc., 339 F. Supp. 713 (716,718).

REMOVAL OF CASES FROM STATE COURTS

Chapter 89.—Title 28

Section 1445. Nonremovable actions.—[Unchanged. See vol. 14741.]

Notes of Decisions

Volume 12—p. 10582; Volume 13—p. 11220; Volume 14—p. 11731; Volume 15—p. 12349; Volume 16—p. 12994; Volume 17—p. 13708; Volume 19—p. 16030; Volume 21—p. 17842.

1. In general.—[Vols. 14-17, 19, 21].—See also Eickhof Construction Co. v. Great Northern Ry. Co. case, 28 USC §1337, n. 1.

In order to be removable from State court to district court, a case must be one of which the federal courts have original jurisdiction; and, if several claims are joined in such action, at least one claim subject to the district court's original jurisdiction must be found in the complaint, and not in defendant's answer or petition for removal, in order to justify removal. Therefore, where common-law suit for breach of contract between two carriers was brought in State court and removed to the district court, and defendant's petition for removal showed that apparently it would raise as a defense invalidity of the contract under Commission regulations, but there was no existing Commission order concerning that contract, the federal court does not have jurisdiction in the matter. Plaintiff's motion to remand granted and action remanded to the State court.—Robertson Motor Freight, Inc. v. Brady Motorfrate, Inc. (Pa.), 287 F. Supp. 449 (451-2).

Although plaintiff shipper's State court suit to recover for damages to shipment while in transit was removed to Federal court by defendant motor carrier as a diversity action allegedly involving more than $10,000, and damages of only $7,500 are now sought, plaintiff's specification of the lower amount occurred after removal; therefore, to remand the case at this point would controvert the ruling in 303 US 283. Alternatively, the complaint states a cause of action which, though not designated as such, falls under the Carmack Amendment, 49 USC §20(11), which is specifically applicable to interstate motor carriers under 49 USC §319; and such an action may be removed to a district court if the matter in controversy exceeds $3,000.—Sun Insurance Office, Ltd. v. Greyhound Van Lines, Inc., 289 F Supp. 483 (484, Note).

The general rule is that removability of an action against interstate carrier in a state court is determined by plaintiff's pleadings. However, fact that complaint seeking to recover, in action which originated in the state court and which defendant railroad removed to federal court, in no way purported to rely on any federal law is not determinative of jurisdiction of federal court (on motion to remand to the state court) when facts stated in the complaint clearly show that gravamen of the action is governed by federal law. Considered action must be governed by terms of the Carmack Amendment (49 USC §20(11)) since it is one for breach of a bill of lading contract, and the matter in controversy exceeds $3,000; thus, on petition to reconsider, prior order denying motion to remand is reaffirmed.—American Synthetic Rubber Corp. v. Louisville & N. R. Co., 291 F. Supp. 723 (725-6)*.

EVIDENCE: DOCUMENTARY

Federal Business Records Act

Chapter 115.—Title 28

Section 1732. Record made in regular course of business; photographic copies.—[Unchanged.]

Notes of Decisions

Volume 16—p. 12995; Volume 17—p. 13708; Volume 18—p. 14742; Volume 19—p. 16031; Volume 21—p. 17843.

REVIEW.—MISCELLANEOUS PROVISIONS

Chapter 133.—Title 28

Section 2101. Supreme Court; time for appeal or certiorari; docketing; stay.—[Unchanged. See vol. 15, p. 12349.]

Notes of Decisions

Volume 21—p. 17844.

Sections 2106, 2109. Determination; quorum of Supreme Court justices.—[Unchanged. See vol. 14, p. 11732, vol. 16, p. 12995.]

Notes of Decisions

§2106: Volume 16—p. 12995; Volume 17—p. 13709; Volume 19—p. 16032; Volume 21—p. 17845.

DECLARATORY JUDGMENTS

Chapter 151.—Title 28

Section 2201. Creation of remedy.—[Unchanged. See vol. 18, p. 14742.]

Notes of Decisions

Volume 15—p. 12351; Volume 16—p. 12996; Volume 17—p. 13709; Volume 18—p. 14743; Volume 19—p. 16032; Volume 21—p. 17845.

2. Construction and interpretation.—[Vols. 15-19, 21].—Reference to an "interested party" in §2201, which creates the remedy of declaratory judgment, is to one seeking a declaration of rights, and not to those who may be joined as defendants to such action. Thus, language of the statute provides no basis for joinder of the Commission as an "interested party" defendant to declaratory judgment suit by railroad employees who seek declaration and establishment of their rights and protections by virtue of, and in accordance with, employee-protection provisions of the Commission's order relating to the Penn-Central merger. Also, while it is generally held that persons who have an interest in the "actual controversy" in a suit for declaratory judgment may be joined as parties defendant, the complaint does not reflect such a controversy involving the Commission. Plaintiffs complain of their employer's failure to complay with the Commission order; that is the "actual controversy" giving rise to their action; and the Commission disclaims any justiciable interest therein. Therefore, the Commission's motion to dismiss the complaint as to it is granted.—Reardon v. *Pennsylvania-New York Cent. Transp. Co., 323 F. Supp. 598 (599, 600).

Section 2202. Further relief.—[Unchanged. See vol. 15, p. 12351.]

INJUNCTIONS: THREE-JUDGE COURTS

Chapter 155.—Title 28

Section 2284. Three-judge court; when required; composition; procedure.—[Amended to read as follows by the act of Aug. 12, 1976, Pub. L. 94-381, 90 Stat. 1119. See vol. 14, p. 11733; vol. 19, p. 16034.]

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State. The hearing shall be given precedence and held at the earliest practicable day.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

Historical Note

P.L. 93-584 eliminates the right to District Court review of Commission orders (except as to orders arising out of referrals or orders relating to the payment of money or the collection of fines, penalties, or forfeitures) and places review of Commission orders under jurisdiction of the Court of Appeals pursuant to 28 USC §2341, et seq.—Annual Report, 1975, p. 71.

Notes of Decisions

Volume 15—p. 12351; Volume 16—p. 12997; Volume 17—p. 13711; Volume 21—p. 17848.

1. In general.—Issuance of temporary restraining order is justified if plaintiff raises questions going to merits which are so serious, substantial, difficult, and doubtful as to make them fair ground for litigation and thus for more deliberate investigation. Carrier herein is entitled to stay of Commission order to prevent irreparable damage supported by elements of damage and loss suggested by carrier's president but where Commission arrived at a diametrically opposed conclusion on basis of same evidence. —G.B.C., Inc. v. United States, 302 F. Supp. 1283 (1283).

INTERSTATE COMMERCE COMMISSION ORDER: ENFORCEMENT AND REVIEW

Chapter 157.—Title 28

Section 2321. Judicial Review of Commission's Orders and Decisions; Procedure Generally; Process.—[Amended by Pub. L. 93-584, 88 Stat. 1917, Jan. 2, 1975. See vol. 14, p. 11734, vol. 15, p. 12352, vol. 19, p. 16034.]

(a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

(b) The procedure in the district courts in actions to enforce, in whole or in part, any order of the Interstate Commerce Commission other than for payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.

(c) The orders, writs, and process of the district courts may, in the cases specified in subsection (b) and in the cases and proceedings under section 20 of the Act of February 4, 1887, as amended (24 Stat. 386; 49 U.S.C. 20), section 23 of the Act of May 16, 1942, as amended (56 Stat. 301; 49 U.S.C. 23), and section 3 of the Act of February 19, 1903, as amended (32 Stat. 848; 49 U.S.C. 43), run, be served and be returnable anywhere in the United States.

Historical note, see vol 21, p. 17849.

Section 2322. United States as party.—[Unchanged. See vol. 14, p. 11734; vol. 15, p. 12352.]

See historical note to §2321, vol. 21, p. 17849.

Notes of Decisions

Volume 17—p. 13711; Volume 21—p. 17850.

1. In general.—[Vols. 17, 21].—Although a statutory defendant in three-judge district court suit to set aside and enjoin Commission order disapproving proposed reduced rail rates, the United States supported the railroads; position in the suit and participated in support of the railroads in proceedings before the Supreme Court on appeal taken by the Commission and competing carriers from the district court's decision.—American Commercial Lines, Inc. v. Louisville & N. R. Co., 392 U.S. 571 (575, note)*.

Section 2323. Duties of Attorney General; Intervenors.—The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under section 20 of the Act of February 4, 1887, as amended (24 Stat. 386; 49 U.S.C. 20), section 23 of the Act of May 16, 1942, as amended (56 Stat. 301; 49 U.S.C. 23), and section 3 of the Act of February 19, 1903, as amended (32 Stat. 848; 49 U.S.C. 43).

(Amended by P. L. 93-584, 88 Stat. 1917, Jan. 2, 1975). [See vol. 14, p. 11735; vol. 15, p. 12352]

See historical note to §2321, vol. 21, p. 17849.

Notes of Decisions

Volume 4—p. 3133; Volume 7—p. 6083; Volume 12—p. 10577; Volume 14—p. 11735; Volume 15—p. 12352; Volume 17—p. 13711; Volume 19—p. 16034; Volume 21—p. 17851.

Section 2324. Stay of Commission's Order.—[Repealed by P. L. 93-584, 88 Stat. 1918, Jan. 2, 1975. See vol. 14, p. 11735.]

Notes of Decisions

Volume 16—p. 12998; Volume 19—p. 16034; Volume 21—p. 17851.

10. Stay of operation of Commission's order.—[Vols. 16, 19, 21].—Although the district court had power to suspend the operation of the Commission's order pending the final determination of shipper's suit [28 USC §2324], entering an injunction forbidding the railroads to implement proposed change in rates is not an injunction suspending the order, and was in error. The power conferred on the district court by §2324 does not in itself include a power to enjoin the railroads from implementing a new charge. Rather, that power must be considered as at best ancillary to the general equitable powers of the reviewing court, and protective of its jurisdiction. Such a power must be inferred from Congress's decision to permit judicial review of agency action, and judicial review would be an idle ceremony if the situation were irreparably changed before correction could be made.—Atchison, T. & S.F. Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800 (818-819)*.

The reviewing court may grant a stay of a Commission order, pending its determination of action to enjoin or set aside the order, when petitioner clearly shows that (1) it is likely to prevail on the merits of its appeal, (2) without such relief, petitioner will be irreparably injured, (3) issuance of a stay would not substantially harm other interested parties, and (4) shows where the public interest lies. Such test is obviously different from that involved in determining whether a district court should issue an injuction (in carrier's action to enjoin competing carrier's unlawful operation) pursuant to 49 USC §322(b) (2) which requires only a clear and patent violation of the Interstate Commerce Act and injury thereby to petitioner.—Baggett Transp. Co. v. Hughes Transp., Inc., 393 F. 2d 710 (716-7)*.

Comity and the orderly administration of justice did not require that Missouri district court refuse to entertain, and exercise its jurisdiction in, appellee carrier's private action to enjoin appellant's unlawful operations, although the Alabama court had stayed effectiveness of Commission's cease-and-desist order against appellant which it had under review; the orders are different and are based on separate statutory provisions; and the grant of a stay under one statute does not necessarily prohibit the exercise of jurisdiction under the other. Furthermore, if the waters of comity between courts have been muddied, appellant did the muddying by requesting the stay order when it was aware that the Missouri court, in an earlier private enforcement action brought by appellee's parent carrier, had declined to enjoin appellant's illegal operations in the apparent belief that the Commission order would not be restrained and would soon become effective.—Id., p. 717.

In reaching decision on plaintiffs' (protestants) motion for temporary restraining order, suspending, in whole or in part, Commission order granting motor carrier certificate to intervenor, case law holds that the Commission is presumed to have properly performed its duties and that presumption supports its actions in absence of clear evidence to the contrary; however, its order must be supported by substantial evidence and must be within its statutory powers. The court must review the record and conclusions reached with full realization it is not deciding the case on the merits but is determining whether plaintiffs are entitled to a *pendente lite* temporary restraining order. Plaintiffs failed to show they would suffer irreparable damage if relief sought is not granted; and record shows intervenor would be irreparably damaged if such relief were granted. Motion for stay, denied.—Braswell Motor Freight, Inc. v. United States, 297 F. Supp. 215 (218-19, 221)*.

Section 2325. Injunction; Three-Judge Court Required.—[Repealed by P. L. 93-584, 88 Stat. 1918, Jan. 2, 1975. See vol. 14, p. 11735.]

Notes of Decisions

Volume 4—p. 3139; Volume 7—p. 6085; Volume 10—p. 8429; Volume 11—p. 9767; Volume 12—p. 10578; Volume 13—p. 11215; Volume 15—p. 12353; Volume 16—p. 12998; Volume 17—p. 13712; Volume 18—p. 14745; Volume 19—p. 16035; Volume 21—p. 17852.

Jurisdiction of Courts to Restrain Enforcement of Commission's Orders

7. Jurisdiction of district court.—[Vols. 4, 7, 10, 12, 14, 16, 18, 19, 21].—See also Baggett Transp. Co. v. Hughes Transp., Inc. case, §222(b), n. 2; Bondholders Protective Committee v. I.C.C. case, 28 USC §1336, n. 2; Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) v. United States case, §15 (7), n. 1, supra.

District court erred in holding that pendency of suit for judicial review of Commission order granting temporary authority to appellant, which had been temporarily stayed by a single judge, deprived the Commission of jurisdiction to grant petitions for rehearing and to reopen the administrative record and receive additional evidence, before the case was argued to the three-judge court and the record was filed with it. Unlike statutes concerning some regulatory systems, the Interstate Commerce Act contains no provisions that the agency may modify any findings up until the record is filed with a court, and any subsequent changes in the record will be made only at the court's direction. By that Act the Commission never lost jurisdiction to pass on rehearing petitions and, since the stay order did not forbid its acting on the pending petitions, it was not necessary that the agency seek the court's permission to rule thereon. The Commission reopened its record merely to remedy a deficiency in it before any judicial review of the merits had begun and fully honored the stay order; thus, it acted in full harmony with the court's jurisdiction. Reversed.—American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (540-2)*.

Defendants' motion to dismiss suit for judicial review of Commission order under §210a of the Act, on grounds that the grant of temporary authority to 25 household-goods carriers was merely preliminary to disposition of their permanent authority applications and, thus, is not reviewable, denied. The court has jurisdiction to review the temporary orders with scope of its review limited to the issue of whether the Commission's determination of "urgent and immediate need" was arbitrary or capricious or whether it acted without authority or committed an error of law. In its limited review of temporary orders in issue, the court is confined to the record made before the Commission; and its function is simply to determine whether evidence of record supports the agency finding of "urgent and immediate need." Review of the administrative record shows a finding of immediate and urgent need for service in each case and that, in granting authority on basis of applications supported by shippers' statements, the Commission did not act arbitrarily or capriciously; judgment for the Commission.—Hussey v. United States, 271 F. Supp. 650 (652, 653-4)*.

Plaintiff's motion for order modifying and amending decision of this court in 293 F. Supp. 879, which upheld the Commission's restrictive interpretation of its certificate, and continuing and extending previously entered temporary restraining order until final Commission determination of its pending application, denied. The Commission has full power over regulation of interstate motor carriers; and a forum for review of its exercise of such power is provided by 28 USC §2284. The court upheld the Commission's findings as to the transportation authorized by plaintiff's certificate, and dissolved the temporary restraining order; thus, for it now to continue its initial restraining order would in effect reverse its recent decision and invade the authority of the Commission. Also, absent an appeal from the court order, if there is such immediate and urgent need for transportation service as plaintiff claims, an avenue of relief is provided in 49 USC §310a. Moreover, even if this proceeding were an appeal, the court is guided by discussion in 272 US 658 and, in light thereof, plaintiff has not shown additional facts as would justify a stay by the court at this time.—Heavy Duty Haulers, Inc. v. United States, 293 F. Supp. 887 (889-92)*.

The district court has jurisdiction over the parties and subject matter in action to enjoin, set aside, or remand Commission order permitting discontinuance of passenger trains; therefore, defendant railroad's motion for dismissal on the ground that a Commission order discontinuing a §13a investigation, after completion of its full investigation, is not a reviewable order within meaning of 28 USC §1336, is denied. That argument has been advanced to other three-judge courts in similar proceedings and was rejected in two cases, 269 F. Supp. 80 and 273 F. Supp. 899, aff'd. (per curiam) 392 US 642; and the court agrees with reasoning in those cases, rather than with contrary conclusions reached in two other decisions. Moreover, as indicated by the hearings, general opinion of the members of the Senate subcommittee considering the legislation was that §13a was not intended to prohibit court review of a Commission order terminating a train discontinuance investigation. —State of New York v. United States, 299 F. Supp. 989 (993-4)*.

While not seriously questioned, the court has jurisdiction to review Commission order granting temporary authority to defendant carrier. Language of §2325 does not define scope of judicial review, nor do other pertinent laws clearly define the rights, extent and scope thereof, but statutes *in pari materia* must be construed together. Statute under which temporary authority is granted entrusts such action to the Commission's discretion and, while judicial review provisions of Administrative Procedure Act do not apply to actions committed to agency discretion, that act defines scope of review including review of agency action that is arbitrary, capricious, an abuse of discretion, or otherwise unlawful. And, applying principles developed by the courts, action committed to agency discretion contemplates and implies a lawful exercise of discretion, and agency action which is arbitrary and capricious abuses discretion and constitutes unlawful exercise thereof; therefore, the court does have jurisdiction to review commission temporary authority orders on complaint fairly alleging that the agency acted arbitrarily, capriciously, and in abuse of its discretion.—Bell Lines, Inc. v. United States, 306 F. Supp. 209 (212-13)*.

Plaintiffs having already filed a notice of appeal to the Supreme Court, it is doubtful that the three-judge court may entertain their motion to reconsider its prior dismissal of their action (asking the court to declare null and void the Commission's "Notice" of its decision not to investigate defendant railroad's proposed discontinuance of passenger trains, and to enjoin such discontinuance) for failure to state a claim on which relief could be granted and lack of subject matter jurisdiction. It has been held that, where an appeal is taken from a court's order, the court thereby loses any jurisdiction it might have to vacate, alter, or amend its earlier findings. In instant case, however, it is clear that the court's earlier findings are consistent with the language used in 396 US 162, which decision plaintiffs refer to as supporting the position they previously urged; accordingly, the court's prior decision is sustained and plaintiffs' motion to reconsider is denied.—Anderson v. United States, 309 F. Supp. 494 (496-7)*.

District court lacks jurisdiction to review Commission orders which permitted class I railroads to effect a general increase in their freight rates and charges to offset increased expenses; thus, it is unnecessary to determine issues raised by plaintiffs' argument that the Commission's conclusions as to railroads' need for additional revenue were not based on adequate findings supported by substantial evidence. The rates which became effective under considered orders are permissive, not mandatory, and the Commission's ultimate findings and conclusions assure any aggrieved party (such as plaintiff shippers) the opportunity to challenge any particular rates which affect them under procedures provided in 49 USC §13; therefore, since factual and legal questions considered in 11 F. Supp. 487 are identical with those raised in instant proceeding, that decision represents the applicable law. Accordingly, the complaint is dismissed.—Alabama Power Company v. United States, 316 F. Supp. 337 (338-9)*; Atlantic City Electric Co. v. United States, 306 F. Supp. 338 (342-3)*.

Three-judge court has jurisdiction over subject matter of motor carriers' action to enjoin or set aside order of the Commission, in proceeding on investigation of increases in freight rates and charges, which plaintiffs assert is beyond the Commission's statutory authority and jurisdiction insofar as it requires carriers to make refunds to shippers to the extent that those increases were not approved. Althought somewhat different review procedure is called for in suits to enforce the payment of money, instant action is not regarded as one for the payment of money; its primary concern is the Commission's effort to uphold and protect its jurisdiction. And while the court's decision may have some effect on shippers' efforts to obtain refunds, its judicial review of the Commission's order is not to be classified as an action to enforce the payment of money or the collection of fines, penalties and forfeitures. Therefore, preliminary questions as to the court's jurisdiction are rejected.—Admiral-Merchants Motor Freight, Inc. v. United States, 321 F. Supp. 353 (357-8)*.

The court lacks jurisdiction in suit to enjoin, vacate and set aside Commission orders assigning motor carrier application for handling under its modified procedure rules, and denying plaintiff's request for oral hearing by a joint board, as those orders are not final. The Commission has made no final decision on opposed three-state application itself; nor has it decided whether or not there will be an oral hearing. Clearly, considered orders are preliminary and procedural and, not being directly reviewable, they are subject to review only on review of the final agency action; thus, doctrine of exhaustion of administrative remedies makes plaintiff's action a premature resort to the court. While 321 F. Supp. 821, stressed by plaintiff, casts doubt on validity of the Commission's use of modified procedure rules in the type of situation presented, that case does not stand for the proposition that plaintiff is entitled to review of the proceedings at this time. The court has no jurisdiction to interfere now with the Commission's procedure; request to convene a three-judge court, denied.—T. J. Claveau Transp., Inc. v. I. C. C., 329 F. Supp. 931 (932-3)*.

As stated in 263 F. Supp. 157, a district court is deemed to retain the power to curb an abuse of discretion by the Commission in granting motor carrier temporary authority. Accordingly, in competing carriers' suit to set aside and annul Commission temporary authority order because, in granting such authority to defendant carrier, the Commission acted arbitrarily and unlawfully and in abuse of its discretion, the challenged order is reviewable by the three-judge court.—Braswell Motor Freight, Inc. v. United States, 336 F. Supp. 709 (712)*.

9. Three-judge court.—[Vols. 4, 7, 10, 14-19, 21].—Under statutes providing for direct review of Commission orders by a three-judge district court, a statutory court is the sole forum for review of all issues ruled on by the Commission in denying appellant company's application for authority to construct new 30-mile railroad between Florida points. The rule (relied on in 380 F. 2d 49) concerning exclusiveness of administrative and judicial review procedures prescribed by Congress, being an application of the exhaustion of administrative remedies doctrine, is not limited only to matters of agency expertise; and all issues essential to the Commission's decision, including those relating to its jurisdiction, should be challenged only in a statutory three-judge court. When no appeal was taken from order denying its application, the company could not defend the railroad's §1(20) suit to enjoin its alleged unlawful construction on grounds that are reviewable only by a three-judge court. Consideration of such issues in a §1(20) suit amounts to collateral attack on validity of the Commission's order and, to preserve statutory mode of review, jurisdictional issues should have been foreclosed in district court injunction proceeding.—Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co., 418 F. 2d 387 (390, 396-400).

In its action to set aside Commission order approving motor carrier control applications, plaintiff joined a civil suit against controlling carrier based on deceit and anti-trust violations; however, three-judge procedure should be used sparingly in view of heavy demands it makes on judicial manpower, and the burden that direct appeal imposes on the Supreme Court. Thus, a rule has evolved that private claims should not be joined with petitions to review a Commission order unless they are ancillary to or dependent upon the court's judgment as to the order; and where the factual basis of private claims is related to the review petition, decision whether to permit joinder before the three-judge court is largely discretionary. The two branches of instant complaint are not closely related; issued presented by the review petition are so different from those in the private case that joinder is unnecessary to effective review of the Commission order; therefore, portions of complaint seeking civil relief are dismissed without prejudice to filing amended complaint, stating the private claims only, to be heard by a single district judge.—Interstate Investors, Inc. v. United States, 287 F. Supp. 374 (378, 384-5)*.

In action seeking review of Commission decisions by the three-judge court, the Commission's orders, though declaratory in nature, are reviewable because they determined rights or obligations from which legal consequences will flow. However, the complaint raises basically the same issues as those encompassed by plaintiff's two earlier civil actions in Florida district court, wherein jurisdiction of the State of Florida was questioned; that court stayed the actions and, while retaining jurisdiction, referred the issues to the Commission for initial determination; and the Commission made its decision and has forwarded a certified copy of its reports and orders to the referring court. Accordingly, pursuant to provisions of 28 USC §1336(b) and 1398(b), the referring one-judge court, rather than a statutory three judge court, has exclusive jurisdiction to review the Commission's reports and orders in question. Case remanded to the Florida district court for disposition.—Keller Industries, Inc. v. United States, 304 F. Supp. 852 (854, 855).

A lawsuit may fall within requirements of the Urgent Deficiencies Act even though there is no request that a Commission order be set aside and no specific order is mentioned on the face of the pleadings. If it can be established extrinsically that the practical effect of plaintiff's success on the merits would be to invalidate or countermand a Commission order, that act applies and its requirements must be met. Also, plaintiff cannot avoid dictates of that act merely by confining the relief sought to money damages since, although §2325 speaks in terms of "injunctions," the cases have held that the act applies to damage actions as well.—REA Express, Inc. v. Alabama G. S. R. Co., 343 F. Supp. 851 (856-7).

In REA's suit against owning railroads seeking damages for alleged breaches of antitrust laws and fiduciary relationships, violations of the Interstate Commerce Act, and also a declaratory judgment that promissory notes issued by it are void, plaintiff's challenge of transactions involving the 1959 notes attacks a valid and subsisting Commission order approving issuance of those notes; therefore, as to such claims, REA's remedy is before a three-judge court pursuant to the Urgent Deficiencies Act. However, since there was no Commission order specifically approving REA's "Non-Negotiable Debt" to the railroads, any attack on transactions involving that debt does not constitute an attack on a Commission order which must be brought before a three-judge court. Defendants' motion to dismiss, on ground that the court lacks subject-matter jurisdiction, granted in part and denied in part.—Id., pp. 853, 857-60.

11. Suits to restrain, set aside, annul, or suspend orders.—[Vols. 4, 7, 10, 12-17, 19, 21].—See also McLean Trucking Co. v. United States case, 28 USC §1336, n. 2, supra.

In motor carrier's action for review of Commission order which required plaintiff to cancel its proposed tariffs publishing rates on single-unit mobile homes because transportation thereof was not authorized in its certificates, there is no merit in plaintiff's argument that considered order contravenes prior three-judge court's decision, 262 F. Supp. 1009, which held that uncontradicted evidence before it required a finding that a single-unit mobile home is a "complete building" within the commodity descriptions in plaintiff's operating authority. The prior court further found that the order then under review (cancelling plaintiff's rates on mobile homes) was based on the Commission's interpretation and application of its own prior orders, to the exclusion of the record before it; and it was in that context that prior Commission order was set aside, "leaving to the Commission any further action which it may deem appropriate."—Pre-Fab Transit Co. v. United States, 321 F. Supp. 1147 (1149)*.

Subsequent to that decision, the Commission held further extensive hearings in the proceeding, productive of voluminous additional testimony and documentary exhibits, which culminated in a new order requiring cancellation of plaintiff's tariffs insofar as they named rates on single-unit mobile homes. That procedure being proper, a new record is not presented for review; and the court must determine whether that record, as now constituted, supports the findings and new order of the Commission. The only issue before the reviewing court is whether substantial evidence supports the Commission's findings and, in turn, whether those findings support its new order. The Commission's finding that commodity descriptions "buildings" or "prefabricated buildings" in plaintiff's certificates does not embrace single-unit mobile homes is supported by substantial evidence of record; and since the new Commission order is founded upon substantial evidence, it is sustained. Complaint dismissed.—Id., pp. 1149-50, 1152.

The scope of judicial review of Commission order, that denied motor carrier plaintiff's application for operating authority, is limited to determining whether the Commission's findings are supported by substantial evidence. The Commission was justified in finding that plaintiff failed to show a public need for additional service when only one shipper filed a verified statement in support of the application, other carriers were shown to be ready and willing to provide that shipper with suitable transportation, and plaintiff did not show with particularity any inadequacy in service of existing carriers. Also, in view of the necessity for efficient administration and the Commisssion's finding that new evidence in plaintiff's petition for reconsideration would not produce a different result, denial of the petition for reconsideration was not an abuse of the Commission's discretion. Accordingly, plaintiff's action seeking to annul the order denying it authority is dismissed.—Popelka Trucking Co. v. United States, 327 F. Supp. 1312 (1312-3)*.

In protesting carrier's suit to annul and vacate Commission order converting outstanding permit of defendant carrier (applicant) into a certificate, neither plaintiff's claim that the conversion proceeding was "artificially inspired" by the Commission's decision in applicant's prior common-carrier extension proceeding, nor defendants' reference to instant action as being a collateral attack on the order therein, is cogent as an absolute defense to plaintiff's suit or as a basis for vacating the Commission order in issue. As plaintiff is a competing common carrier, it has sufficient interest to maintain an action against the conversion proceeding order without considering order in the extension proceeding. Also, while effect of the extension order is relevant and material in the conversion proceeding, the challenged conversion order cannot be vacated merely because order in the prior extension case invited or suggested the conversion proceeding. Commission report and order under review is supported by substantial evidence and accords with the applicable law; sustained.—Perkins Furniture Transport, Inc. v. United States, 333 F. Supp. 879 (882-3, 885)*.

12. Collateral attack.—[Vols. 4, 7, 10, 11, 13, 16-19, 21].—See Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co. case, n. 9, supra; Toye Bros. Yellow Cab Co. v. Irby case, 28 USC §1332, n. 3.

13. Orders of the Commission.—[Vols. 4, 7, 10, 12-14, 16-19, 21].—See also Aberdeen & R. R. Co. v. United States case, §15(6), n. 34; Travel & Tour Service, Inc. v. United States, §212(a), n. 35.

The Commission's conclusion not to suspend proposed increased rates, filed by motor carrier rate bureaus after previous proposed schedules containing indentical rate increases (which were suspended) had been cancelled by them, was discretionary with the Commission under the Interstate Commerce Act; and its refusal to suspend such rates is not reviewable. Moreover, decision of the Commission not to suspend the rates was necessarily only a preliminary determination; and since plaintiffs might have challenged lawfulness of those rates by filing a complaint with the Commission, they have not exhausted statutory remedies available to them. Accordingly, inasmuch as plaintiffs obtained no final agency action subject to judicial review before they sought to invoke the court's jurisdiction, the complaints are dismissed.—National Industrial Traffic League v. United States, 287 F. Supp. 129 (131, 132)*.

In action to set aside Commission report and order which authorized construction of a new line of railroad in Permian Basin area of west Texas, the Commission's findings as to (1) estimated income for the new railroad, (2) need for rail service over proposed route and further development in the area which the service would stimulate, and (3) effect of granting the application on protesting rail carriers, are each supported by substantial evidence. Also, the Commission's findings regarding profitability are sufficient when, while it did not precisely estimate revenues and cost for each commodity, it made an estimate of total revenues and costs and, further, it named the commodities on which it focused in revising the examier's estimate. Moreover, profitability is only one factor, albeit a major one, to be considered; the ultimate question is public convenience and necessity. Presence of need in the area for proposed railroad balance against only a minimal threat of hardship to other carriers provides an adequate basis for the Commission's order; sustained.—Atchison, T. & S.F. Ry. Co. v. United States, 287 F. Supp. 354 (356)*.

14. Parties entitled to restrain enforcement of Commission's orders.—[Vols. 4, 7, 10, 12-19, 21].—None of the plaintiffs have standing to challenge the Commission's report and order in freight forwarder application proceeding inasmuch as they have not suffered a legal wrong because of it, nor have they been adversely affected or aggrieved by grant of authority therein. Motor carriers of household goods are not affected by decision that applicant must have forwarder authority to handle unaccompanied baggage which, when shipped separately from householder's other goods, is not within "used household goods" the forwarding of which is exempt by statute; as that decision does not pertain to motor household-goods carriers, it would have no effect on their authority to transport unaccompanied baggage. Nor does such decision affect regulated forwarder plaintiffs because their permits authorize them to forward commodities generally, including baggage moving independently. Also, forwarders' claim that competitive injury would result to the household goods carriers does not give rise to a standing to sue, since an increase in competition is not a reason for denying the Commission's authority to issue a certificate.—American Movers Conference v. United States, 307 F. Supp. 74 (78-9)*.

Plaintiff carrier (protestant before the Commission) can maintain a suit to annul and vacate Commission order granting application of defendant carrier (applicant) for conversion of its contract—carrier permit into a common—carrier certificate, which emanated from the Commission's conclusion in prior common-carrier extension proceeding to withhold issuance of a certificate to applicant pending its eliminating the possibility of unlawful dual operations, although Commission action in the extension proceeding is not challenged. A large portion of plaintiff's authority conflicts with that accorded applicant in the extension proceeding, and final outcome of the conversion application carries with it the final outcome of the extension application; therefore, plaintiff has sufficient interest to maintain instant action against the conversion proceeding order without considering the extension-case order, since grant of a certificate to defendant carrier and its operation thereunder could presently and in the future affect plaintiff's operation under its authority.—Perkins Furniture Transport, Inc. v. United States, 333 F. Supp. 879 (881-2)*.

Association concerned with enhancing quality of the environment for its members has standing to bring suit for injunctive relief against Commission orders which permitted railroads to attach an interim 2.5 percent sucharge to normal tariff rates on all freight, with certain exceptions, because of the Commission's failure to issue an environmental impact statement, pursuant to the National Environmental Policy Act, on the effect of the surcharge on shipment and use of recyclable materials. Plaintiff organization clearly has standing to raise the rights of its members [citing 371 US 415], and it alleges the kind of "injury in fact" to those members which would give them standing to sue. Moreover, unlike pleadings in 405 US 727, plaintiff's amended complaint alleges that its members actually use the environmental resources adversely affected by the Commission action. And mere fact that plaintiff's allegations make no distinction between its members and a great many others who use the natural resources does not disqualify it as a party.—Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) v. United States, 346 F. Supp. 189 (195-6)*.

15. Parties defendant.—[Vols. 4, 7].—See McLean Trucking Co. v. United States case 28 USC §1336, n. 2.

Equitable Relief

21. Other remedies available upon application to Commission.—[Vols. 4, 7, 10, 12, 14-17, 19, 21].—See Heavy Duty Haulers, Inc. v. United States case, n. 7, supra.

26. Temporary restraining orders.—[Vols. 4, 7, 17, 18, 21].—Granting of a temporary injunction is addressed to the discretion of the trial court, not the appellate court; and merits of the case will not be considered by the reviewing court excepting only as may be necessary to determine whether the trial court improvidently exercised its judicial discretion. In light of obvious purposes and objectives of 1965 law amending 49 USC §322(b), the Missouri court had jurisdiction to entertain appellee carrier's action under that statute (contrary to appellant's contention) and issue complained-of injunction against appellant restraining it from operating in clear and patent violation of 49 USC §§303(c) and 306, even though review (and injunction against enforcement) of a Commission cease-and-desist order against appellant was then pending in an Alabama court. The two orders are different and are based on separate statutory provisions; the granting of injunction by one court does not necessarily prohibit the exercise of its jurisdiction by the other. Order of trial court affirmed.—Baggett Transp. Co. v. Hughes Transp., Inc., 393 F. 2d 710 (714, 717-8)*.

Before granting a temporary restraining order, the court is required by statute to find that without such order there will be "irreparable damage" to movant; and several cases have added to that irreparable-harm requirement a mandate that movant show it has a "reasonable possibility" of prevailing on the merits. However, no matter how reasonable the possibility of prevailing on the merits, a temporary restraining order should not issue without a showing of irreparable harm. Therefore, even assuming they have met the light burden of proving reasonable possibility of prevailing on the merits, plaintiffs' motion for a temporary restraining order is denied because they failed to show how and in what manner they will suffer "specified irreparable damage," as required by statute, if forced to comply with Commission order that through-bus service, pursuant to their agreement to use route of defendant bus line, be reinstituted. However, any action plaintiffs take in complying with the Commission order, pending a three-judge court review thereof, shall not be deemed prejudicial to their right of judicial review.—Greyhound Lines, Inc. v. United States, 301 F. Supp. 356 (358-60)*.

Pending the court's decision on merits of motor carriers' suit to enjoin the Commission from issuing certificates implementing its orders granting extension authority to intervening carriers, a district judge may issue a temporary restraining order suspending effectiveness and operation of the Commission orders upon a specific finding, based on evidence submitted to him, that irreparable damage will result if the order is not granted. Nevertheless, in ruling on question of whether or not plaintiffs are entitled to temporary restraining order sought, the Commission's orders are entitled to initial respect and the agency is presumed to have properly performed its duties; that presumption supports its action in absence of clear evidence to the contrary. However, the order must be supported by substantial evidence and must be made within statutory limits of the Commission's powers. Also, as stated in 433 F. 2d 212, the standards for grant of a temporary stay of a Commission order are the criteria set out in 259 F. 2d 921 for the entry of such an order.—Arkansas-Best Freight System, Inc. v. United States, 350 F. Supp. 539 (541-2).

Purpose of a temporary restraining order is to maintain the status quo, the last status preceding pending controversy, until the issues can be decided after a full hearing. While the Commission is not bound by the hearing officers' findings and is free to reach conclusions that are contrary to those of its examiners, it must evaluate the evidence in accordance with mandate of the National Transportation Policy and within its statutory powers; it must disregard any testimony that would produce unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices. Even though intervenors had expended large sums of money in preparing to meet their new obligations, implementation of challenged orders by issuance of the certificates would, in effect, permit those carriers to institute direct, single-line service between their currently authorized points in various states where plaintiffs and other protestants hold substantially duplicating authority.—Id., pp. 542-5.

After consideration of all the evidence, record is convincing that all the established criteria necessary for issuance of requested temporary restraining order have been met. Plaintiffs established that they are likely to prevail on the merits and that, without a stay, they will suffer irreparable injury because, if certificates in question are issued, intervenors' new single-line service will result in substantial diversion of traffic and revenues which they now enjoy; also, there is no proof that grant of a stay will cause substantial harm to any other interested persons; and the public interest will not be harmed. Therefore, the Commission is temporarily restrained from implementing the challenged orders pending final hearing and decision in the case on the merits.—Id., pp. 545-7.

27. Preliminary or pendente lite injunction. —[Vols. 4, 7, 14, 19, 21].—A temporary restraining order against enforcement of a government agency's order is a drastic remedy and will not be granted except on a strong showing of necessity and desirability. Plaintiffs (protestants), who seek temporary restraining order pending final determination of their action to set aside the Commission's order granting motor carrier certificate to intervenor (applicant), have the burden of proving that specific, probable and irreparable damage will result if a stay is not granted. In determining whether to grant such relief, the court also takes into account all of the circumstances, including possible injury to opposing persons if a stay is granted. Careful review and consideration of all the testimony offered by all parties, and careful reading of the Commission's findings and order, establishes that plaintiffs failed to meet their burden of proof; on the other hand, record shows that irreparable damage would be caused to intervenor if temporary restraining order were issued. Plaintiffs' motion for restraining order, *pendente lite*, denied.—Braswell Motor Freight, Inc. v. United States, 297 F. Supp. 215 (217, 219-21)*.

A preliminary injunction will issue only upon plaintiff's showing it has a reasonable chance of prevailing on final hearing, and that it will suffer irreparable injury unless temporary relief is granted: and unless the act sought to be enjoined is about to occur, issuance of such injunction to prevent its occurrance would be futile. Plaintiff seeking to enjoin defendant from acquiring "control" of its motor carrier, alleging that defendant's buying plaintiff's voting stock without prior Commission approval would violate 49 USC §5(2) and (4), has made the same claim before the Commission; and, in denying plaintiff's request that it investigate legality thereof, the Commission implicitely found no reason to enjoin the transaction. Congress has left it to the Commission to determine whether "control" exists in a given case; thus, in view of the primary jurisdiction principle, it is doubtful that on final hearing the court would enjoin defendant from obtaining "control" of the motor carrier when the Commission found no need for such relief. Plaintiff failed to show it has a reasonable chance of prevailing on final hearing, and record shows no immediate danger that purchase of the stock will give defendant control over the motor carrier; preliminary injunction denied.—B. F. Goodrich Co. v. Northwest Industries, Inc., 303 F. Supp. 53 (57-61)*.

On plaintiff's motion for preliminary injunction against implementation of Commission orders allowing railroads to add a 2.5 percent surcharge to their normal tariff rates, the traditional balancing of the equities weighs in favor preliminary relief insofar as the surcharge affects shipment of recyclable materials. There is strong likelihood that plaintiff will prevail on the merits of its allegation that increased shipping costs will discourage environmentally desirable use of recyclable goods and, hence, considered orders are "major Federal actions" which, under the National Environment Protection Act, cannot take effect before an agency impact statement is prepared. Moreover, record is convincing that damage done to the environment is likely to be irreparable if relief is denied, whereas damage done the railroads by granting the injunction, while nonfrivolous, is not overwhelming. Therefore, to the extent that the surcharge relates to goods transported for purposes of recycling, preliminary relief requested is granted.—Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) v. United States, 346 F. Supp. 189 (191-2, 201-2)*.

However, on plaintiff's request for preliminary relief against subsequent Commission order approving selective permanent percentage rate increases, issuance of further equitable relief would be inappropriate. The Commission suspended those rates as they applied to goods being shipped for recycling purposes; railroads are not collecting either the interim surcharge or permanent increase on such shipments; and, as no harm to plaintiff could be remedied thereby, further equitable relief with respect to such goods is not necessary. Furthermore, with regard to approved rate increases on all other goods, preliminary relief will not be issued in view of (1) the dubious likelihood of success on the merits of plaintiff's claim that an increase in rail rates causes diversion of shipments to other modes of transport which cause more pollution and consume more scarce energy resourses than railroads, (2) the substantial harm to the railroads that such relief would cause, and (3) plaintiff's failure to attack those rate increases before they were approved and went into effect. Therefore, present motion for preliminary injunction is denied.—Id., 353 F. Supp. 317 (322-4)*.

29. —Review on appeal from order granting or denying.—[Vols. 4, 7, 19, 21].—See Aberdeen & R. R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP) case 28 USC §1253, n. 2.

Scope of Judicial Review of Commission's Orders

40. In general.—[Vols. 4, 7, 12-15, 17-19, 21].—See also Brooklyn Eastern District Terminal v. United States case, §1(22), n. 1; Hudson Transit Lines, Inc. v. United States case, §207(a), n. 25.

In suit to set aside Commission order requiring plaintiff to cease certain operations found to exceed its territorial authority, the court will not disturb Commission orders that are within scope of its statutory authority, based on adequate findings supported by substantial evidence of record, and are not completely unreasonable. Also, if the law and the facts warrant agency's action, the court may not set it aside merely because it might have reached a different decision on same record; it must give due credit to the Commission's expertness in the field Congress confided to it. However, unlike cases involving Commission expertise in interpreting certificate commodity descriptions, the normal reasons for deferring to its expertise in trade parlance do not apply in action challenging, on the grounds of grammar and punctuation, Commission interpretation of description of plaintiff's authorized base territory; no questions of construction befitting its experience in drafting and construing industry language are involved and record reveals no reasons to support its avoiding the normal grammatical reading of the certificate. Matter remanded for further Commission proceedings.—T. I. McCormack Trucking Co. v. United States, 251 F. Supp. 526 (534-6, 540-1)*.

The function of the reviewing court is limited to ascertaining whether there is warrant in both the law and facts for what the Commission has done. And unless there has been prejudicial departure from requirements of law or abuse of Commission discretion the reviewing court is without authority to intervene; it cannot substitute its own view concerning what should be done for the Commission's judgment upon matters committed to its determination, if that judgment has support in the record and applicable law.—Dunkley Refrigerated Transport, Inc. v. United States, 253 F. Supp. 891 (894)*.

However, considering entire record in proceeding on plaintiff's application for authority to transport frozen foods and potato products, the Commission's finding that commodity description in its certificate should be limited to frozen fruits, berries, and vegetables and potato products is not based on adequate subsidiary findings and its ultimate conclusion is not supported by substantial evidence. While the Commission recognized evidentiary factors which would support a finding that a broad commodity description such as "frozen foods" was required by plaintiff's supporters, it made no such finding; nor were any findings made to support its grant of the lesser commodity description. Moreover, no evidence supported the Commission's "scheme" for determining commodity description in certificate granted each applicant in the consolidated proceeding; and no consideration was given to copious evidence of shippers' requirements and the necessity for authority to transport frozen foods other than potatoes, vegetables, fruits, and berries. Order set aside and case remanded for further proceedings in conformity with the court's opinion.—Id., pp. 895-6.

Despite assertion of plaintiffs (protestants in Commission proceeding) to the contrary, the Commission's conclusion that vendor's substantial service justified proposed purchase of its operating rights by intervening defendant is neither without factual foundation nor is it unsound in law. What constitutes substantial service in a given case is a question of fact; and the function of weighing evidence on such a question is one peculiarly for the Commission not the courts. Record shows that the Commission properly considered all evidence presented and that, obviously, the evidence did not require it to find the purchase rights to be dormant. Therefore, since substantial evidence in the record, considered in its entirety, supports the Commission's finding that proposed purchase of vendee's rights would be in the public interest, plaintiffs' action must be dismissed.—Blue Ridge Transfer Company, Inc. v. United States, 283 F. Supp. 858 (860-61)*.

Since §207(a) gives the Commission authority to determine whether public convenience and necessity require issuance of a motor carrier certificate, the court's consideration and review of the order granting certificate to intervening defendant is limited to determining whether there was a "rational basis . . . supported by substantial evidence" for the Commission's action. Upon finding that such a basis exists, the Commission's order is sustained.—National Bus Traffic Association, Inc. v. United States, 284 F. Supp. 270 (272)*.

In reviewing a Commission order, the court considers only the record as made before the Commission, and cannot accept evidence *de novo*, except in cases falling within the jurisdictional facts doctrine or challenging a rate order as confiscatory; thus, since instant case is not within either of those exceptions, the court may consider only evidence contained in the record made before the Commission. Moreover, while rules of procedure relating to discovery of admissible evidence should not be narrowly read, the discovery rule plainly precludes depositions in those instances where no evidence could be admitted in any event; nor has plaintiff shown the requisite good cause to entitle it to discovery and inspection of documents and memoranda. Accordingly, plaintiff's motions for pretrial discovery on the merits are denied.—Interstate Investors, Inc. v. United States, 287 F. Supp. 374 (378, 385-6)*.

In action to set aside Commission orders in complaint proceeding, handled under modified procedure, requiring cancellation of motor carrier rates found unjust and unreasonable because noncompensatory, the court recognizes that the Commission's judgment is entitled to great weight and that neither the wisdom nor consistency of its decisions is within the court's field of inquiry. However, while the scope of review is limited, record in instant case shows agency action that is not in accord with the law and not in observance of procedure required by law. Moreover, it would be unjust to affirm complained of order on the basis of the Commission's modified procedure rules when a liberal administration of those rules would have permitted reception of evidence on the basic issue of compensativeness of the assailed rates. Commission report and orders vacated and annulled; case returned to the Commission for a full hearing as to whether rates at issue are noncompensatory and thus unjust and unreasonable.—United Buckingham Freight Lines v. United States, 288 F. Supp. 883 (885-6, 887)*.

In action to set aside Commission orders denying purchase and related extension applications of two motor carriers, the test of court review of Commission decisions is the same in both a §5 and a §207 proceeding. In reviewing a §207 case, the court cannot substitute its own view as to what should be done (whether regarding competitive considerations or others) for the Commission's judgment on matters committed to its discretion, if that judgment has support in the record and the applicable law. In a §5 proceeding, wisdom and experience of the Commission, not of the courts, must determine whether proposed transaction is consistent with the public interest; and if the Commission did not exceed its statutory discretion, and its findings are adequate and supported by evidence, it is not the court's function to upset its order.—Consolidated Copperstate Lines v. United States, 293 F. Supp. 858 (861)*.

Plaintiffs bolster their challenge of the Commission's decision by the fact that the examiner and four of the commissioners were of the opinion that their applications should be granted; however, that circumstance does not permit the court to vary from established rules of judicial review. Record shows that challenged orders are based on substantial evidence and in accord with applicable law; thus, plaintiffs in effect are asking that the court direct the Commission to be more lenient in its disposition, a position advanced by the four dissenting commissioners. The case does not permit such action by the court even if it were so disposed. Decision and orders of the Commission sustained.—Id., pp. 861-2.

In action to set aside Commission orders granting certificates authorizing interstate motor carrier operations, the court may not disturb the Commission's findings as to whether or not public convenience and necessity warrant issuance of a certificate if such findings are supported by substantial evidence. Even though the record contains substantial evidence supporting a contrary conclusion or, as a matter of first impression, the court might arrive at such contrary conclusion, the reviewing court is bound to affirm the Commission's findings if there is also substantial evidence of record to support them. In light of the Commission's findings and conclusions with respect to the volume of traffic and supporting shippers' potential future markets, and with respect to the need for the various services in question and the applicants' ability to provide them, and the substantial evidence of record in support of those findings and conclusions, the commission's orders in issue are sustained.—Midwest Emery Freight System, Inc. v. United States, 295 F. Supp. 112 (118-9)*.

When, upon further hearing and deliberate and searching reconsideration, the Commission determined that proposed railroad merger and related transactions, subject to the conditions imposed, would be consistent with the public interest and should be approved, the reviewing court does not inquire whether the merger satisfies its conception of public interest. The judicial task is to determine whether the Commission acted in accordance with the law and whether its findings and conclusions accord with statutory standards and are supported by substantial evidence. Accordingly, since the Commission was guided by applicable legal principles and made findings, supported by substantial evidence, requisite to the validity of its action, considered orders approving the merger and related transactions are sustained.—United States v. United States, 296 F. Supp. 853 (855, 856, 862)*.

Judicial review of the Commission's certificate and order, which authorized applicant railroad to abandon certain of its branch lines, is very limited in scope. When, after examining the whole record before it, the reviewing court finds no basis for holding that the Commission's findings are not amply supported by the evidence, that those findings are not adequate to sustain its order, or that the Commission exceeded its statutory authority or abused its discretion, the court may not set aside the order in question. Previously issued temporary restraining order is dissolved and the complaint dismissed.—Cobb v. United States, 297 F. Supp. 169 (170)*.

In Hawaiian truckers' appeal from Commission decision and order an applications for household goods authority between points in Hawaii and points in mainland United States, insofar as it grants authority to 19 mainland carriers, the court's duties are limited to ascertaining whether there is warrant in the law and facts for the Commission's action. Unless there is some specific prejudicial departure from the law, or abuse of the Commission's discretion, a reviewing court may not intervene; however, the Commission has a duty to set forth facts from which its findings and conclusions rationally ensue and to apply the relevant law thereto. While the court is not concerned with consistency or inconsistency of the Commission's decisions, consistency of administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily; the law does not permit an agency's grant to one person the authority it denies to another similarly situated. In light of the relevant law, the Commission's evidentiary findings are not sufficient for the court to support its ultimate decision; remanded for further proceedings consistent with the court's ruling.—HC&D Moving & Storage Co., Inc. v. United States, 298 F. Supp. 746 (747, 749-52)*.

In action to enjoin Commission decision and order (which was adverse to plaintiffs) in motor carriers purchase proceeding, and embraced application and complaint proceedings, the reviewing court is limited to the record presented to the Commission. Examination of that record in the light of the authorities cited shows that the Commission followed the law and, also, that its findings of unlawful control of an intrastate carrier by an interstate carrier are supported by substantial evidence, including inferences reasonably drawn therefrom. Accordingly, since the court is not warranted in overturning the Commission's order simply because there is also substantial evidence in the record which would have supported findings favorable to plaintiffs, the complaint is dismissed and previously entered temporary restraining order is vacated.—Washum v. United States, 299 F. Supp. 712 (713)*.

In suit to enjoin, set aside, or remand Commission order permitting discontinuance of passenger trains, there can be little doubt of rationale of the Commission's decision, if the facts are as it found them; thus, petitioners have the burden of proving existence and prejudicial effect of alleged errors and, to establish an assigned error, their evidence must be strong and convincing. Therefore, as there is substantial evidence of record and ample authority in the statute to support the Commission's determinations, and since petitioners failed to carry the burden of showing those determinations to be erroneous, unreasonable or arbitrary, the Commission's order is sustained.—State of New York v. United States, 299 F. Supp. 989 (994, 997-9, 1001)*.

In suit to set aside and annul Commission orders granting intervening motor carrier authority that would enable it to relocate its interchange point, and denying plaintiffs' (protestants) request for rehearing, the scope of court review is extremely limited. The court cannot retry the facts; it may only determine whether the Commission's findings and conclusions are supported by substantial evidence and are arrived at by proper application of relevant legal standards; and in reviewing the denial of rehearing, the court is limited to determining whether or not the Commission abused its discretion. The Commission's finding that applicant (intervenor) showed sufficient public convenience and necessity to justify the grant of authority to relocate its interchange point is based on substantial and largely undisputed evidence and the conclusions drawn are in accord with the proper legal standards; furthermore, record does not show that the Commission's denial of rehearing was a clear abuse of its discretion; therefore, considered decision and orders must be sustained.—Garrett Freightlines, Inc. v. United States, 305 F. Supp. 149 (151-2, 153)*.

Scope of judicial review of administrative action with regard to questions of fact is whether on the record as a whole the agency could reasonably make the finding it did, i.e., the "substantial evidence" test; and, as regards questions of law, whether the expert agency's judgment has warrant in the record and a rational basis in the law. Courts recognize the comparative qualifications of court and agency to decide a particular issue; and, as Congress has delegated power and authority to various agencies to discharge their respective duties and reach practical results, agency expertness in a specialized field often follows. Thus, the court is inclined to give great weight to Commission's latest interpretation of plaintiff's motor carrier certificate, although, to some degree, it appears to represent a change of mind by the experts. Moreover, the Commission may change its mind on certificate interpretation if the final determination is sound; the Commission properly and reasonably decided the issues presented; sustained.—PreFab Transit Co. v. United States. 306 F. Supp. 1247 (1250, 1252)*.

In action seeking review of Commission order granting Oregon Short Line and Union Pacific authority to construct and operate a 13-mile rail line from their main line to newly developing Little Mountain industrial area in Utah, the court's function is to determine whether the Commission's action is supported by substantial evidence on the record as a whole. Though plaintiffs contend the certificate should have been denied, since Southern Pacific is a carrier in the area and, thus, has a preemptive right to all traffic it can economically and efficiently handle, that question is one of fact properly determinable by the Commission. Whether a carrier is "in the area" is a factual issue to be determined from the evidence; and there is substantial evidence to support the commission's conclusion that SP is not a carrier already in the area. While there may be evidence in the record from which the opposite conclusion could be drawn, the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence.—Denver &R. G. W. R. Co. v. United States, 312 F. Supp. 329 (331-2)*.

Furthermore, even if SP is or will be a carrier in the general area, that fact is not determinative of whether there is need for services of another carrier. Evidence in the record with respect to such factors as inadequacy of present or future rail service, the desirability of competition, and of different kinds of, and improved, service, clearly supports the Commission's finding that public convenience and necessity would best be served by granting defendant railroads' application. The Commission, with its expertise and special knowledge, is allowed broad discretion in determining the "necessity" for a proposed service and the scope of judicial review is exceedingly narrow. Accordingly, after reviewing the record, the Commission's action is found not to constitute an abuse of discretion and to be based on substantial evidence on the record as a whole. Plaintiffs' claim for relief denied, and judgment entered for defendants.—Id., pp. 332-3.

In suit to enjoin and set aside Commission order, which dismissed plaintiff's complaint alleging defendant carrier was operating in violation of its authority, the court's power is limited to ascertaining whether there is warrant in the law and facts for the agency's action. Commission finding that defendant carrier's certificate authorizing regular-route limousine service between Philadelphia airport and Atlantic City, N.J., but not specifying any route or terminal to be used in Atlantic City, did not preclude it from picking up and discharging passengers at other points within corporate limits thereof, was clearly a permissive administrative determination. Such decision being within the Commission's statutory powers, and neither inconsistent with its prior rulings nor made in abuse of its discretion, the reviewing court has no authority to intervene. Further, viability of the challenged service, which depends on continuance of the pickup and discharge service, is in the public interest; and plaintiff's certificate for irregular-route, special non-scheduled limousine service between same points does not entitle it to be free from competition. Complaint dismissed.—Salem Transp. Co. v. United States, 314 F. Supp. 693 (694-6)*.

There is no error of law in the Commission report and order approving varying allowances paid by railroads to shippers for motor carriage of baled cotton from gins to the compress (transit point) based on distances between rail origin points and the transit points, even though the gin is not located at the rail origin point and the baled cotton is not actually tendered at the on-rail origin; therefore, since the Commission's decision is supported by substantial evidence, its order approving considered freight allowance system should be sustained. Complaint dismissed with prejudice.—Federal Compress & Warehouse Co. v. United States, 319 F. Supp. 917 (918)*.

In suit to set aside Commission decision that permitted discontinuance of two passenger trains between St Louis, Mo., and Carbondale, Ill., the court's function is limited to ascertaining whether there is warrant in law and in fact for the agency's action; unless there was prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court has no authority to intervene. Once the agency conclusions are found to be supported by substantial evidence on the whole record, that ends the matter; but the order must be reversed if the law was not followed or if the Commission's findings are found to be arbitrary or capricious and to have no basis on the record. In instant case, the Commission's ultimate findings are supported by substantial evidence and do not involve any legal error; the Commission followed applicable rules of law in conducting the hearings and reaching its final decision; and there is warrant in the law and the facts for its action. The court finds no prejudicial departure from the law, nor any abuse of the Commission's discretion; considered decision and order, sustained. Temporary restraining order dissolved.—Illinois Commerce Commission v. United States, 320 F. Supp. 205 (209, 211)*.

The doctrine of primary jurisdiction is flexible, not rigid, and the court is not without discretion in its application; where rights may be saved thereby, the court should retain a cause, but should stay its hand pending administrative determination of matters particularly within the agency's jurisdiction. Thus, while only questions of law which the court could decide (doctrine of primary jurisdiction having no application in such cases) are involved in petition to modify order enjoining agricultural cooperative from engaging in unlawful for-hire carrier operations, since the matter is now before the Commission, the court will stay its hand pending determination by the agency of whether an agricultural cooperative may hold temporary authority to lease motor carrier certificate which it has contracted to purchase from the owner and, conversely, whether the Commission can issue, or authorize transfer of, a certificate to a qualified cooperative, either on a temporary or permanent basis. Proceedings stayed pending Commission decision or further court order.—I. C. C. v. Milk Producers Marketing Co., 320 F. Supp. 738 (742)*.

Judicial review of a Commission order is very limited. The court's function is to determine whether ultimate findings of the Commission are supported by substantial evidence on the whole record and do not involve an error of law; and once it finds that substantial evidence supports the findings and that, in arriving at its determination, the Commission did not depart from applicable rules of law, that ends the matter. While a Commission order must be reversed if it fails to follow the applicable law or if its findings are arbitrary and capricious and have no basis on the record as a whole, substantial evidence need not necessarily be a preponderance of evidence; it is enough if it is that degree of evidence which would justify, if the trial were to a jury, refusal to direct a verdict when the conclusion to be drawn is one of fact for a jury. Therefore, since plaintiffs failed to prove that, on the record as a whole, considered Commission decision and orders are arbitrary or capricious or not in accord with applicable statutes, the complaint is dismissed.—Beaufort Transfer Co. v. United States, 324 F. Supp. 649 (651-2, 653)*.

The scope of judicial review of Commission orders, that granted authority to defendant motor carriers, is such that if the Commission's actions are supported by substantial evidence on the record as a whole, then incorrect, misleading and prejudicial statements of fact by the hearing examiner, *which are insubstantial* or which do not negate the substantiality of the agency actions will not afford grounds for the court's setting aside the orders and enjoining issuance of the certificates. However, there is no merit in plaintiff's argument that considered orders erroneously affirmed and adopted incorrect, misleading and prejudicial statements of fact in the examiner's report, since examination of the record reveals that many of those statements, when read in full context, are not inaccurate and are supported by substantial evidence. On the record as a whole, the Commission's orders appear generally reasonable and well founded; sustained.—Curtis, Inc. v. United States, 327 F. Supp. 291 (293, 295)*.

In suits by two motor carriers to set aside Commission order granting heavy-hauling authority to defendant carriers, the court's task is to review the record to determine whether it contains substantial evidence to support the order, not to weigh the evidence or to substitute its own judgment for that of the Commission. Sole function of the reviewing court is to protect the parties against arbitrary administrative action unfounded in law or fact. While the extent of proof of shipper needs appears to differ on each disputed area, there is substantial evidence of need for single-line heavy-hauler service in each of the respective geographic regions; and that evidence supports the Commission's authorization of new heavy haulers in each area. Therefore, since possibility of economic loss to existing carriers does not preclude issuance of new certificates that will improve service to the public, and the Commission's decision is based on material facts which are supported by substantial evidence, the challenged order is sustained.—Mitchell Bros. Truck Lines v. United States, 327 F. Supp. 796 (798)*.

Courts are not empowered to weigh the evidence *de novo* and reach an independent conclusion. Although the court reviewing administrative action is confined to the record made before the agency, it may review the entire record and is not limited to those portions cited by the parties. On review of the entire record in western railroads' suit to enjoin and set aside the Commission's decision, insofar as it concludes that proposed increase in the waterborne charge at western ports is not shown to be just and reasonable, the court concludes that challenged Commission order is based upon adequate findings and that those findings are supported by substantial evidence. Therefore, carriers' complaint is dismissed.—Atchison, T. & S.F. Ry. v. United States, 334 F. Supp. 651 (654-5)*.

Commission's order is a product of expert judgment which is presumed to be valid. Thus, in suit to set aside, enjoin and annul order of the Commission ordering plaintiff to cease and desist its unlawful operations as a freight forwarder, it is the court's duty to decide whether the Commission's conclusion that plaintiff is a "freight forwarder," as defined in the Act, is based on "substantial evidence." That the reviewing court might have reached a different conclusion is irrelevant if the Commission order is based on adequate findings which are warranted in the law and facts. When viewed as a whole, the record contains sufficient "substantial evidence" to support the Commission's findings; Commission order, sustained.—Metropolitan Shipping Agents of Ill., Inc. v. United States, 342 F. Supp. 1266 (1268, 1269-71)*.

In motor carrier's suit to enjoin Commission order imposing a "single plantsite"—in lieu of the "mixed load"—restriction in its certificate, it is not the court's function to judge the paramount public interest; by statute, that is the business of the Commission. The reviewing court's function is limited to ascertaining whether there is warrant in the law and facts for the Commission's action. Absent a specific prejudicial departure from the law or abuse of the Commission's discretion, the court cannot intervene; nor can it substitute its own opinion, whether respecting competitive considerations or others, for the Commission's judgment on matters committed to its determination, if supported by the record and applicable law. Reviewing the record as a whole, substantial evidence supports the critical Commission finding that a more meaningful restriction in plaintiff's certificate was required to protect competing carriers; also, in substituting the "single plantsite" for the "mixed load" restriction, the Commission did not abuse its discretion. Therefore, injunctive relief sought is denied.—Greenstein Trucking Co. v. United States, 343 F. Supp. 194 (198-200)*.

Commission is expert in the field of transportation and its judgment is entitled to great deference because of its knowledge of conditions in that industry; nevertheless, it must make findings that support its decision which, in turn, must be supported by substantial evidence. In reaching its conclusion that aluminum billets and ingots in question could be loaded individually and manually, or in small packages without use of special equipment, the Commission ignored substantial evidence to the contrary and made a finding that has no evidentiary basis other than a presumption; therefore, its determination that those commodities are not within the scope of plaintiff motor carrier's existing heavy-hauling authority is not based on the substantial evidence required to support its findings. Commission order is set aside and annulled.—Aero Trucking, Inc. v. United States, 346 F. Supp. 826 (828-30)*.

Once court finds substantial evidence in support of Commission's findings, it cannot go further and inquire into the soundness of Commission's reasoning or the wisdom of the result (272 US 658). Nonetheless, we have a recognized obligation under 5 USC §706 (2) (A) to set aside agency conclusions found "otherwise not in accordance with the law". The Commission's conclusion, without adequate basis, in 341 ICC 57 that charges for switch movements to and from repair facilities may be assessed against carrier-owned cars but not against privately owned cars precipitates discrimination in violation of §2 of the Interstate Commerce Act. Commission's order is hereby set aside.—Indiana Harbor Belt R. Co. v. General Amer. Transp. Co., 368 F. Supp. 904 (908)*.

45. [Review]—Orders within scope of delegated authority.—[Vols. 4, 7, 10, 12-19, 21]. —See Land-Air Delivery, Inc. v. United States case, §207(a), n. 9, supra.

48. Soundness of Commission's reasoning. —[Vols. 4, 7, 11-19, 21].—In suit to annul and set aside Commission order granting intervening irregular-route common carrier authority to relocate its interchange point, plaintiffs' contention that the order is arbitrary and capricious because of purported inconsistency with previous Commission order (denying same carrier's application for identical authority), must fail for two reasons: (1) principles of res judicata do not apply to Commission rulings, and (2) factual situation as presented at the two hearings differed in that road conditions had changed, connecting carrier testified at second hearing, and the effect of increased use of new interchange under temporary authority could be evaluated. As the court must judge the appealed proceeding and judge it by the applicable standards, it cannot hold the Commission was right in its first proceeding and wrong in the second, especially since respective records considered at the two agency hearings are not identical. Thus, the alleged inconsistency does not vitiate Commission order under review; sustained.—Garrett Freightlines, Inc. v. United States, 305 F. Supp. 149 (150, 152)*.

In motor carrier's action to enjoin and invalidate Commission orders granting it a "Kingpak," rather than an unrestricted, household goods certificate, it is neither the duty nor the right of the court to inquire into the soundness of the Commission's reasoning, wisdom of its decisions, or the consistency of its conclusion with those reached in similar cases. Fact that an administrative tribunal's new decision departs from the rule of an earlier one does not require corrective action by a reviewing court; the court must decide whether the Commission correctly applied the laws, not whether it followed its own precedents. The Commission's action, sustained.—Towne Services Household Goods Transp. Co. v. United States, 329 F. Supp. 815 (821, 822)*.

49. Expediency or wisdom of order, substitution of judgment.—[Vols. 4, 7, 10-19, 21]. —See also James Hughes, Inc. v. United States case, §309(c), n. 25.

In action to enjoin and set aside Commission order granting a motor carrier certificate, scope of the court's review is limited; and reviewing court will not substitute its independent judgment for that of the Commission's expert determination in considering a matter of appeal.—Howard Hall Co. v. United States, 332 F. Supp. 1076 (1079)*.

54. Review of Commission's findings of fact.—[Vols. 4, 7, 10-19, 21].—In action to set aside the Commission's order denying plaintiff's application for motor carrier authority, the court does not sit as a court of first impression when reviewing factual findings based upon evidence produced before the Commission; only if such findings are not supported by substantial evidence on the record as a whole can they be disturbed.—

Neptune World-Wide Moving, Inc. v. United States, 284 F. Supp. 135 (138)*.

In suit to set aside Commission reports and orders approving considered rail rates, scope of the court's power to review Commission decisions is limited; where it makes adequate findings supported by substantial evidence on the record as a whole, the court must affirm. However, on instant record, substantial evidence does not support the Commission's finding that highly disparate export rates on soybeans to Chicago are neither unreasonable nor unduly prejudicial to Chicago and preferential of Gulf ports, so long as the rate to Chicago never exceeds that to New Orleans, regardless of other factors (including other cost factors, quantities shipped from various origins, distances to destinations, etc.); there is no evidence as to basis for such finding and, absent some information as to other relevant factors, nothing of record substantiates the Commission's conclusions except its expertise. Also, if there is a sound economic basis for the rate structure approved, it does not appear in the findings and reports. As the Commission failed to make adequate fingings to justify its conclusions, the case must be returned to it for further proceedings consistent with the court's opinion.—City of Chicago v. United States, 291 F. Supp. 858 (861-3)*.

55. —Weight of evidence.—[Vols. 4, 7, 10, 12, 13, 15-19, 21].—In action to set aside, enjoin and annul Commission order directing that plaintiff cease and desist from operations found to be unlawful "freight forwarder" operations, many of plaintiff's contentions go to the weight and credibility of the evidence adduced before the Commission. However, it is the exclusive function of the Commission to appraise conflicting testimony or other evidence, to judge the credibility of witnesses and evidence adduced by the parties, and to determine the weight of the evidence.—Metropolitan Shipping Agents of Ill., Inc. v. United States, 342 F. Supp. 1266 (1271)*.

56. —Substantial evidence to sustain order. —[Vols. 4, 7, 10-19, 21].—Upon consideration of the record, briefs, and oral argument in action seeking judicial review of Commission action granting operating authority to three motor carriers (intervening defendants), brought by protestant in the administrative proceeding, it is apparent that the Commission's findings, conclusions, and orders are supported by substantial evidence; that it followed the standards prescribed in the applicable law; and that it did not act arbitrarily or capriciously in making its findings and reaching its conclusions. Therefore, the Commission's decision and orders granting considered certificates are sustained.—Southern Trucking Corporation v. United States, 293 F. Supp. 297 (298)*.

In action to set aside the Commission's grant of authority to intervening defendant to provide motor bus passenger service over roughly the same routes as plaintiff's limousine service, function of the reviewing court is quite restricted; if there is warrant in the facts and the law for the Commission's action, that is all that is necessary, for its judgment is then controlling. Testimony of public witnesses in the Commission proceeding afforded, in content and volume, substantial support for the examimers' conclusions which the Commission adopted; moreover, while plaintiff belittles some of that testimony, credibility of the witnesses is primarily for the examiners who observed them and the court finds no reason to question their determination with regard thereto. Grant of the certificate at issue, sustained; complaint dismissed.—Connecticut Limousine Service, Inc. v. United States, 295 F. Supp. 1335 (1336-7, 1338)*.

Substantial evidence to support a Commission finding means "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusions sought to be drawn from it is one of fact for the jury"; moreover, possibility of drawing two inconsistent conclusions from evidence does not prevent an agency finding from being supported by substantial evidence. [Citing 385 US 49.] Review of the extensive record in the case shows that the Commission had before it substantial evidence upon which to predicate its actions in granting authority to defendant carriers; and plaintiff, in attempting to refute the agency findings of public need for proposed service, cannot equate controverted or disputed evidence with insubstantial evidence. Evidence in the record, which is substantial in terms of the applicable standard, supports the Commission's conclusion that the kind of service needed was not available to shippers; sustained.—Curtis, Inc. v. United States, 327 F. Supp. 291 (294-5)*.

In resolving question whether Commission determination is supported by substantial evidence, general test is used to determine whether agency considered "such relevant evidence as a reasonable man might accept as adequate to support a conclusion." Record before Commission indicates that western railroads were unable to furnish adequate statistical data concerning their current port terminal costs and that, for some time, they had been sharing costs with water carriers. Though plaintiffs' single witness attempted to show reasonableness of overall rate structure on waterborne traffic, he could only offer partial information as to volume of such traffic. Substantial evidence of record supports Commission's finding that carriers had failed to prove that proposed increase in waterborne additive charge at western ports was just and reasonable. Complaint dismissed.—Atchison, T. & S.F. Ry. v. United States, 334 F. Supp. 651 (654-5)*.

61. Burden of proof.—[Vols. 4, 7, 10, 14, 16, 19, 21].—Petitioners, in action seeking to overturn Commission decision permitting discontinuance of passenger-train service, have the burden of proving existence of alleged errors in the findings and of proving prejudicial effect of such errors upon the Commission's conclusions; and, in order to establish the assigned errors, their evidence must be strong and convincing. Therefore, since petitioners failed to carry the heavy burden of showing that the Commission's conclusions (as to need for, and undue burden on interstate commerce of, requiring continuation of the service) were erroneous, arbitrary, or unreasonable, the order of the Commission must be sustained; complaint dismissed.—State of New York v. United States, 299 F. Supp. 989 (997-1001)*.

Evidence in terminal railroad's action to enjoin and annul Commission orders (denying plaintiff leave to abandon portion of its track) is insufficient to support its claim that, in light of its long continued overall losses, denial of its abandonment application was confiscatory. While plaintiff has had long-continued, over-all corporate book-losses, evidence does not indicate that its total railway operation is conducted at a loss; on the contrary, it has continued to operate as a railroad with a low net operating income, not with a net operating loss. Compulsion to continue a public service rendered at a loss is not necessarily an unconstitutional taking of property, since there is no general principle that every component of a whole utility service must show a profit; however, the fact of a loss is an important criterion to be considered in determining reasonableness of an order requiring continuance of such service.—Brooklyn Eastern District Terminal v. United States, 302 F. Supp. 1095 (1099-1100)*.

While compelled continuance of a particular service can amount to a forbidden taking of property without due process of law, whether a carrier facility or service can be abandoned involves broader analysis than a simple showing of segmental loss; decision whether order to continue service is unreasonable requires consideration of the loss factor and, also, the relation of the service or facility to carrier's whole service, public-service value of required continuance, and any other factors conducive to determining whether such service and its losses may be considered in isolation from the rest of the public service involved. The questions, then, would be (1) whether traffic over considered track actually produces losses, so that abandonment would improve plaintiff's railway economics, (2) whether the track sought to be abandoned is in fact an isolable and severable portion of the line of railroad, and (3) whether the economic case for abandonment outweighs the resulting disadvantages, if any, to shippers and the public.—Id., pp. 1100-01.

Evidence fails to support plaintiff's argument that traffic of the three shippers on considered track is handled at differentially heavy loss. Proof of inadequate revenue on traffic of one shipper (which plaintiff would continue serving at other tracks) has no relation to abandonment but rather implies need for fairer rate divisions with line-haul carriers; but plaintiff stated the division was fair and, if overall division is fair in aggregate result, it cannot complain that one isolated rate is confiscatory as between it and one shipper. Moreover, evidence does not show that the portion of plaintiff's line sought to be abandoned is in fact severable segment of rail property or service from an abandonment point of view; on the contrary, the "abandonment" is, in effect, a discriminatory attempt to discontinue service. Conclusion compelled by the evidence is not that a portion of railroad is sought to be abandoned, but that two shippers' traffic is to be jettisoned in the hope of gaining increased traffic of another shipper. An economic case for abandonment is not made out; plaintiff is not entitled to any relief; action dismissed on the merits.—Id., pp. 1101-5, 1107.

A presumption of validity accompanies orders of the Commission, and a party attacking an order has the burden of showing its invalidity. In suit to enjoin and annul Commission order granting temporary authority to defendant carrier, carrier's application and supporting shipper statements, considered along with other record information including the several motor carrier protests, are presumed to have constituted sufficient showing for the grant. Record is convincing that temporary authority was granted after considerable sifting of supporting letter statements and checking them with requirements of Commission rules relating to content of shipper statements; and in view of the Commission's statutory discretion, the nature and application of its rules, and the record information before it, the court cannot say that the grant was arbitrary or capricious or action in abuse of discretion. Presumption of validity not rebutted by plaintiffs; Commission order sustained.—Bell Lines, Inc. v. United States, 306 F. Supp. 209 (215-6, 218)*.

The burden of showing the invalidity of a Commission order rests on the plaintiff suing to enjoin and set aside that order.—Atchison, T. & S.F. Ry. v. United States, 334 F. Supp. 651 (654)*.

63. Contentions not raised before the Commission.—[Vols. 4, 13-19, 21].—In action for review of Commission order granting operating rights to intervenor, it is argued that plaintiff (protestant) did not question before the Commission the variance between the certificate granted and the findings of fact and, therefore, it cannot raise the issue in court; however, objection on that ground was unnecessary where the certificate permitted the same service as plaintiff offers and a timely objection was made to the Commission that there was no evidence to support a finding of inadequacy of existing service, which is a necessary legal basis for considered order. Moreover, in light of the National Transportation Policy, the court cannot approve a certificate which is inconsistent with the findings and the inconsistency is such that existing carriers might be endangered.—Drum Transport, Inc. v. United States, 298 F. Supp. 667 (672-3)*.

In action to enjoin Commission order requiring plaintiffs (defendants in Commission proceeding) to cease and desist from operations found to be in violation of the Interstate Commerce Act, plaintiffs' motion for leave to amend the complaint and to adduce additional evidence is denied; the issue plaintiffs seek to present, which was not submitted to the Commission, may not be raised for the first time in the district court. Furthermore, the court's review of considered order is limited to the record presented to the Commission. Upon examination, that record satisfactorily shows that the Commission followed the law and that its findings are supported by substantial evidence. Complaint dismissed, and temporary restraining order previously entered is vacated.—Washum v. United States, 299 F. Supp. 712 (713)*.

Section 2341. Definitions.—As used in this chapter—* * * * * * * (3) "agency" means—(A) The Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, the Interstate Commerce Commission, or the Atomic Energy Commission, as the case may be; * * * * * * * * * * [Paragraph (3) (A) was amended by adding "the Interstate Commerce Commission" by P. L. 93-584, 88 Stat. 1917, Jan. 2, 1975.]

Section 2342. Jurisdiction of Court of Appeals.—The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—* * * * * * * * * * (4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42; and (5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title. [Paragraph (5) was added by P. L. 93-584, 88 Stat. 1917, Jan. 2, 1975.]

Historical Note

P. L. 93-584 eliminates the right to District Court review of Commission orders (except as to orders arising out of referrals or orders relating to the payment of money or the collection of fines, penalties, or forfeitures) and places review of Commission orders under jurisdiction of the Court of Appeals pursuant to 28 USC §2341, et seq. Under the new law all suits to review Commission orders must be brought within 60 days of the service of the Commission's administratively final order.—Annual Report, 1975, p. 71.

UNITED STATES AS PARTY GENERALLY

Chapter 161.—Title 28

Section 2401. (a) Time for commencing action against United States.—[Unchanged. See vol. 16, p. 13003.]

Notes of Decisions

Volume 16—p. 13003; Volume 17—p. 13721; Volume 18—p. 14753; Volume 19—p. 16053; Volume 21—p. 17891.

Section 2403. Intervention by United States; constitutional question.—[Unchanged. See vol. 16, p. 13004.]

FAIR LABOR STANDARDS

Chapter 8—Title 29

Sections 213, 215. Exemptions; Prohibited acts, prima facie evidence.— (b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer engaged in the operation of a common carrier by rail and subject to the provisions of Part I of the Interstate Commerce Act. * * * (7) any driver, operator, or conductor employed by an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier, (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit, if such employee receives compensation for employment in excess of *forty-eight* hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed. [Former §213 (a)(9) was repealed by Pub. L. 89-601; §213(b)(2) was amended by Pub. L. 93-259, April 8, 1974, 88 Stat. 69; §213(b)(7) was amended by Pub. L. 89-601, September 23, 1966, 80 Stat. 830, and Pub. L. 93-259, April 8, 1974, 88 Stat. 69. §215 unchanged. See vol. 10, p. 8449; vol. 19, p. 16054; vol. 21—p. 17892.]

Notes of Decisions

Volume 10—p. 8449; Volume 11—p. 9770; Volume 12—p. 10583; Volume 13—p. 11221; Volume 14—p. 11739; Volume 15—p. 12358; Volume 17—p. 13721; Volume 19—p. 16054; Volume 21—p. 17892.

1. In general.—[Vols. 10-15, 17, 19, 21].—Employees of noncarrier transportation company that leases and maintains motor carrier equipment, principally to its wholly owned corporate subsidiary which holds interstate carrier authority, are not employees of a motor common carrier and, therefore, they do not come within the motor-carrier exemption from the overtime provisions of the Fair Labor Standards Act. Furthermore, while some aspects of supervising mechanic's work for defendant company indicate that he might be an independent contractor, he works exclusively for that company as an essential, integral part of its every-day operation; therefore, in light of the decision in 331 US 722, the district court correctly classified him as an employee of the company. Judgment of the district court, affirmed.—Hodgson v. Ellis Transportation Co., 456 F. 2d 937 (938-40).

PARCEL POST ACTS

Chapter 6—Title 39

Section 247. Reformation of classification, etc.—[For text of this paragraph, see vol. 4, p. 3193. Repealed by Public Law 89-593, §4(b), Sept. 20, 1966, 80 Stat. 819.]

Historical notes, see vol. 4, p. 3194, vol. 15, p. 12359.

Notes of Decisions

Volume 4—p. 3194; Volume 7—p. 6119; Volume 10—p. 8453; Volume 11—p. 9771; Volume 16—p. 13005; Volume 17—p. 13721; Volume 19—p. 16056; Volume 21—p. 17894.

Section 434. Failure to enter into or perform contract; proceedings, temporary contracts; adjustment of compensation; extension of term of contract.—[For text of paragraph, see vol. 17, p. 13723. Repealed by Public Law 86-682, Sept 2, 1960, 74 Stat. 578-730.]

Supplemental Appropriations Act, Sept. 27, 1950, Fourth-Class Mail Service.—[*31 U.S.C.§695.*]—[For text of this paragraph, see vol. 19, p. 16057. Repealed by Public Law 89-593, §4(a), Sept. 20, 1966, 80 Stat. 819.]

Historical note, vol. 21, p. 17897.

Section 536.—[For text of this paragraph, see vol. 4, p. 3198. This section was not incorporated in Chap. 95 of Title 39 which was enacted by Public Law 86-682, Sept. 2, 1960, 74 Stat. 578.]

Section 550, 552.—[For text of these paragraphs, see vol. 4, pp. 3209, 3211. These sections were not incorporated in Chap. 95 of Title 39 which was enacted by Public Law 86-682, Sept 2, 1960, 74 Stat. 578.]

Notes of Decisions

§550: Volume 4—p. 3209; §552: Volume 4—p. 3211.

Section 557. Information from Interstate Commerce Commission as to revenues from express companies; rates for transporting matter other than first class.—[For text of paragraph, see vol. 4, p. 3214. Repealed by Public Law 87-108, July 26, 1961, 75 Stat. 221.]

Notes of Decisions

Volume 15—p. 12362; Volume 17—p. 13725.

POSTAL SERVICE

Title 39 U.S.C.

PART V—TRANSPORTATION OF MAIL

TABLE

Showing former and current section numbers of Chap. 95 of Title 39 as reenacted by Part V of Public Law 91-375, Aug. 12, 1970, 84 Stat. 766. Notes of decisions, see vol. 21, pp. 17898-99.

Former section	New section	Former section	New section
6201	5201	6209	5208
6202	5202, 5210	6210	5209
6203	5007, 5203	6211	omitted
6204	5203, 5204	6212	see 3662
6205	5204	6213	see 5210
6206	5205	6214	see 5211
6207	5206	6215	see 5210
6208	5207	6216	see 5213

Chapter 50.—GENERAL

Section

5001. Provisions for carrying mail.
5002. Transportation of mail of adjoining countries through the United States.
5003. Establishment of post roads.
5004. Discontinuance of service on post roads.
5005. Mail transportation.
5006. Lien on compensation of contractor.
5007. Free transportation of postal employees.

Section 5001. Provisions for carrying mail—The Postal Service shall provide for the transportation of mail in accordance with the policies established under section 101 (e) and (f) of this title and the provisions of this chapter. Notwithstanding any other provision of this title, the Postal Service may make arrangements on a temporary basis for the transportation of mail when, as determined by the Postal Service, an emergency arises. Such arrangements shall terminate when the emergency ceases and the Postal Service is promptly able to secure transportation services under other provisions of this title.

Section 5002. Transportation of mail of adjoining countries through the United States.—The Postal Service, with the consent of the President, may make arrangements to allow the mail of countries adjoining the United States to be transported over the territory of the United States from one point in that country to any other point therein, at the expense of the country to which the mail belongs, upon obtaining a like privilege for the transportation of United States mail through the country to which the privilege is granted.

Section 5003. Establishment of post roads.—The following are post roads:

(1) the waters of the United States, during the time the mail is carried thereon;

(2) railroads or parts of railroads and air routes in operation;

(3) canals, during the time the mail is carried thereon;

(4) public roads, highways, and toll roads during the time the mail is carried thereon; and

(5) letter-carrier routes established for the collection and delivery of mail.

Section 5004. Discontinuance of service on post roads.—The Postal Service may discontinue service on a post road or part thereof when, in its opinion, the public interest so requires.

Section 5005. Mail transportation.—(a) The Postal Service may obtain mail transportation service—

(1) from common carriers by rail and motor vehicle or persons as provided in chapter 52 of this title;

(2) from air carriers as provided in chapter 54 of this title;

(3) from water carriers as provided in chapter 56 of this title; and

(4) by contract from any person (as defined in section 5201 (7) of this title) or carrier for surface and water transportation under such terms and conditions as it deems appropriate, subject to the provisions of this section.

(b)(1) Contracts for the transportation of mail procured under subsection (a)(4) of this section shall be for periods not in excess of 4 years (or where the Postal Service determines that special conditions or the use of special equipment warrants, not in excess of 6 years) and shall be entered into only after advertising a sufficient time previously for proposals. The Postal Service, with the consent of the holder of any such contract, may adjust the compensation allowed under that contract for increased or decreased costs resulting from changed conditions occurring during the term of the contract.

(2) A contract under subsection (a)(4) of this section may be renewed at the existing rate by mutual agreement between the contractor or subcontractor and the Postal Service.

(3) Any contract between the Postal Service and any carrier or person for the transportation of mail shall be available for inspection in the office of the Postal Service and either the Interstate Commerce Commission or the Civil Aeronautics Board, as appropriate, and in post offices on the post roads involved, as determined by the Postal Service, at least 15 days prior to the effective date of the contract.

(c) The Postal Service, in determining whether to obtain transportation of mail by carrier or person under subsection (a)(1) of this section, by contract under subsection (a)(4) of this section, or by Government motor vehicle, shall use the mode of transportation which best serves the public interest, due consideration being given to the cost of the transportation service under each mode.

Section 5006. Lien on compensation of contractor.—(a) A person who—

(1) performs service for a contractor or subcontractor in the transportation of mail;

(2) files his contract for service with the Postal Service; and

(3) files satisfactory evidence of performance with the Postal Service; shall have a lien on money due the contractor or subcontractor for the service.

(b) The Postal Service may pay the person establishing a lien under subsection (a) of this section the sum due him, when the contractor or subcontractor fails to pay the person the smount of his lien within 2 months after the expiration of the month in which the service was performed. It shall charge the amount so paid to the contract. The payments may not exceed the annual rate of pay of the contractor or subcontractor.

Section 5007. Free transportation of postal employees.—Each person or carrier engaged in the transportation of mail shall carry on any vessel, train, motor vehicle, or aircraft he operates, upon exhibiting their credentials and without extra charge therefor, persons on duty in charge of the mails or when traveling to and from such duty.

Chapter 52.—TRANSPORTATION OF MAIL BY SURFACE CARRIER

Section

5201. Definitions.
5202. Applicability.
5203. Authorization of service by carrier.
5204. Changes in service; placement of equipment.
5205. Evidence of service.
5206. Fines and deductions.
5207. Interstate Commerce Commission to fix rates.

5208. Procedures.
5209. Special rates.
5210. Intermodal transportation.
5211. Statistical studies.
5212. Special contracts.
5213. Carrier operations: receipts: expenditures.
5214. Agreements with passenger common carriers by motor vehicle.
5215. Star route certification.

Section 5201. Definitions.—For purposes of this chapter—

(1) "Commission" means the Interstate Commerce Commission:

(2) "carrier" and "regulated surface carrier" mean a railroad, a freight forwarder, a motor carrier, or an express company:

(3) "railroad" means a railway common carrier, including an electric urban and interurban railway common carrier:

(4) "freight forwarder" means any regulated freight forwarder which holds itself out to the general public as a common carrier to transport or provide transportation of property as authorized by a permit issued by the Commission:

(5) "motor carrier" means any common carrier by motor vehicle, except a passenger carrying motor vehicle, within the meaning of section 303 (a) (14) of title 49, which holds a certificate of public convenience and necessity issued by the Commission;

(6) "express company" means any express company engaged in transportation as a common carrier for hire under section 1(3) of title 49;

(7) "person" includes any person other than a carrier holding a certificate of public convenience and necessity issued by the Commission; and

(8) "mail" includes equipment and supplies of the Postal Service.

Section 5202. Applicability.—This chapter applies to mail transportation performed by any person or carrier or carrier combination regardless of the mode of transportation actually used to provide the service.

Section 5203. Authorization of service by carrier.—(a) The Postal Service may establish mail routes and authorize mail transportation service thereon.

(b) A carrier shall transport mail offered for transportation by the Postal Service in the manner, under the conditions, and with the service prescribed by the Postal Service. A carrier is entitled to receive fair and reasonable compensation for the transportation and service connected therewith.

(c) The Postal Service shall determine the trains or motor vehicles upon which mail shall be transported, except that no carrier shall be compelled to transport mail on any train or vehicle which is operated exclusively for the transportation of passengers and their baggage.

(d) A carrier shall transport with due speed such mail as the Postal Service directs under this section.

(e) No carrier shall be required to serve territory it is not otherwise authorized to serve, to provide service for the Postal Service at a rate which is less than compensatory cost, or to provide service at a detriment to the carrier or its other customers.

(f) Any order or determination of the Postal Service providing for the transportation of mail by a motor carrier shall be filed with the Commission. If the Commission finds, within 90 days after the filing, that the order or determination will be detrimental to the motor carrier or its other customers, or that such carrier does not operate equipment suitable for the transportation of mail, the order or determination sahll be terminated.

(g) An order or determination of the Postal Service under this section shall be consistent with the orders of the Commission under sections 5207 and 5208 of this title.

Section 5204. Changes in service; placement of equipment.—(a) The Postal Service may authorize, according to the need therefor, new or additional mail transportation service by carriers at the rate or compensation fixed under this chapter. It may reduce or discontinue service with pro rata reductions in compensation and indemnity for the loss of reasonable investment in equipment used exclusively for mail.

(b) A railroad shall place cars used for full or apartment post office service in position at such times before departure as the Postal Service directs.

Section 5205. Evidence of service.—A carrier shall submit evidence of its performance of mail transportation service, signed by an authorized official, in such form and at such times as the Postal Service requires. Mail transportation service is considered that of the carrier performing it regardless of the ownership of the property used by the carrier.

Section 5206. Fines and deductions.—(a) The Postal Service may fine any carrier an amount not to exceed $500 for each day the carrier refuses to perform mail transportation services required by it at rates or compensation established under this chapter.

(b) The Postal Service shall fine a carrier an amount it deems reasonable for failure or refusal by that carrier to transport mail as required by the Postal Service under section 5203 of this title.

(c) The Board may make deductions from the compensation of a carrier for failure to perform mail transportation service as required under section 5203 of this title. If the failure to perform is due to the fault of the carrier, it may deduct a sum not exceeding twice the compensation applying to such service. Such deductions shall not be made prior to the expiration of 60 days following service upon the carrier by the Board of notice of intention to assess a fine or make a deduction and of the basis therefor.

Section 5207. Interstate Commerce Commission to fix rates.—(a) The Commission shall determine and fix the fair and reasonable rates or compensation for the transportation of mail by carrier and the service connected therewith, and shall prescribe the method of computing such rates or compensation. The Commission shall publish its orders stating its determination under this section which shall remain in force until changed by it after notice and hearing.

(b) For the purpose of determining and fixing rates or compensation under this section, the Commission may make just and reasonable classifications of carriers and, where just and equitable, fix general rates applicable to carriers in the same classification.

(c) In determining and fixing fair and reasonable rates or compensation under this section, the Commission shall consider the relation between the Government and carriers as public service corporations, and the nature of public service as distinguished, if there is a distinction, from the ordinary transportation business of the carriers.

(d) Initial rates or compensation for mail transportation service by any carrier or carriers shall be those agreed to by the Postal Service and the carrier or carriers, and such rates or compensation shall continue in effect until such time as the Commission fixes the rates or compensation under subsection (a) of this section.

Section 5208. Procedures.—(a) At any time after 6 months from the entry of an order stating the Commission's determination under section 5207 of this title, the Postal Service or an interested carrier may apply for a reexamination and substantially similar proceedings as have theretofore been had shall be followed with respect to the rates of compensation for services covered by the application. At the conclusion of the hearing the Commission shall enter an order stating its determination.

(b) Except as authorized by sections 5207 (d), 5209, 5210, and 5212 of this title, the Postal Service shall pay a carrier the rates or compensation so determined and fixed for application at such stated times as named in the order.

(c) The Postal Service may file with the Commission a comprehensive plan stating—

(1) its requirements for the transportation of mail by carrier;

(2) the character and speed of the trains or motor vehicles which are to carry the various kinds of mail;

(3) the service, both terminal and en route, which carriers are to render;

(4) what it believes to be the fair and reasonable rates or compensation for the services required; and

(5) all other information which may be material to the inquiry, but such other information may be filed at any time in the discretion of the Commission.

(d) When a comprehensive plan is filed, the Commission shall give notice of not less than 30 days to each carrier required by the Postal Service to transport mail pursuant to such plan. A carrier may file its answer at the time fixed by the Commission, but not later than 30 days after the expiration date fixed by the Commission in the notice, and the Commission shall proceed with the hearing.

Section 5209. Special rates.—Upon petition by the Postal Service, the Commission shall determine and fix carload or truckload, or less than carload or truckload, rates for the transportation of mail not entitled to high priority in transportation. A carrier shall perform the service at the rates so determined when requested to do so and under the conditions prescribed by the Postal Service.

Section 5210. Intermodal transportation.—The Postal Service may permit a carrier to perform mail transportation by any form of transportation it deems appropriate at rates or compensation not exceeding those allowable for similar service by the designated form of transportation.

Section 5211. Statistical studies.—The Postal Service may arrange for weighing and measuring mail transported on carrier mail routes and make other computations for statistical and administrative purposes to carry out the purposes of this chapter.

Section 5212. Special contracts.—The Postal Service may enter into special contracts with any carrier or person, without advertising, for bids and for periods not in excess of 4 years. It may contract to pay lower rates or compensation or, where in its judgment conditions warrant, higher rates or compensation than those determined or fixed by the Commission. The fact that the Commission has not prescribed rates or compensation for the carrier involved, under section 5207 of this title, shall not preclude execution of a contract under this section. Such contracts may be negotiated only after reasonable notice has been posted in advance in post offices on the post roads to be served, and other carriers or persons have been given an opportunity to offer to negotiate for the transportation of mail.

Section 5213. Carrier operations; receipts; expenditures.—The Postal Service shall request any carrier transporting the mails to furnish, under seal, such data relating to the operations, receipts and expenditures of such carrier as may, in its judgment, be deemed necessary to enable it to ascertain the cost of mail transportation and the proper compensation to be paid for such service.

Section 5214. Agreements with passenger common carriers by motor vehicle.—The Postal Service may enter into contracts under such terms and conditions as it shall prescribe and without advertising for bids for the transportation of mail, in passenger-carrying motor vehicles, by passenger common carriers, or by motor vehicles over the regular routes on which the carrier is permitted by law to transport passengers.

Section 5215. Star route certification.—(a) Any person who was a contractor under a star route, mail messenger, or contract motor vehicle service contract on the effective date of this section (or successor in interest to any such person), shall, upon application to the Commission for the territory within which such contractor operated on or before the effective date of this section be issued a certificate of public convenience and necessity as a motor carrier for the transportation of mail by the Commission without the Commission's requiring further proof that the public convenience and necessity will be served by such operation and without further proceedings.

(b) Applications of persons who were not contractors on the effective date of this section shall be decided in accordance with applicable Commission procedure.

(c) For purposes of this section, the term 'person' has the same meaning given that term under section 1 of title 1. [Public Law 91-375, Part V, Aug. 12, 1970, 84 Stat. 766. See vol. 21, p. 17898.]

Regulations of the Commission

36 FR 6426, April 3, 1971, Part 1332: Filing Contracts for Surface Mail Transportation (new part), regulations governing the filing with the Commission of motor carrier mail transportation orders or determinations of the Postal Service, added, effective on date specified and published by the Board of Governors, U.S. Postal Service, or on date of publication, whichever occurs later, but not later than Aug. 12, 1971.

36 FR 13032, July 13, 1971, Part 1332: Filing Contracts for Surface Mail Transportation, §1332.3(b), (d), and (e) amended, effective July 1, 1971, or on date of publication in Federal Register, whichever occurs later.

TITLE 42—THE PUBLIC HEALTH AND WELFARE

CHAPTER 55—NATIONAL ENVIRONMENTAL POLICY

Section 4331. [§*101 as enacted*] Congressional declaration of national environmental policy.—(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and corrdinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a reponsibility to contribute to the preservation and enhancement of the environment.

Section 4332. [§ *102 as enacted*] Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.—The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5. United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act.

2. Construction and interpretation.—See also Jones, Inc., Ext.—Antipollution Control Commodities case, §207(a), n. 25 *Environment.*

Commission in considering petition for abandonment had duty to consider provisions of NEPA in reaching decision which could lead to increased use of alternative modes of transportation with greater polluting effects. Failure to consider environmental effects requires remand of proceedings for such consideration but does not compel court to vacate abandonment order.—City of New York v. United States, 337 F. Supp. 150 (151-2)*; phrase "to fullest extent possible" in this act imposing duties on all federal agencies with respect to consideration and exploration of environmental effects of their decisions and plan obliges agencies to comply to fullest extent possible, and is not intended to relax obligations of administrative authorities to perform duties set forth in section.—Id., p. 151.

NEPA does not indicate an intent to authorize federal agency to compel a parent or sister company to finance losing subsidiary or affiliate simply because latter's demise will have unfortunate environmental effects. —Id., p. 151.

Under NEPA responsibility for evaluation and consideration of environmental consequences of abandonment of railroad line resides in first instance with Commission.—City of New York v. United States, 344 F. Supp. 929 (939)*; court has serious doubt whether substantial evidence test or abuse of discretion test applies to judicial review of merits of agency decision under NEPA. —Id., p. 940.

Commission's environmental impact statement in connection with abandonment of railroad line was adequate although it was couched in terms of alternatives and evidenced some uncertainty as to precise environmental consequences of abandonment. Report evidences no uncertainty as to its ultimate conclusion that, in light of all relevant factors, the decision will not have a significant environmental impact.—Id., p. 939.

Act does not require that agency hold hearings to investigate environmental consequences of a proposed action, does not specify that findings are necessarily to be made, and does not require formal record.—Id., p. 940.

The statute explicitly requires preparation of an agency impact statement in conjunction with "major Federal actions significantly affecting the quality of the human environment"; thus, since it is conceded that no impact statement accompanied Commission orders which approved railroads' addition of an interim 2.5 percent surcharge to certain tariff rates on freight, the Commission has failed to comply with NEPA unless it can show that its orders either (a) are not a "major Federal action" or (b) do not "significantly [affect] the quality of the human environment." However, while the Commission argues that it made an environmental assessment of the surcharge and that it has no obligation to file an impact statement, at least until permanent rate increases take effect, it has failed to prove either of those propositions.—Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) v. United States, 346 F. Supp. 189 (198-9)*.

Contrary to the Commission's position, fact that temporary rate increases must be decided upon quickly and do not lend themselves to the reflective deliberation required by NEPA is not relevant to importance of the agency action; nor is challenged order disqualified as a "major Federal action" because it is only temporary in nature, to be replaced by a permanent rate structure. Also, the CEQ Guidelines make it plain that the necessity of preparing an impact statement cannot be avoided or postponed by designating a decision "temporary" or by breaking it down into minute component parts. Therefore, in light of the interpretations of the statutory language discussed, it is clear beyond doubt that considered order is a "major Federal action"; and, since the Commission decision involves almost every rairoad in the country, and millions of dollars in freight charges, it requires an impact statement.—Id., pp. 199-200.

Nor is mere fact that the Commission order stated that rate increases involved would have no significantly adverse effect on the environment convincing proof that the order will not significantly affect quality of the environment, within meaning of the statute. Main purpose of an impact statement is to force assessment of environmental impact of a proposed action; thus, a statement is required whenever the action *arguably* will have an adverse environmental impact. And under CEQ Guidelines, a statement is to be prepared if there is *potential* that the environment may be significantly affected; also, proposed actions should be covered in all cases where the environmental impact is likely to be highly controversial. When the test is so understood, it is clear that the danger of an adverse impact is sufficiently real to require an impact statement in instant case. On the record in suit to enjoin the Commission's action for failure to comply with NEPA, therefore, the court holds that an impact on effect of the interim surcharge, to extent that it relates to recyclable goods, is required by the statute. —Id., pp. 200-1.

In order that this Commission may implement the directives of NEPA and related pronouncements, we herein institute a proceeding to determine how the Commission may best implement the national environmental policy and meet our statutory obligations. Considered herein are procedural rules and guidelines, general considerations, and specific proposals affecting filing of environmental impact statements and related issues as further explained in appendix B hereto.—Implementation—Nat. Environmental Policy Act, 1969, 339 I.C.C. 508 (510-13).

The National Environmental Policy Act (NEPA) has been construed by the courts to mean essentially that every Federal agency must consider ecological factors when dealing with activities which may have an impact on man's environment, see 430 F. 2d. 199. Commission therefore adopted special rules and regulations designed to implement the NEPA in accordance with guidelines adopted by the Council on Environmental Quality. These rules amend the Code of Federal Regulations by addition of 49 CFR §1100.250 and will become effective upon their publication in the Federal Register.—Implementation—Natl. Environmental Policy Act, 340 I.C.C. 431 (436-41).

Commission required that environmental statements, alleging whether the environment will be affected by the Commission action sought, must be filed with all initial papers filed with this Commission, to enable earliest consideration of the environmental issues and to ensure fullest compliance with the guidelines of the Council.—Id., p. 439.

Notice of all proceedings which may affect human environment will be given to the public through publication in Federal Register insofar as is practicable and to the Council on Environmental Quality and appropriate governmental bodies. An initial decision that environmental issues are not present will not preclude a later finding that such issues are involved and the consequent giving of public notice.—Id., p. 440-41.

Upon remand in 337 F. Supp. 150, Commission concluded that although question of possible environmental damage from grant of application herein has been raised, the denial of application would result in the financial collapse of applicant and under the balancing test in *Calvert Cliffs,* No. 24, 839 (U.S. Ct. App., D.C. 1971), economic harm outweighs environmental damage. Application approved.—Bush Terminal R. Co. Entire Line Abandonment, 342 I.C.C. 34 (35)*.

Total or substantial discontinuance of service sought in this §13a proceeding not approved as such action would increase highway traffic and automobile exhaust pollution levels.—Chicago S.S. & S.B.R. Restructuring of Pass. Serv., 342 I.C.C. 154 (194).

5. Environmental impact statement, when required.—Considered Commission order allowing railroads to add a 2.5 percent interim surcharge to normal freight tariff rates was a "major Federal action" which, under the statute, requires preparation of an agency environmental impact statement, even though the order is only temporary in nature and notwithstanding the fact that temporary rate increases must be decided upon quickly; furthermore, in light of a sufficiently real danger of an adverse impact, the order "significantly [affects] the quality of the human environment" and, thus, an impact statement is required in instant case. Accordingly, in suit to enjoin implementation of challenged order because of the Commission's failure to comply with NEPA, after the traditional balancing of the equities, preliminary relief sought by plaintiff is granted to the extent that the interim surcharge relates to goods being shipped for purposes of recycling.—Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) v. United States, 346 F. Supp. 189 (198-202)*.

In plaintiff's action to enjoin subsequent Commission decision approving selective percentage rate increases because of the agency's failure to prepare an environmental impact statement in conjunction therewith, however, any further equitable relief would be inappropriate. The court's earlier decision is presently before the Supreme Court for review of the preliminary relief granted therein. Also, though no final environmental impact statement was issued with respect to Commission approval of the percentage increases, plaintiff has failed to satisfy requirements, as set forth in 249 F. 2d 921, for granting preliminary equitable relief. Therefore, rather than issue preliminary injunctive relief, the case should be allowed to proceed to the merits for determination whether the Commission, in considered decision, undertook major federal action significantly the quality of the environment which should have been preceeded by an impact statement under NEPA. Motion or preliminary injuction, denied.—Id., 353 F. Supp. 317 (321-3, 324)*.

In compliance with requirements of Council on Environmental Quality, this Commission will issue an environmental impact statement together with and as part of each initial determination made as a result of any hearing (oral or written) in those cases determined to involve environmental issues. Such statements and initial determinations will be circulated to appropriate governmental agencies and made available to the general public in manner prescribed by the Council. All hearings on these issues will be public subject to the Administrative Procedure Act.—Implementation—Natl. Environmental Policy Act, 1969, 340 I.C.C. 431 (441-43).

All interested persons were given due notice that environmental issues would be considered in instant general-revenue proceeding, and all participants have full opportunity to express their views as to impact that previously approved temporary surcharge and requested selective rate increases, to supplant the surcharge, may have on the quality of the human environment; however, many of the comments and presentations submitted, while helpful, are plainly advanced in furtherance of the parties' own particular or special interests. There is no absolute or mathematically conclusive method of balancing the environmental, economic, and social values involved in such a proceeding; therefore, in attempting to analyze the probable results of its action in the proceeding, the Commission carefully examined the evidence, applied its expertise in surface transportation, and used to the fullest extent possible (given the limitations of time and budget) all available expertise in ecological, economical, and social areas. —Increased Freight Rates and Charges, 1972, 341 I.C.C. 288 (313-4, 316)*.

The NEPA impact statement is designed to assure that Federal agencies investigate and give weight to significant environmental effects caused by their action, to require development of less damaging alternatives, and to assure that effects are made known to the public before action is taken. The CEQ Guidelines seek to allow an agency to assess potential effect of a considered action so that adverse effects may be avoided, and environmental quality restored or enhanced, to fullest extent practicable. While the Commission endeavors to develop fully the record in its proceedings, limited funds and personnel as well as nature of the subject matter preclude its direct gathering of any significant amount of environmental data; however, it has used all *practicable* means and measures to evaluate environmental considerations to the fullest extent possible. Also, as the Commission must depend on the parties to a proceeding to furnish substantially all needed information, and as it does not believe Congress intended it to go beyond the "practicable" when enacting NEPA, it will continue to direct the parties to supply information necessary for proper evaluation of environmental issues coming within its jurisdiction.—Id., pp. 318-9.

Thus, the Commission's duty under NEPA to develop the extent of impacts of the surcharge and proposed selective increases will, in its judgment, be entirely satisfied by full consideration of the basic environmental questions presented by the parties: (1) whether increased rail rates will divert traffic from the railroads to other transportation modes in degradation of the human environment, and (2) whether proposed rate increases will adversely affect shipment (and hence, recycling) of secondary materials. Evidence of record convincingly shows that, despite approved increases, secondary materials will continue to move by rail about as they have for many years; it also shows that, without those increases, railroads will not be able economically and efficiently to provide the shipping public with service it requires. Railroads must move freight at reasonable rates and, where practical, should promote shipment of secondary materials; to direct them to do more is to require that they bear their customers' environmental burdens which, financially, most lines are not able to assume. Also, it is the Commission's statutory duty to prevent the carriers from pursuing any course which might jeopardize their total ability and duty to serve.—Id., pp. 319-21.

Mere assertion that approval of the selective increases will tend to divert traffic to truck movement, thereby further despoiling the environment, is no basis for so deciding. While the trend of traffic has been away from railroads, recent marked shifts in traffic patterns fairly cannot be attributed to railroad pricing policies. Truck transportation long has been noted as offering certain advantages over rail movement; at the same time, railroad service to some extent has been deficient. Also, shippers' demand for rail service varies, being much greater for some commodities than for others and more pronounced for shorter distances than for longer; and as to some freight catagories, truckers and barge lines have proved to be forceful and effective competitors of the railroads. In such competitive context the threat of diversion resulting from approval of railroads' proposal fails to agree with reality, for it is unlikely that railroads will avail themselves of the permissive authority to increases rates and charges except to the extent that levels of truck and barge line rates enable them to do so without losing the traffic.—Id., pp. 321-5.

However, even assuming, *arguendo*, that the rail increases would tend to divert traffic to truck transportation, it does not thereby follow that the environment will be further despoiled; at best, the data on relative polluting effect of train and truck operations is fragmentary and inconclusive. Sufficient probative data are not available or published to permit a reliable comparison of exhaust emission characteristics, fuel consumption, and noise levels of locomotives and trucks, although it appears that they are not markedly dissimilar. Nevertheless, in analysis of economic and regulatory aspects of increases proposed in various commodity groups, environmental factors are given careful consideration. Based on that analysis, the Commission is persuaded that prior recent general increases in rail rates and charges have not substantially affected the use, consumption, or shipping of secondary materials, and that increases currently authorized will have no significant adverse effect on the quality of the human environment.—Id., pp. 325-8.

The Commission (Division 1) concluded that action in the applications herein did not constitute a major Federal action having a significant effect on the human environment within the meaning of the National Environmental Policy Act. Commission believes that through its longstanding policy of approving only those operations demonstrably required by the public, adverse environmental effects will be mitigated and the mandate of NEPA fulfilled; and when special circumstances are found to require special remedies, they will be adopted. See 114 MCC 92. However, this decision will be served on the Council on Environmental Quality and the other Federal agencies listed herein as a matter of courtesy.—Jones, Inc., Ext.—Antipollution Control Commodities, 118 M.C.C. 253 (265-69).

Section 4333. [§*103 as enacted*] Conformity of administrative procedures to national environmental policy.—All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into comformity with the intent, purposes, and procedures set forth in this Act.

Section 4334. [§*104 as enacted*] Other statutory obligations of agencies.—Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Section 4335. [§*105 as enacted*] Efforts supplemental to existing authorizations.—The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies. (Public Law 91-190, title I, Jan. 1, 1970, 83 State. 852; Public Law 94-83, Aug. 9, 1975, 89 Stat. 424, amended section 102(2) by adding new subparagraph (D) and redesignating subparagraphs (D), (E), (F), (G), and (H) as (E), (F), (G), (H), and (I), respectively.)

ENERGY POLICY AND CONSERVATION ACT

Title 42—Chapter 77, U. S. Code

Energy Conservation in Policies and Practices of Certain Federal Agencies

Sec. 382 [December 22, 1975] [*42 U.S.C. §6362*]. (a)(1) The Civil Aeronautics Board, the Interstate Commerce Commission, the Federal Maritime Commission, the Federal Power Commission, and the Federal Aviation Administration shall each conduct a study and shall each report to the Congress within 60 days after the date of enactment of this Act with respect to energy conservation policies and practices which such agencies have instituted subsequent to October 1973.

(2) Each of the agencies specified in paragraph (1) shall, within 120 days after the date of enactment of this Act, report to the Congress with respect to the content and feasibility of proposed programs for additional savings in energy consumption by the persons regulated by each such agency which have as a minimum goal a 10-percent reduction, within 12 months of the institution of such programs, in energy consumption from the amount of energy consumed during calendar 1972, including any legislative recommendations each such agency finds are necessary to achieve such goal.

(3) Each of the agencies specified in paragraph (1) shall conduct a study and prepare a report with respect to any requirement of any law administered by such agency or any major regulatory action which the agency determines has the effect of requiring, permitting, or inducing the inefficient use of petroleum products, coal, natural gas, electricity, and other forms of energy, together with a statement of the need, purpose, or justification of any such requirement or such action. Each such report shall be submitted to the Congress within one year after the date of enactment of this Act.

(b) Except as provided in subsection (c), each of the agencies specified in subsection (a)(1) shall, where practicable and consistent with the exercise of their authority under other law, include in any major regulatory action (as defined by rule by each such agency) taken by each such agency, a statement of the probable inpact of such major regulatory action on energy efficiency and energy conservation.

(c) Subsection (b) shall not apply to any authority exercised under any provision of law designed to protect the public health or safety.

[Pub. L. 94-163, 89 Stat. 939.]

SUBMERGED LANDS

Title 43—Chapter 29, U.S. Code

Subchapter III.—Outer Continental Shelf Lands

Section 1334. Administration of Leasing.—[Unchanged. See Vol. 19 p. 16065].

2. Construction and interpretation.—District attorney of Santa Barbara County, Calif., was properly enjoined pending termination of litigation from attempting to frustrate the power of the United States to develop Outer Continental Shelf by use of private leases to oil companies by threatening such oil companies under California statute prohibiting maintenance of a public nuisance.—Union Oil Co. of Calif. v. Minier, 437 F. 2d. 408 (409).

SAFETY APPLIANCE ACTS

Chapter I—Title 45

Historical Note

The functions, powers, and duties assigned to the Commission by this Act have been transferred (in whole or in part) to the Secretary of Transportation, by Public Law 89-670, the Department of Transportation Act [49 U.S.C. §1651] dated Oct. 15, 1966.

Section 1. Driving-wheel brakes and appliances for operating trainbrake system.—[See vol. 4, p. 3225.]

Historical notes, see vol. 4, p. 3225, vol. 18, p. 14757; vol. 19, p. 16066.

Notes of Decisions

Volume 4—p. 3226; Volume 7—p. 6155; Volume 10—p. 8466; Volume 11—p. 9771; Volume 13—p. 11223; Volume 14—p. 11743; Volume 15—p. 12364; Volume 16—p. 13007; Volume 17—p. 13726; Volume 18—p. 14757; Volume 19—p. 16066; Volume 21—p. 17900.

Section 2. Automatic couplers.—[See vol. 4, p. 3238.]

Notes of Decisions

Volume 4—p. 3238; Volume 7—p. 6161; Volume 10—p. 8468; Volume 11—p. 9772; Volume 12—p. 10586; Volume 14—p. 11744; Volume 15—p. 12364; Volume 17—p. 13727; Volume 18—p. 14758; Volume 19—p. 16068; Volume 21—p. 17902.

Section 3. Refusal of insufficiently equipped cars from connecting lines.—[See vol. 4, p. 3244.]

Historical notes, see vol. 4, p. 3225.

Notes of Decisions

Volume 4—p. 3244.

Section 4. Grab irons or handholds for security in coupling and uncoupling cars.—[See vol. 4, p. 3245.]

Historical notes, see vol. 4, p. 3225.

Notes of Decisions

Volume 4—p. 3245; Volume 7—p. 6162; Volume 10—p. 8469; Volume 18—p. 14759; Volume 19—p. 16068.

Section 5. Standard height of drawbars for freight cars; noncomplying cars excluded from traffic.—[See vol. 4, p. 3247.]

Historical notes, see vol. 4, p. 3225.

Notes of Decisions

Volume 4—p. 3247; Volume 17—p. 13728.

Section 6. Failure to equip cars as provided; duty of United States Attorneys and Interstate Commerce Commission; exceptions from operation of provisions.—[See vol. 4, p. 3249; vol. 19, p. 16069.]

Historical note, see vol. 4, p. 3249, vol. 18, p. 14760, vol. 19, p. 16069.

Notes of Decisions

Volume 4—p. 3250; Volume 7—p. 6163; Volume 10—p. 8470; Volume 11—p. 9773; Volume 12—p. 10586; Volume 13—p. 11224; Volume 14—p. 11745; Volume 15—p. 12366; Volume 16—p. 13008; Volume 17—p. 13728; Volume 18—p. 14760; Volume 19—p. 16069; Volume 21—p. 17904.

Section 7. Assumption of risk by employees.—[See vol. 4, p. 3257.]

Historical note, see vol. 4, p. 3225.

Section 8. Provisions of chapter extended.—[See vol. 4, p. 3258.]

Historical notes, see vol. 4, p. 3258.

Notes of Decisions

Volume 4—p. 3259; Volume 7—p. 6164; Volume 10—p. 8472; Volume 11—p. 9773; Volume 13—p. 11225; Volume 14—p. 11746; Volume 15—p. 12366; Volume 16—p. 13009; Volume 17—p. 13730; Volume 18—p. 14761; Volume 19—p. 16069; Volume 21—p. 17906.

Section 9. [§*2 as enacted*] Number of cars to be operated with power or train brakes; increase of number.—[See Vol. 18, p. 14762.]

Notes of Decisions

Volume 4—p. 3269; Volume 7—p. 6167; Volume 10—p. 8473; Volume 14—p. 11746; Volume 15—p. 12367; Volume 16—p. 13011; Volume 19—p. 16070; Volume 21—p. 17907.

Section 10. Former duties, requirements, and liabilities continued unless specifically amended.—[See vol. 4, p. 3271.]

Historical note, see vol. 4, 3258.

Section 11. Safety appliances required for each car; when hand brakes may be omitted.—[See vol. 4, p. 3272.]

Historical note, see vol. 4, p. 3272.

Notes of Decisions

Volume 4—p. 3272; Volume 7—p. 6168; Volume 10—p. 8475; Volume 12—p. 10587; Volume 13—p. 11225; Volume 14—p. 11747; Volume 15—p. 12368; Volume 16—p. 13011; Volume 17—p. 13730; Volume 18—p. 14763; Volume 19—p. 16072; Volume 21—p. 17908.

Section 12. Safety appliances as designated by Commission to be standards of equipment; modification of standard height of drawbars.—[See vol. 4, p. 3274.]

Historical note, see vol. 4, p. 3272.

Notes of Decisions

Volume 4—p. 3274; Volume 10—p. 8475; Volume 19—p. 16075; Volume 21—p. 17910.

Section 13. Penalty for using car not equipped as provided; hauling car for repairs where equipment becomes defective; liability for death or injury of employee; use of chains instead of drawbars.—[See vol. 4, p. 3277, vol. 18, p. 14764.]

Historical note, see vol. 4, p. 3272.

Notes of Decisions

Volume 4—p. 3278; Volume 7—p. 6169; Volume 10—p. 8476; Volume 13—p. 11226; Volume 14—p. 11747; Volume 16—p. 13012; Volume 17—p. 13731; Volume 19—p. 16075; Volume 21—p. 17911.

Sections 14, 15, 16.—[See vol. 4, p. 3283, 3284.]

Notes of Decisions

§14: Volume 4—p. 3283.

ASH PAN ACT

Historical Note

The functions, powers, and duties assigned to the Commission by this Act have been transferred (in whole or in part) to the Secretary of Transportation, by Public Law 89-670, the Department of Transportation Act [49 U.S.C. §1651] dated Oct. 15, 1966.

Sections 17—21. Locomotives to be equipped with safety ash pans; penalty for violation; enforcement.—[See vol. 4, p. 3285, 3286.]

Historical note, see vol. 4, p. 3285.

LOCOMOTIVE INSPECTION ACT

Historical Note

The functions, powers, and duties assigned to the Commission by this Act have been transferred (in whole or in part) to the Secretary of Transportation, by Public Law 89-670, the Department of Transportation Act [49 U.S.C. §1651] dated Oct. 15, 1966.

Section 22. Inspection of locomotives and appurtenances; definitions.—[See vol. 4, p. 3287.]

Historical notes, see vol. 4, p. 3287, vol. 11, p. 9774.

Notes of Decisions

Volume 4—p. 3288; Volume 7—p. 6172; Volume 10—p. 8478; Volume 11—p. 9774; Volume 13—p. 11227; Volume 16—p. 13012; Volume 17—p. 13732; Volume 18—p. 14765; Volume 21—p. 17912.

Section 23. Use of unsafe locomotive and appurtenances unlawful; inspection and tests.—[See vol. 4, p. 3291.] (Feb. 17, 1911, c. 103, §2, 36 Stat. 913; Mar. 4, 1915, c. 169, §1, 38 Stat. 1192; June 7, 1924, c. 355, §2, 43 Stat. 659.)

Historical notes, see vol. 4, p. 3291, vol. 12, p. 10587, vol. 13, p. 11227, vol. 14, p. 11748.

Notes of Decisions

Volume 4—p. 3291; Volume 7—p. 6173; Volume 10—p. 8478; Volume 12—p. 10588; Volume 13—p. 11227; Volume 14—p. 11748; Volume 15—p. 12369; Volume 16—p. 13013; Volume 17—p. 13733; Volume 18—p. 14765; Volume 19—p. 16077; Volume 21—p. 17912.

Section 24. Director and assistant directors of locomotive inspection; appointment and salaries.—[See vol. 17, p. 13733, vol. 14, p. 11749.]

Amendments, see footnotes, vol. 4, p. 3295, vol. 10, pp. 8482-83, vol. 14, p. 11749, vol. 17, p. 13735. Historical notes, see vol. 4, p. 3295, vol. 18, p. 14766, vol. 21, p. 17914.

Sections 25, 26, 27.—[See vol. 14, p. 11749, 11750, vol. 10, p. 8484.]

Section 28. Rules and instructions as to inspection.—[See vol. 10, p. 8486.]

Historical notes, see vol. 4, p. 3287.

Notes of Decisions

Volume 4—p. 3299; Volume 7—p. 6175; Volume 10—p. 8486; Volume 12—p. 10588; Volume 13—p. 11228; Volume 14—p. 11750; Volume 17—p. 13734; Volume 18—p. 14766; Volume 19—p. 16078; Volume 21—p. 17914.

Sections 29-33. Duties of district inspectors; inspection and repairs; notice; appeal Powers and duties of inspectors; examinations of inspectors; Reports.—[See vol. 10, pp. 8487-8490.]

Amendments, see footnotes, vol. 10, pp. 8487-9; historical notes, see vol. 4, p. 3287, vol. 21, p. 17915.

Notes of Decisions

§29: Volume 4—p. 3303; Volume 7—p. 6176.

Section 34. Penalty for violations by carrier; duty of United States attorney to sue therefor; director to give information.—[See vol. 10, p. 8490, vol. 18, p. 14770.]

Amendment, see footnotes, vol. 10, p. 8490; historical note, see vol. 4, p. 3287, vol. 18, p. 14771.

Notes of Decisions

Volume 4—p. 3306; Volume 7—p. 6178; Volume 13—p. 11228; Volume 14—p. 11751; Volume 16—p. 13014; Volume 17—p. 13735; Volume 21—p. 17916.

BLOCK SIGNAL RESOLUTION

Section 35. Investigation and report by Commission; evidence.—[See vol. 4, p. 3307.]

Historical notes, see vol. 4, p. 3307.

Historical Note

The functions, powers, and duties assigned to the Commission by this Act have been transferred (in whole or in part) to the Secretary of Transportation, by Public Law 89-670, the Department of Transportation Act [49 U.S.C. §1651] dated Oct. 15, 1966.

SUNDRY CIVIL APPROPRIATIONS ACT, MAY 27, 1908, SEC. 1

Sections 36, 37. Investigation, testing appliances or systems to promote safety; mail cars.—[See vol. 4, pp. 3309, 3310.]

Historical notes, see vol. 4, pp. 3307, 3309, 3310.

Historical Note

The functions, powers, and duties assigned to the Commission by this Act have been transferred (in whole or in part) to the Secretary of Transportation, by Public Law 89-670, the Department of Transportation Act [49 U.S.C. § 1651] dated Oct. 15, 1966.

ACCIDENT REPORTS ACT

Historical Note

The functions, powers, and duties assigned to the Commission by this Act have been transferred (in whole or in part) to the Secretary of Transportation, by Public Law 89-670, the Department of Transportation Act [49 U.S.C. §1651] dated Oct. 15, 1966.

Section 38. Monthly reports of railroad accidents; duty of carrier to make.—[See vol. 19, p. 16090.]

Notes of Decisions

Volume 4—p. 3311; Volume 12—p. 10589.

Section 39. Penalty for failure to make report.—[See vol. 4, p. 3312.]

Section 40. Investigation by Commission of accidents; cooperation with State commissions; reports of investigations.—[See vol. 4, p. 3313.]

Historical notes, see vol. 4, p. 3311, vol. 11, p. 9775, vol. 12, p. 10589; vol. 19, p. 16080.

Notes of Decisions

Volume 16—p. 13014; Volume 17—p. 13736; Volume 18—p. 14771; Volume 19—p. 16080; Volume 21—p. 17917.

Section 41. Reports not evidence in suits for damages.—[See vol. 4, p. 3313.]

Historical note, see vol. 21, p. 17918.

Notes of Decisions

Volume 19—p. 16081.

Section 42. Rules and regulations; form of reports.—[See Vol. 19, p. 16081.]

Section 43. Definitions.—[See Vol. 19, p. 16082.]

MEDALS OF HONOR ACT

Historical Note

The functions, powers, and duties assigned to the Commission by this Act have been transferred (in whole or in part) to the Secretary of Transportation, by Public Law 89-670, the Department of Transportation Act [49 U.S.C. §1651] dated Oct. 15, 1966. The Medals of Honor Act, formerly codified at 45 U.S.C. §§44-46, has been transferred to 49 U.S.C. §§1201-1203.

HOURS OF SERVICE ACT

Chapter 3.—Title 45

Historical Note

The functions, powers, and duties assigned to the Commission by this Act have been transferred (in whole or in part) to the Secretary of Transportation, by Public Law 89-670, the Department of Transportation Act [49 U.S.C. §1651] dated Oct. 15, 1966.

Section 61. Carriers and transportation subject to provisions of chapter; "railroad" and "employees" defined.—[See vol. 4, p. 3321.]

Historical notes, see vol. 4, p. 3321, vol. 10, p. 8493, vol. 11, p. 9775, vol. 12, p. 10589.

Notes of Decisions

Volume 4—p. 3322; Volume 7—p. 6185; Volume 10—p. 8493; Volume 13—p. 11229; Volume 14—p. 11752; Volume 15—p. 12372; Volume 21—p. 17919.

Section 62. Hours of service limited.—[See vol. 4, p. 3331.]

Historical note, see vol. 4, p. 3321.

Notes of Decisions

Volume 4—p. 3322; Volume 7—p. 6186; Volume 10—p. 8493; Volume 11—p. 9775; Volume 12—p. 10590; Volume 13—p. 11230; Volume 14—p. 11752; Volume 15—p. 12372; Volume 17—p. 13737; Volume 21—p. 17920.

Section 63. Penalty; suits therefore; exceptions from operation of act.—[See vol. 4, p. 3346, vol. 18, p. 14773.]

Historical notes, see vol. 4, pp. 3321, 3346, vol. 18, p. 14773.

Notes of Decisions

Volume 4—p. 3347; Volume 13—p. 11230; Volume 21—p. 17922.

Section 64. Enforcement by Interstate Commerce Commission.—[See vol. 4, p. 3359.]

Historical notes, see vol. 4, pp. 3321, 3359.

Notes of Decisions

Volume 4—p. 3359.

ADAMSON EIGHT-HOUR ACT

Sections 65, 66. Establishment of eight-hour day; Penalty for violation.—[See vol. 4, p. 3361.]

Historical note, see vol. 4, p. 3361.

Notes of Decisions

Volume 4—p. 3362; Volume 7—p. 6187; Volume 13—p. 11231.

Chapter 5.—GOVERNMENT-AIDED RAILROADS

Section 84. Interstate communication.—[See vol. 4, p. 3365.]

Historical note, see vol. 4, p. 3365; vol. 16, p. 12715.

Notes of Decisions

Volume 4—p. 3365.

Chapter 8.—RAILWAY LABOR ACT

Section 151. Definitions.—[Unchanged. See vol. 7, p. 6193, vol. 15, p. 12373.]

Historical note, see vol. 7, p. 6194.

Notes of Decisions

Volume 4—p. 3374; Volume 10—p. 8495; Volume 11—p. 9776; Volume 12—p. 10591; Volume 13—p. 11232; Volume 14—p. 11753; Volume 15—p. 12373; Volume 16—p. 13016; Volume 17—p. 13738; Volume 18—p. 14774; Volume 19—p; 16084; Volume 21—p. 17923.

RAILROAD RETIREMENT ACT OF 1937

Sections 228a (a), (e), (j), (k), (m), 228r.—Definitions.—[Unchanged, with respect to jurisdiction of Commission.]

Notes of Decisions

Volume 10—p. 8502; Volume 11—p. 9778; Volume 12—p. 10592; Volume 13—p. 11233; Volume 14—p. 11754; Volume 15—p. 12374; Volume 18—p. 14774.

RAILROAD RETIREMENT TAX ACT

26 USC §3231, Railroad Retirement Tax Act, 1954, Internal Revenue Code. [Vol. 17, p. 13702.]

RAILROAD RETIREMENT ACT OF 1974

Title 45.—Chapter 9

DEFINITIONS

Sec. 1. [August 29, 1935, June 24, 1937, August 13, 1940, October 16, 1974.] [*45 U. S. C. §231*] For the purposes of this Act—

(a)(1) The term "employer" shall include—

(i) any express company, sleeping-car company, and carrier by railroad, subject to part I of the Interstate Commerce Act;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passenger or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad;

(iii) any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any employer as defined in paragraph (i) or (ii) of this subdivision;

(iv) any railroad association, traffic association, tariff bureau, demurrage bureau, weighing and inspection bureau, collection agency, and any other association, bureau, agency, or organization which is controlled and maintained wholly or principally by two or more employers as defined in paragraph (i), (ii), or (iii) of this subdivision and which is engaged in the performance of services in connection with or incidental to railroad transportation; and

(v) any railway labor organization, national in scope, which has been or may be organized in accordance with the provisions of the Railway Labor Act, as amended, and its State and National legislative committees, general committees, insurance departments, and local lodges and divisions, established pursuant to the constitution or bylaws of such organization.

(2) Notwithstanding the provisions of subdivision (1) of this subsection, the term "employer" shall not include—

(i) any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any such activities; and

(ii) any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general diesel-railroad system of transportation, but shall not exclude any part of the general diesel-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this paragraph.

* * * * *

(c) The term "employee representative" means any officer or official representative of a railway labor organization other than a labor organization included in the term "employer" as defined in subsection (a) who before or after August 29, 1935, was in the service of an employer as defined in subsection (a) and who is duly authorized and designated to represent employees in accordance with the Railway Labor Act, as amended, and any individual who is regularly assigned to or regularly employed by such officer or official representative in connection with the duties of his office.

* * * * *

(j) The term "company" includes corporations, associations, and joint-stock companies.

(m) The term "United States," when used in a geographical sense, means the States and the District of Columbia.

* * * * *

(o) An individual shall be deemed to have a "current connection with the railroad industry" at the time an annuity begins to accrue to him and at death if, in any thirty consecutive calendar months before the month in which an annuity under this Act begins to accrue to him, or the month in which he dies if that first occurs, he will have been in service as an employee in not less than twelve calendar months and, if such thirty calendar months do not immediately precede such month, he will not have been engaged in any regular employment other than employment for an employer or employment with the Department of Transportation, the Interstate Commerce Commission, the National Mediation Board, or the Railroad Retirement Board in the period before such month and after the end of such thirty months. For the purposes of section 2(d) only, an individual shall be deemed also to have a "current connection with the railroad industry" if he will have completed ten years of service and (A) he would be neither fully nor currently insured under the Social Security Act if his service as an employee after December 31, 1936, were included in the term "employment" as defined in that Act, or (b) he has no quarters of coverage under the Social Security Act.

* * * * *

FREE TRANSPORTATION

Sec. 17. [June 24, 1937, October 16, 1974.] [*45 U.S.C. §231p*] It shall not be unlawful for carriers by railroad subject to this Act to furnish free transportation to individuals receiving annuities under this Act in the same manner as such transportation is furnished to employees in their service.

* * * * *

Sec. 602. (a) [October 16, 1974.] [*45 U. S. C. §231a*] The provisions of title I of this Act shall become effective on January 1, 1975, except as otherwise provided herein.

* * * * *

(b) The provision of section 1(o) of the Railroad Retirement Act of 1974 which provides that a "current connection with the railroad industry" will not be broken by "employment with the Department of Transportation, the Interstate Commerce Commission, the National Mediation Board, or the Railroad Retirement Board" shall not be applicable (A) for purposes of paragraph (iv) of section 2(a)(1) of such Act, to an individual who became disabled, as provided for purposes of such paragraph, prior to January 1, 1975, (B) for purposes of section 2(b)(1) of such Act, to an individual whose annuity under section 2(a) of the Railroad Retirement Act of 1937 or section 2(a)(1) of the Railroad Retirement Act of 1974 first began to accrue prior to January 1, 1975, and (C) for purposes of section 2(d)(1) of such Act, to a survivor of a deceased employee if such employee died prior to January 1, 1975.

Historical Note

The Railroad Retirement Act of 1935, 49 Stat. 967-973, was amended by and incorporated in the Railroad Retirement Act of 1937, 50 Stat. 307. The latter was amended by the Railroad Retirement Act of 1974, October 16, 1974, P. L. 93-445 [88 Stat. 1305].

RAILROAD UNEMPLOYMENT INSURANCE ACT

Sections 351, 357, 362.—[Unchanged. See vol. 10, p. 8505, vol. 15, p. 12375.]

Notes of Decisions

Volume 15—p. 12375; Volume 21—p. 17924.

RAIL PASSENGER SERVICE ACT
Title 45—Chapter 14

Title I—Findings, Purposes, and Definitions

Section 101. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSE—[October 30, 1970, June 22, 1972, November 3, 1973, October 28, 1974, May 26, 1975, February 5, 1976.] [*45 U.S.C. §501*] The Congress finds that modern, efficient, intercity railroad passenger service is a necessary part of a balanced transportation system; that the public convenience and necessity require the continuance and improvement of such service to provide fast and comfortable transportation between crowded urban areas and in other areas of the country; that rail passenger service can help to end the congestion on our highways and the overcrowding of airways and airports; that the traveler in America should to the maximum extent feasible have freedom to choose the mode of travel most convenient to his needs; that to achieve these goals requires the designation of a basic national rail passenger system and the establishment of a rail passenger corporation for the purpose of providing modern, efficient, intercity rail passenger service; that Federal financial assistance as well as invesment capital from the private section of the economy is needed for this purpose; and that interim emergency Federal financial assistance to certain railroads may be necessary to permit the orderly transfer of railroad passenger service to a railroad passenger corporation.

Section 102. DEFINITIONS. [*45 U.S.C. §502*] For the purposes of this Act—

(1) "Railroad" means a common carrier by railroad, as defined in section 1(3) of part I of the Interstate Commerce Act, as amended (49 U.S.C. 1(3)) other than the corporation created by title III of this Act.

(2) "Secretary" means the Secretary of Transportation or his delegate unless the context indicates otherwise.

(3) "Commission" means the Interstate Commerce Commission.

(4) "Basic system" means the system of intercity rail passenger service designated by the Secretary under title II and section 403(a) of this Act.

(5) "Intercity rail passenger service" means all rail passenger service other than commuter and other short-haul service in metropolitan and suburban areas, usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations.

(6) "Avoidable loss" means the avoidable cost of providing passenger service, less revenues, attributable thereto, as determined by the Interstate Commerce Commission pursuant to the provisions of section 553 of title 5, United States Code.

(7) "Corporation" means the National Railroad Passenger Corporation created under title III of this Act.

(8) "Regional transportation agency" means an authority, corporation, or other entity established for the purpose of providing passenger service within a region.

(9) "Auto-ferry service" means intercity rail passenger service characterized by transportation of automobiles and their occupants.

5. Intercity rail passenger service.—The Commission, using the six criteria established in 338 ICC 318 found the subject rail service between Philadelphia and Harrisburg. Pa., to be "commuter and other short haul" in nature and not "intercity rail passenger service" within the meaning of this act. The term "commuter and other short-haul" service could reflect an operation extending beyond a metropolitan area to another metropolitan area as is the case herein. Further, inasmuch as this act makes no direct or indirect reference to the inclusion of substituted bus-for-rail service and the legislative history of the statute does not envision any bus service, the Commission found such service, between Lancaster and York, Pa., is not "intercity rail passenger service.—Penn Central Transp. Co.—Status of Passenger Serv., 338 I.C.C. 621 (635-41).

The Commission's function in this case, in accord with district court's order for the Commission to investigate the status of the subject trains, is to determine the character of the service actually being rendered and to analyze that service in light of certain limited and definite statutory language. Therefore, the Commission, using the six criteria established in 338 ICC 318 found the considered rail service between New York City and Chatham, N.Y., to be "intercity rail passenger service" although such service has some minor characteristics of commuter trains, i.e., frequent stops and "casual" use for commuter purposes.—Penn Central Transp. Co.—Status of Passenger Serv., 338 I.C.C. 660 (666-69).

Commission found all subject trains operating solely between New York, N. Y., and Phila., Pa., to be commuter trains. Subject rail service contains 4 metropolitan areas but the actual use of the subject service by passengers as well as adherence to the criteria set forth in 338 ICC 621 show that this service is definitely commuter or short haul in nature. However, four other trains considered herein were found to constitute "intercity rail passenger service" primarily because of the enormous distances between their terminal points and the fact that the metropolitan areas they serve are not contiguous.—Penn Central Transp. Co.—Status of Passenger Serv., 338 I.C.C. 690 (699-703).

Upon request for an opinion by a district court, the Commission found all trains involved herein to be intercity rail passenger trains as defined by the criteria expounded in 338 ICC 318, especially as regards the substantial distances covered. Therefore, defendant lawfully discontinued such trains and the Commission has no jurisdiction to intervene in this proceeding.—Kennedy v. Baltimore & O. R. Co., 342 I.C.C. 19 (20-22).

Regulations of the Commission

39 FR 1047, Jan. 4, 1974, Part 1124: Regulations Governing the Adequacy of Intercity Railroad Passenger Service. Regulations promulgated and numbered 49 CFR §1124.1 et al.

39 FR 41985, Dec. 4, 1974, Part 1124: Regulations Governing the Adequacy of Intercity Railroad Passenger Service. Regulations promulgating penalties for violations, effective on date of service.

TITLE II—BASIC NATIONAL RAIL PASSENGER SYSTEM

Section 201. DESIGNATION OF SYSTEM. [*45 U.S.C. §521.*] In carrying out the congressional findings and declaration of purpose set forth in title

I of this Act, the Secretary, acting in cooperation with other interested Federal agencies and departments, is authorized and directed to submit to the Commission and to the Congress within thirty days after the date of enactment of this Act his preliminary report and recommendations for the basic system. Such recommendations shall specify those points between which intercity passenger trains shall be operated, identify all routes over which service may be provided, and the trains presently operated over such routes, together with basic service characteristics of operations to be provided within the basic system, taking into account schedules, number of trains, connections, through car service, and sleeping, parlor, dining, and lounge facilities. In recommending the basic system the Secretary shall take into account the need for expeditious intercity rail passenger service within and between all regions of the continental United States, and the Secretary shall consider the need for such service within the States of Alaska and Hawaii and the Commonwealth of Puerto Rico. In formulating such recommendations the Secretary shall consider opportunities for provision of faster service, more convenient service, service to more centers of population, and service at lower cost, by the joint operation, for passenger service, of facilities of two or more railroad companies; the importance of a given service to overall viability of the basic system; adequacy of other transportation facilities serving the same points; unique characteristics and advantages of rail service as compared to other modes of transportation; the relationship of public benefits of given services to the costs of providing such services; and potential profitability of the service. The exclusion of a particular route, train, or service from the basic system shall not be deemed to create a presumption that the route, train, or service is not required by public convenience and necessity in any proceeding under section 13a of the Interstate Commerce Act (49 U.S.C. 13a).

Section 202. REVIEW OF THE BASIC SYSTEM. [*45 U.S.C. §522.*] The Commission, the State Commissions, the representatives of the railroads, and labor organizations duly authorized under the Railway Labor Act to represent railroad employees shall, within thirty days after receipt of the preliminary report of the Secretary designating the basic system, review such report consistent with the purposes of this Act and provide the Secretary with their comments and recommendations in writing, The Secretary shall give due consideration to such comments and recommendations. The Secretary shall, within ninety days after the date of enactment of this Act, submit his final report designating the basic system to the Congress. Such final report shall include a summary of their recommendations with his reasons for failing to adopt any such recommendation. The basic system as designated by the Secretary shall become effective for the purposes of this Act upon the date that the final report of the secretary is submitted to Congress and shall not be reviewable in any court.

TITLE III—CREATION OF A RAIL PASSENGER CORPORATION

Section 301. CREATION OF THE CORPORATION. [*45 U.S.C. §541.*] There is authorized to be created a National Railroad Passenger Corporation. The Corporation shall be a for profit corporation, the purpose of which shall be to provide intercity rail passenger service, employing innovative operating and marketing concepts so as to fully develop the potential of modern rail service in meeting the Nation's intercity passenger transportation requirements. The Corporation will not be an agency or establishment of the United States Government. It shall be subject to the provisions of this Act and, to the extent consistent with this Act, to the District of Columbia Business Corporation Act. The right to repeal, alter, or amend this Act at any time is expressly reserved.

Section 302. PROCESS OF ORGANIZATION. [*45 U.S.C. §542*] The President of the United States shall appoint not fewer than three incorporators, by and with the advice and consent of the Senate, who shall also serve as the board of directors for one hundred and eighty days following the date of enactment of this Act. The incorporators shall take whatever actions are necessary to establish the Corporation, including the filing of articles of incorporation, as approved by the President.

Section 303. DIRECTORS AND OFFICERS. [*45 U.S.C. §543.*] (a)(1) The Corporation shall have a board of directors consisting of seventeen individuals who are citizens of the United States selected as follows:

(A) The Secretary of Transportation, ex officio.

(B) Nine members appointed by the President, by and with the advice and consent of the Senate, to serve for terms of four years or until their successors have been appointed and qualified, of whom not more than five shall be appointed from the same political party.

(C) Three members elected annually by the common stockholders of the Corporation.

(D) Four members elected annually by the preferred stockholders of the Corporation, which members shall be elected as soon as practicable after the first issuance of preferred stock by the Corporation.

(2) Any vacancy in the membership of the board shall be filled in the same manner as in the case of the original selection; except that any member appointed by the President under paragraph (1)(B) of this subsection to fill a vacancy shall be appointed only for the unexpired term of the member he is appointed to succeed.

(3) The board shall elect one of its members annually to serve as Chairman.

(4) Not less than three members appointed by the President shall be designated by him, at the time of their appointment, to serve as consumer representatives, of whom not more than two shall be members of the same political party.

(5) Each member not employed by the Federal Government shall receive compensation at the rate of $300 per diem when engaged in the actual performance of duties. In addition, each member shall be reimbursed for necessary travel, secretarial or professional staff support which is reasonably required and subsistence expenses incurred in attending meetings of the board.

(6) No member elected by railroads shall vote on any action of the board relating to any contract or operating relationship between the Corporation and a railroad, but he may be present at meetings of the board at which such matters are voted upon, and he may be included for purposes of determining a quorum and may participate in discussions at any such meeting.

(7) No member appointed by the President may—

(A) have any direct or indirect financial or employment relationship with any railroad, nor

(B) have any significant direct or indirect financial relationship, or any direct or indirect employment relationship, with any person engaged in the transportation of passengers in competition with the Corporation, during the time that he serves on the board.

(8) Pending the election of the four members by the preferred stockholders of the Corporation under paragraph (1)(D) of this subsection, seven members shall constitute a quorum for the purpose of conducting the business of the board.

(9) Any vacancy in the membership of the board of directors required to be filled by appointment by the President under paragraph (1) (B) of this subsection shall be filled by the President not more than one hundered and twenty days after such vacancy occurs.

(b) The board of directors is empowered to adopt and amend by laws governing the operation of the Corporation. Such bylaws shall not be inconsistent with the provisions of this Act or of the articles of incorporation.

(c) The articles of incorporation of the Corporation shall provide for cumulative voting for all stockholders and shall provide that, upon conversion of one-fourth of the outstanding shares of preferred stock, the common stockholders shall be entitled to elect four directors and the preferred stockholders shall be entitled to elect three directors; upon the conversion of one-half of the outstanding shares of preferred stock, the common stockholders shall be entitled to elect five directors and the preferred stockholders shall be entitled to elect two directors; upon the conversion of three-fourths of the outstanding shares of preferred stock, the common stockholders shall be entitled to elect six directors and the preferred stockholders shall be entitled to elect one director; and upon conversion of all outstanding shares of preferred stock, the common stockholders shall be entitled to elect seven directors. Any change of directors resulting from such stock conversion shall take effect at the next annual meeting of the Corporation following such stock conversion.

(d) The Corporation shall have a president and such other officers as may be named and appointed by the board. The rates of compensation of all officers shall be fixed by the board. No officer of the Corporation shall receive compensation at a rate in excess of that prescribed for level I of the Executive Schedule under section 5312 of title 5, United States Code; except that this limitation upon compensation shall not apply in the case of the president of the Corporation if the board determines with respect to such officer that a higher level of compensation is necessary and is not higher than $85,000 or the general level of compensation paid officers of railroads in positions of comparable responsibility, whichever is lesser. Officers shall serve at the please of the board. No individual other than a citizen of the United States may be an officer of the Corporation. No officer of the Corporation may have any direct or indirect employment or financial relationship with any railroad during the time of his employment by the Corporation.

Section 304. FINANCING OF THE CORPORATION. [*45 U.S.C. §544.*]

(a) The Corporation is authorized to issue and have outstanding, in such amounts as it shall determine, two issues of capital stock, a common and a preferred, each of which shall carry voting rights and be eligible for dividends. Common stock may be initially issued only to a railroad. Preferred stock may be issued to and held only by any person other than (1) a railroad or (2) any person controlling one or more railroads, as defined in section 1(3)(b) of the Interstate Commerce Act. The articles of incorporation of the Corporation shall provide for the following respective rights of each issue of stock.

(A) COMMON STOCK.—Common stock shall have a par value of $10 per share and shall be designated fully paid and nonassessable. No dividends shall be paid on the common stock whenever dividends on the preferred stock are in arrears.

(B) (i) PREFERRED STOCK.—Preferred stock shall have a par value of $100 per share and shall be designated fully paid and nonassessable. Dividends shall be fixed at a rate not less than 6 per centum per annum, and shall be cumulative so that, if for any dividend period dividends at the rate fixed in the articles of incorporation shall not have been declared and paid or set aside for payment on the preferred shares, the deficiency shall be declared and paid or set apart for payment prior to the making of any dividend or other distribution on the common shares.

(ii) Preferred stock shall be entitled to a liquidation preference over common stock, which shall entitle preferred stockholders to a liquidating payment not less than par value plus all accrued unpaid dividends prior to any payment on liquidation to common stockholders.

(iii) Preferred stock shall be convertible into shares of common stock at such time and upon such terms as the articles of incorporation shall provide.

(b) At no time after the initial issue is completed shall the aggregate of the shares of common stock of the corporation voted by a single railroad or by any person controlling one or more railroads, as defined in section 1(3) (b) of the Interstate Commerce Act, directly or indirectly through subsidiaries or affiliated companies, nominees, or any person subject to its direction or control, exceed 33 1/3 per centum of such shares issued and outstanding. If any railroad or any person controlling one or more railroads, as defined in section 1(3)(b) of the Interstate Commerce Act (49 U.S.C. 1(3) (b)), owns, directly or indirectly through subsidiaries or affiliated companies, nominees, or any person subject to its direction or control, a number of shares in excess of 33 1/3 per centum of the total number of common shares issued and outstanding, such excess number shall, for voting and quorum purposes, be deemed to be not issued and outstanding.

(c) At no time may any stockholder, or any syndicate or affiliated group of such stockholders, own more than 10 per centum of the shares of preferred stock of the Corporation issued and outstanding.

(d) The articles of incorporation shall provide that no shares of any issue of stock may be redeemed or repurchased for five years, following the date of enactment of this Act.

(e) The Corporation is authorized to issue, in addition to the stock authorized by subsection (a) of this section, nonvoting securities, bonds, debentures, and other certificates of indebtedness as it may determine.

(f) The requirement of section 45(b) of the District of Columbia Business Corporation Act (D.C. Code, sec. 29-920(b)) as to the percentage of stock which a stockholder must hold in order to have the rights of inspection and copying set forth in that subsection shall not be applicable in the case of holders of the stock of the Corporation, and they may exercise such rights without regard to the percentage of stock they hold.

Section 305. GENERAL POWERS OF THE CORPORATION. [*45 U.S.C. §545*] (a) The Corporation is authorized to own, manage, operate, or contract for the operation of intercity trains operated for the purpose of providing modern, efficient, intercity transportation of passengers and to carry mail and express on such trains; to conduct research and development related to its mission; and to acquire by construction, purchase, or gift, or to contract for the use of, physical facilities, equipment, and devices necessary to rail passenger operations. Insofar as is practicable, the Corporation shall directly operate and control all aspects of its rail passenger service. To carry out its functions and purposes, the Corporation shall have the usual powers conferred upon a stock corporation by the District of Columbia Business Corporation Act.

(b) The Corporation shall take such actions as may be necessary to increase its revenues from the carriage of mail and express. In order to increase revenues and to better accomplish the purposes of this Act, the Corporation is authorized to modify its services to provide auto-ferry service as a part of the basic passenger services authorized by this Act, except that nothing contained in this Act shall prevent any other person, other than a railroad (except that for purposes of this section a person primarily engaged in auto-ferry service shall not be deemed to be a railroad), from providing such auto-ferry service over any route in accordance with a certificate issued by the Commission if—

(1) the Commission finds that such auto-ferry service—

(A) will not impair the ability of the Corporation to reduce its losses or to increase its revenues, and

(B) is required to meet the demands of the public, or

(2) such auto-ferry service is being performed by such person on the date of enactment of this paragraph under contracts entered into before October 30, 1970. Nothing in this section shall be construed to restrict the right of a railroad that has not entered into a contract with the Corporation for the provision of rail passenger service from performing auto-ferry service over its own lines. The Corporation is authorized to acquire, lease, modify, or develop the equipment and facilities required for the efficient provision of mail, express, and auto-ferry service, or to enter into contracts for the provision of such service. Upon request by the Corporation, Federal departments and agencies shall, consistent with the provisions of existing law, provide such assistance as may be necessary in carrying out the purposes of this subsection.

(c) The Corporation is authorized to take all steps necessary to insure that no elderly or handicapped individual is denied intercity transportation on any passenger train operated by or on behalf of the corporation, including but not limited to, acquiring special equipment and devices and conducting special training for employees; designing and acquiring new equipment and facilities and eliminating architectural and other barriers in existing equipment and facilities to comply with the highest standards for the design, construction and alteration of property for the accommodation of elderly and handicapped individuals; and providing special assistance while boarding and alighting and in terminal areas to elderly and handicapped individuals.

(d) (1) The Corporation is authorized, to the extent financial resources are available—

(A) to acquire any property which the Secretary, acting in furtherance of his responsibility to design and construct an intermodal transportation terminal at Union Station in the District of Columbia, requests, upon assurance of full reimbursement by the Secretary; and

(B) to acquire any right-of-way, land, or other property (except right-of-way, land, or other property of a railroad or property of a State or political subdivision thereof or of any other governmental agency), which is required to provide intercity rail passenger service;

by the exercise of the right of eminent domain, in accordance with the provisions of this subsection, in the district court of the United States for the judicial district in which such property is located or in any such court if a single piece of property is located in more than one judicial district: *Provided*, That such right may only be exercised when the Corporation cannot acquire such property by contract or is unable to agree with the owner as to the amount of compensation to be paid.

(2) The Corporation shall file with the complaint, or at any time before judgment, a declaration of taking containing or having annexed thereto—

(A) a statement of the public use for which the property is taken:

(B) a description of the property taken sufficient for the identification thereof;

(C) a statement of the estate or interest in the property taken;

(D) a plan showing the property taken; and

(E) a statement of the amount of money estimated by the Corporation to be just compensation for the property taken.

(3) Upon the filing of the declaration of taking and the depositing in court of the amount of money estimated in such declaration to be just compensation for the property, the property shall be deemed to be condemned and taken for the use of the Corporation. Title to such property shall there-upon vest in the Corporation in fee simple absolute or in any lesser estate or interest specified in the declaration of taking, and the right to the money deposited as estimated just compensation shall immediately vest in the persons entitled thereto. The court, after a hearing, shall make a finding as to the amount of money which constitutes just compensation for such property and shall make an award and enter judgment accordingly. Such judgment shall include, as part of the just compensation awarded, interest on the amount finally awarded as the value of the property on the date of taking minus the amount deposited in the court on such date, at the rate of 6 per centum per annum from the date of taking to the date of payment.

(4) Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in the proceeding. If the compensation finally awarded exceeds the amount of money re-

ceived by any person entitled to compensation, the court shall enter judgment against the Corporation for the amount of the deficiency.

(5) Upon the filing of a declaration of taking, the court may fix the time within which, and the terms upon which, the parties in possession are required to surrender possession to the Corporation. The court may make such orders in respect to encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

(e) The Corporation is authorized to take all steps necessary to—

(1) establish improved reservations systems and advertising;

(2) service, maintain, repair, and rehabilitate railroad passenger equipment;

(3) conduct research and development and demonstration programs respecting new rail passenger services;

(4) develop and demonstrate improved rolling stock;

(5) establish and maintain essential fixed facilities for the operation of passenger trains on lines and routes included in the basic system, over which no through passenger trains are being operated at the time of enactment of this Act, including necessary track connections between lines on the same or different railroads;

(6) purchase or lease railroad rolling stock;

(7) develop and operate international intercity rail passenger service between points within the United States and points in Canada and Mexico, including Montreal, Canada; Vancouver, Canada; and Nuevo Laredo, Mexico (for purposes of section 404(b) of this Act, such international rail passenger service is service included within the basic system); and

(8) to carry out other corporate purposes.

(f) The Corporation shall, to the maximum extent practicable, directly perform all maintenance, rehabilitation, repair, and refurbishment of rail passenger equipment. Until the Corporation obtains, by purchase, lease, construction, or any other method of acquisition, Corporation-owned or controlled facilities which are adequate for the proper maintenance, repair, rehabilitation, and refurbishment of the rolling stock and other equipment and facilities of the Corporation, the railroads performing such services shall do so as expeditiously as possible.

(g) The Corporation shall advise, consult and cooperate with, and upon request, is authorized to assist in any other manner the Secretary, the United States Railway Association, the Corps of Engineers, and the Consolidated Rail Corporation in order to facilitate completion and implementation of the Northeast Corridor project, as defined in section 206(a)(3) of the Regional Rail Reorganization Act of 1973, by the earliest practicable date. The Secretary shall assign the highest priority to the completion of such project.

(h) The Secretary of the Treasury and the Attorney General shall (consistent with the effective enforcement of the immigration and customs laws) establish and maintain, in cooperation with the Corporation, en route customs inspection and immigration procedures aboard trains operated in international-al intercity rail passenger service, which procedures will be convenient for passengers and will result in the most rapid possible transit in international intercity rail passenger service.

Section. 306 APPLICABILITY OF THE INTERSTATE COMMERCE ACT AND OTHER LAWS. [*45 U.S.C. §546.*] (a) The Corporation shall be deemed a common carrier by railroad within the meaning of section 1(3) of the Interstate Commerce Act and shall be subject to all provisions, including the provisions of section 22(1), of the Interstate Commerce Act other than those pertaining to—

(1) regulation of rates, fares, and charges;

(2) abandonment or extension of lines or railroads utilized solely for passenger service, and the abandonment or extension of operations over such lines of railroads, whether by trackage rights or otherwise;

(3) regulation of routes and service and, except as otherwise provided in this Act, the discontinuance or change of passenger train service operations.

(b) The Corporation shall be subject to the same laws and regulations with respect to safety and with respect to the representation of its employees for purposes of collective bargaining, the handling of disputes between carriers and their employees, employee retirement, annuity and unemployment systems, and other dealings with its employees as any other common carrier subject to part I of the Interstate Commerce Act.

(c) The Corporation shall not be subject to any State or other law pertaining to the transportation of passengers by railroad as it relates to rates, routes, or service.

(d) Leases and contracts entered into by the Corporation, regardless of the place where the same may be executed, shall be governed by the laws of the District of Columbia.

(e) Persons contracting with the Corporation for the joint use or operation of such facilities and equipment as may be necessary for the provision of efficient and expeditious passenger service shall be and are hereby relieved from all prohibitions of existing law, including the antitrust laws of the United States, with respect to such contracts, agreements, or leases insofar as may be necessary to enable them to enter into such contracts and to perform their obligations thereunder.

(f) All departments, agencies, and instrumentalities of the Federal Government shall, in authorizing travel in the continental United States for their employees or for members of the Armed Forces or commissioned services, treat travel by train (whether or not extra fare trains) on the same basis as travel by other authorized modes.

(g) The Corporation shall be subject to the provisions of section 552 of title 5, United States Code.

(h) No common carrier by railroad may refuse to participate with the Corporation in providing auto-ferry service on the grounds that a State or local law or regulation makes the service unlawful; and neither the Corporation nor such railroad shall be subject to any fine, penalty, or other sanction for violation of a State or local law or regulation which has the effect of prohibiting or impairing the provision of auto-ferry service.

(i) The provisions of section 361 on the Public Health Service Act (42 U.S.C. 264) shall not apply to railroad conveyances operated in intercity rail passenger service.

Section 307. SANCTIONS. [*45 U.S.C. §547.*] (a) If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this Act, obstructs or interferes with any activities authorized by this Act, refuses, fails, or neglects to discharge its duties and responsibilities under this Act, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat.

(b) Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this Act.

Section 308. REPORTS TO THE CONGRESS. [*45 U.S.C. §548.*] (a)(1) Not later than the eightieth day following the end of each calendar month, the Corporation shall transmit to the Congress and release to the public the following information applicable to its operations for such calendar month:

(A) Total itemized revenues and expenses.

(B) Revenues and expenses of each train operated.

(C) Revenues and total expenses attributable to each railroad over which service is provided.

(2) Not later than the fifteenth day following the end of each calendar month, the Corporation shall transmit to the Congress and release to the public the following information applicable to its operations for such calendar month:

(A) The average number of passengers per day on board each train operated.

(B) The on-time performance at the final destination of each train operated, by route and by railroad.

(b) The Corporation shall transmit to the President and to the Congress by February 15 of each year (beginning with 1973), and at such other times as it deems desirable, a comprehensive and detailed report of its operations, activities, and accomplishments under this Act, including a statement of receipts and expenditures for the preceding fiscal year. At the time of its annual report, the Corporation shall submit such legislative recommendations as it deems desirable, including the amount of financial assistance needed for operations and for capital improvements, the manner and form in which the amount of such assistance should be computed, and the sources from which such assistance should be derived.

(c) The Secretary and the Commission shall transmit to the President and to the Congress by March 15 of each year (beginning with 1974) reports (or, in their discretion, a joint report) on the effectiveness of this Act in meeting the requirements for a balanced national transportation system, together with any legislative recommendations. Beginning in 1976, the Secretary's report on the Corporation shall be made part of the Department of Transportation annual report to the Congress.

TITLE IV - PROVISION OF RAIL PASSENGER SERVICES

Section 401. ASSUMPTION OF PASSENGER SERVICE BY THE CORPORATION: COMMENCEMENT OF OPERATIONS. [*45 U.S.C.* §*561*.] (a)(1) On or before May 1, 1971, the Corporation is authorized to contract and, upon written request therefor from a railroad, shall tender a contract to relieve the railroad, from and after May 1, 1971, of its entire responsibility for the provision of intercity rail passenger service. On or after March 1, 1973, but before January 1, 1975, the Corporation is authorized to contract, and upon written request therefor, shall tender a contract to relieve the railroad of its entire responsibility for the provision of intercity rail passenger service and such relief shall become effective upon the date on which such contract is entered into. Contracts may be entered into on or before May 1, 1971, notwithstanding the fact that the decision of the Commission under section 102(f) of this Act with respect to avoidable loss has not become final. Any contract entered into before such decision of the Commission has become final shall be subject to adjustment to assure that the contract is consistent with such final decision of the Commission. The contract may be made upon such terms and conditions as necessary to permit the Corporation to undertake passenger service on a timely basis. Upon its entering into a valid contract (including protective arrangements for employees), the railroad shall be relieved of all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service under part I of the Interstate Commerce Act or any State or other law relating to the provision of intercity passenger service: *Provided*. That any railroad discontinuing a train hereunder must give notice in accordance with the notice procedures contained in section 13a (a) of the Interstate Commerce Act.

(2) In consideration of being relieved of this responsibility by the Corporation, the railroad shall agree to pay to the corporation, each year for three years an amount equal to one-third of 50 percentum of the fully distributed passenger service deficit of the railroad as reported to the Commission for the year ending December 31, 1969. The payment to the Corporation may be made in cash or, at the option of the Corporation, by the transfer of rail passenger equipment or the provision of future service as requested by the Corporation. Unless the railroad waives all rights to receive stock in exchange for its payments, the railroad shall receive common stock from the Corporation in an amount equivalent in par value to each payment.

(3) In agreeing to pay the amount specified in paragraph (2) of this subsection, a railroad may reserve the right to pay a lesser sum to be determined by calculating either of the following:

(A) 100 per centum of the avoidable loss of all intercity rail passenger service operated by the railroad during the period January 1, 1969, through December 31, 1969; or

(B) 200 per centum of the avoidable loss of the intercity rail passenger service operated by the railroad during the period January 1, 1969, through December 31, 1969, covering all intercity service over the routes between those points between which the Secretary, under sections 201 and 202 of title II of this Act, has specified that intercity passenger trains shall be operated within the basic system.

If the amount owed the Corporation under either of these alternatives is agreed by the parties to be less that the amount paid pursuant to paragraph (2), the Corporation shall pay the difference to the railroad and the railroad shall surrender to the Corporation an amount of stock, at par value, equivalent to such payment. If the railroad and the Corporation are unable to agree as to the amount owed, the matter shall be referred to the Interstate Commerce Commission for decision. The Commission, upon investigation, shall decide the issue within ninety days following the date of referral, or within such additional time as the Commission may order not to exceed an aggregate of on hundred and eighty days following such date of referral, and its decision shall be binding on both parties.

(4) The payments to the Corporation shall be made in accordance with a schedule to be agreed upon between the parties. Unless the parties otherwise agree, the payments for each of the first twelve months following the date on which the Corporation assumes any of the operational responsibilities of the railroad shall be in cash and not less than one thirty-sixth of the amount owed.

(b) On May 1, 1971, the Corporation shall begin the provision of intercity rail passenger service between points within the basic system unless such service is being provided (i) either by a railroad with which it has not entered into a contract under subsection (a) of this section or (ii) by a regional transportation agency, provided such agency gives satisfactory assurance to the

Corporation of the agency's financial and operating capability to provide such service, and of its willingness to cooperate with the Corporation and with other regional transportation agencies on matters of through train service, through car service, and connecting train service. The Corporation may at any time subsequent to May 1, 1971, contract with a regional transportation agency to provide intercity rail passenger service between points within the basic system included within the service of such agency.

(c) Except as provided in section 305 (b) of this Act concerning auto-ferry service, no railroad or any other person may, without the consent of the Corporation, conduct intercity rail passenger service over any route over which the Corporation is performing scheduled intercity rail passenger service pursuant to a contract under this section.

2. Construction and interpretation.—Section 401 makes it mandatory that Amtrak enter into a contract relieving a railroad of its entire responsibility for the provision of interstate passenger service; and sets out the formula for computing the consideration (entry fee) which the relieved carrier must pay. It provides for contracts only between Amtrak and railroads and it deals especially with relieving the railroads of their prior obligations.—Penn Central—Compensation for Passenger Service, 342 I.C.C. 765 (767).

Section 402. FACILITY AND SERVICE AGREEMENTS. [*45 U.S.C. §562*] (a) The Corporation may contract with railroads or with regional transportation agencies for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree. In the event of a failure to agree, the Interstate Commerce Commission shall within ninety days after application by the Corporation, if it finds that doing so is necessary to carry out the purposes of this Act, order the provision of services or the use of tracks or facilities of the railroad by the Corporation, on such terms and for such compensation as the Commission may fix as just and reasonable, and the rights of the Corporation to such services or to the use of tracks or facilities of the railroad or agency under such order or under an order issued under subsection (b) of this section shall be conditioned upon payment by the Corporation of the compensation fixed by the Commission. In fixing just and reasonable compensation for the provision of services ordered by the Commission under the preceding sentence, the Commission shall, in fixing compensation in excess of incremental costs, consider quality of service as a major factor in determining the amount (if any) of such compensation. If the amount of compensation fixed is not duly and promptly paid, the railroad or agency entitled thereto may bring an action against the Corporation to recover the amount properly owed. Notwithstanding any other provision of this Act, the Corporation may enter into agreements with any other railroads and with any State (or local or regional transportation agency) responsible for providing commuter rail or rail freight services over tracks, rights-of-way, and other facilities acquired by the Corporation pursuant to authority granted by the Regional Rail Reorganization Act of

1973 and the Railroad Revitalization and Regulatory Reform Act of 1976. In the event of a failure to agree, the Commission shall order that rail services continue to be provided, and it shall, consistent with equitable and fair compensation principles, decide, within 180 days after the date of submission of a dispute to the Commission, the proper amount of compensation for the provision of such services. The Commission, in making such a determination, shall consider all relevant factors, and shall not permit cross subsidization among intercity, commuter, and rail freight services.

(b) To facilitate the initiation of operations by the Corporation within the basic system, the Commission shall, upon application by the Corporation, require a railroad to make immediately available tracks and other facilities. The Commission shall thereafter promptly proceed to fix such terms and conditions as are just and reasonable.

(c) To facilitate such operations by the Corporation as may be deemed by it to be necessary in an emergency, the Commission shall, upon application by the Corporation, require a railroad to make immediately available tracks and other facilities for the duration of such emergency. The Commission shall thereafter promptly proceed to fix such terms and conditions as are just and reasonable including indemnification of the railroad by the Corporation against any casualty risk to which it may be exposed.

(d) (1) If the Corporation and a railroad are unable to agree upon the terms for the sale to the Corporation of property (including interests in property) owned by the railroad and required for intercity rail passenger service, the Corporation may apply to the Commission for an order establishing the need of the Corporation for the property at issue and requiring the conveyance thereof from the railroad to the Corporation on reasonable terms and conditions, including just compensation. Unless the Commission finds that

(A) conveyance of the property to the Corporation would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and

(B) the obligations of the Corporation to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to the Corporation or available to the Corporation by the exercise of its authority under section 305(d) of this Act;

the need of the Corporation for the property shall be deemed to be established and the Commission shall order the conveyance of the property to the Corporation on such reasonable terms and conditions as it may prescribe, including just compensation.

(2) The Commission shall expedite proceedings under this subsection and, in any event, issue its order within one hundred and twenty days from receipt of the application from the Corporation. If just compensa-

tion has not been determined on the date of the order, the order shall require, as part of just compensation, interest at the rate of 6 per centum per annum from the date prescribed for conveyance until just compensation is paid.

(e) (1) Except in an emergency, intercity passenger trains operated by or on behalf of the Corporation shall be accorded preference over freight trains in the use of any given line of track, junction, or crossing, unless the Secretary has issued an order to the contrary in accordance with paragraph (2) of this subsection.

(2) Any railroad whose rights with regard to freight train operation are affected by paragraph (1) of this subsection may file an application with the Secretary requesting appropriate relief. If, after hearing under section 553 of title 5 of the United States Code, the Secretary finds that adherence to such paragraph (1) will materially lessen the quality of freight service provided to shippers, the Secretary shall issue an order fixing rights of trains, on such terms and conditions as are just and reasonable.

(f) If, upon request of the Corporation, a railroad refuses to permit accelerated speeds by trains operated by or on behalf of the Corporation, the Corporation may apply to the Secretary for an order requiring the railroad to permit such accelerated speeds. The Secretary shall make findings as to whether such accelerated speeds are unsafe or otherwise impracticable, and with respect to the nature and extent of improvements to track, signal systems, and other facilities that would be required to make such accelerated speeds safe and practicable. After hearing, the Secretary shall issue an order fixing maximum permissible speeds of Corporation trains, on such terms and conditions as he shall find to be just and reasonable.

2. Construction and interpretation.—Section 402 provides for contracts (discretionary on the part of Amtrak) by which Amtrak may employ the facilities and services of others (including railroads) to carry out the Amtrak obligation to provide interstate rail passenger service in the basic system. In the instant case, although we cannot determine the amount of compensation due to Penn Central without further development of the record, we shall direct Penn Central to provide services and facilities specified in its contract with Amtrak, trom July 1, 1973, a thing required by public convenience and necessity, on condition that just and reasonable terms ultimately determined will become retroactively applicable as of July 1, 1973.—Penn Central—Compensation for Passenger Service, 342 I.C.C. 765 (770-71).

5. Compensation, determination of just and reasonable.—Amtrak is committed to the proposition that just and reasonable compensation should have a necessary relationship to the quality of the service. We are inclined to agree. We not ready to embrace the view that all service performed under §402 terms should be paid for on a full cost basis or that the railroads are entitled to a cost-plus contract situation. In any event, we believe that the determination of just and reasonable compensation should be made to depend on the factual circumstances surrounding particular services.—Penn Central—Compensation for Passenger Service, 342 I.C.C. 765 (770).

Section 403. NEW SERVICE [*45 U.S.C. §563.*] (a) The Corporation may provide intercity rail passenger service in excess of that prescribed for the basic system, either within or outside the basic system, where the Corporation, based on its own or available marketing studies or other similar reports or information determines that experimental or expanded service would be justified, if consistent with prudent management. In determining the establishment of the additional routes, the Corporation shall take into account the current and the estimated future population and economic conditions of the points to be served, the adequacy of alternative modes of transportation available to those points, and the cost of adding the service. The Corporation shall cooperate with State, regional, and local agencies to encourage the use of trains established under this subsection and shall make reasonable efforts to assure high quality of customer services. Any intercity rail passenger service provided under this subsection for a continuous period of two years shall be designated by the Secretary as a part of the basic system.

(b)(1) Any State, regional, or local agency may request of the Corporation rail passenger service beyond that included within the basic system. The Corporation shall institute such service under an agreement if the State, regional, or local agency agrees to reimburse the Corporation for 50 percent of total operating losses and associated capital costs of such service if service can be provided with the resources available to the Corporation and if it is consistent with the following requirements:

(A) The State or agency must make an adequate assurance to the Corporation that it has sufficient resources to meet its share of the costs of such service for the period such service is to be provided under this section.

(B) The State or agency has conducted a market analysis acceptable to the Corporation to insure that there is adequate demand to warrant such service.

An agreement made pursuant to this section may by mutual agreement be renewed for one or more additional terms of not more than 2 years.

(2) If more than one application is made for service and all applications are consistent with the requirements of this subsection, but all the services applied for cannot be provided with the available resources of the Corporation, the Board of Directors shall decide in its discretion which application or applications best serve the public interest and can be provided with the available resources of the Corporation, except that a proposal for State support of a service deleted from the basic system shall be given preference.

(3) The Board of Directors shall establish the basis for determining the total costs and the total revenue of the service provided pursuant to this subsection. The Corporation, at the request of States, may conduct studies during the fiscal year ending June 30, 1976, to determine benefits of seasonal routes to recreational areas.

(c) The Corporation shall initiate not less than one experimental route each year, such route to be designated by the Board of Directors, and shall operate such route for not less than two years. After such two-year period, the Secretary in consultation with the Board of Directors shall terminate such route if he finds that it has attracted insufficient patronage to serve the public convenience and necessity, or he may designate such route as part of the basic system. In carrying out the provisions of this subsection, the Board of Directors shall give priority to experimental routes designed to extend intercity rail passenger service to the major population area of each of the contiguous 48 States which does not have such service to any large population area designated as part of the basic system. After January 1, 1977, all route additions shall be in accordance with the Criteria and Procedures for Making Route and Service Decisions approved by the Congress pursuant to section 404(c)(3), and this subsection shall no longer apply to route additions.

Section 404. DISCONTINUANCE OF SERVICE. [*45 U.S.C. §564.*] (a) Unless it has entered into a contract with the Corporation pursuant to section 401(a)(1) of this Act, no railroad may discontinue any intercity passenger train whatsoever prior to January 1, 1975, the provisions of any other Act, the laws or constitution of any State, or the dicision or order of, or the pendency of any proceeding before a Federal or State court, agency, or authority to the contrary notwithstanding. On and after January 1, 1975, passenger train service operated by such railroad may be discontinued under the provisions of section 13a of the Interstate Commerce Act. Upon filing of a notice of discontinuance by such railroad, the Corporation may undertake to initiate passenger train operations between the points served.

(b)(1) The Corporation must provide the service included within the basic system until October 1, 1976, to the extent it has assumed responsibility for such service by contract with a railroad pursuant to section 401 of this Act.

(2) Except as otherwise provided in this paragraph and in section 403(a) of this Act, service beyond that prescribed for the basic system undertaken by the Corporation upon its own initiative may be discontinued at any time. No such service undertaken by the Corporation on or after January 1, 1973, shall be discontinued until March 1, 1977.

(3) If at any time, after October 1, 1976, the Corporation determines that any train or trains in the basic system in whole or in part are not required by public convenience and necessity, or will impair the ability of the Corporation to adequately provide other services, such train or trains may be discontinued under the procedures of section 13a of the Interstate Commerce Act (49 U.S.C. 13a): *Provided, however,* That at least thirty days prior to any change or discontinuance in whole or in

part, of any service under this subsection, the Corporation shall mail to the Governor of each State in which the train in question is operated, and post in every station, depot, or other facility served thereby notice of the proposed change or discontinuance. The Corporation may not change or discontinue this service if prior to the end of the thirty-day notice period, State, regional, or local agencies request continuation of the service and within ninety days agree to reimburse the Corporation for a reasonable portion of any losses associated with the continuation of service beyond the notice period.

(4) For purposes of paragraph (3) of this subsection, the reasonable portion of such losses to be assumed by the State, regional, or local agency shall be equal to 50 percent of the total operating losses and associated capital costs of such service. If the Corporation and the State, regional, or local agencies are unable to agree upon a reasonable apportionment of such losses, the matter shall be referred to the Secretary for decision. In deciding this issue the Secretary shall take into account the purposes of this Act and the impact of requiring the Corporation to bear such losses upon its ability to provide improved service within the basic system.

(c)(1) Within 120 days after the date of enactment of this subsection, the board of directors of the Corporation shall study, develop, and submit to the Secretary, to the Commission, and to the Congress an initial proposal setting forth criteria and procedures under which the Corporation would be authorized to add or discontinue routes and services. Such criteria and procedures shall include, but need not be limited to—

(A) methods for evaluating the economic and environmental impact of any addition or discontinuance of intercity rail passenger service including an evaluation of the economic impact to the Corporation and to the nation of the addition of new service points along existing or new inter-city routes within the Northeast Corridor;

(B) methods for evaluating the effects of any such addition or discontinuance on connecting parts of the national system of intercity rail passenger service;

(C) methods for estimating, with respect to any such addition or discontinuance, the population to be affected, the demand for intercity rail passenger service, the revenue per passenger mile, and the effect on capital costs and revenue of the Corporation;

(D) methods for evaluating the availability of alternative modes of transportation;

(E) methods for giving public notice of, and obtaining public comments on, any such addition or discontinuance; and

(F) methods for establishing a priority ranking system for routes and trains to meet the needs of the public convenience and necessity for a balanced transportation system, taking into consideration the criteria and procedures referred to in subparagraphs (A) through (E) of this paragraph, together with such other criteria as the board of directors deems appropriate.

(2) Within 150 days after the date of enactment of this subsection, the Secretary and the Commission shall submit to the Congress and to the board of directors of the Corporation their comments on the initial proposal setting forth criteria and procedures developed by the board of directors of the Corporation, together with such recommendations as they may deem appropriate.

(3) Within 30 days after receipt of comments submitted by the Secretary and the Commission under paragraph (2) of this subsection, the board of directors of the Corporation shall consider such comments and shall submit to the Congress a final proposal setting forth criteria and procedures under which the Corporation would be authorized to add or discontinue routes and services within the national system of intercity rail passenger service. The criteria and procedures set forth in such final proposal shall take effect at the end of the first period of 60 calendar days of continuous session of the Congress after the date of its submission, unless either the Senate or the House of Representatives adopts a resolution during such period stating that it does not approve such final proposal. If no resolution is adopted as provided in the preceding sentence, the Corporation may add or discontinue routes and services in accordance with the criteria and procedures set forth in the final proposal, notwithstanding the provisions of section 13a of the Interstate Commerce Act or of section 404(b) (3) of this Act, relating to discontinuance of service within the basic system. Service beyond the basic system referred to in section 404(b) (2) of this Act shall not be discontinued under this subsection until March 1, 1977. For purposes of this paragraph, continuity of session of the Congress is broken only by an adjournment sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded from the computation of the 60-day period.

Section 405. PROTECTIVE ARRANGEMENTS FOR EMPLOYEES. [*45 U.S.C. §565.*] (a) A railroad shall provide fair and equitable arrangements to protect the interests of employees, including employees of terminal companies affected by a discontinuance of intercity rail passenger service whether occurring before, on, or after January 1, 1975. A "discontinuance of intercity rail passenger service" shall include any discontinuance of service performed by railroad under any facility or service agreement under sections 305 and 402 of this Act pursuant to any modification or termination thereof or an assumption of operations by the Corporation.

(b) Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act. Any contract entered into pursuant to the provisions of this title shall specify the terms and conditions of such protective arrangements. No contract under section 401(a)(1) of this Act between a railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective provisions of such contract afford affected employees, including affected terminal employees, fair and equitable protection by the railroad.

(c) Upon commencement of operations in the basic system, the substantive requirements of subsections (a) and (b) of this section shall apply to the Corporation and its employees in order to insure the maintenance of the protective arrangements specified in such subsections, except that nothing in this subsection shall be construed to impose upon the Corporation any obligation of a railroad with respect to any right, privilege, or benefit earned by any employee as a result of prior service performed for such railroad. The Secretary of Labor shall certify that affected employees of the Corporation have been provided fair and equitable protection as required by this section within one hundred and eighty days after assumption of operations by the Corporation.

(d) The Corporation shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors and subcontractors in the performance of construction work financed with the assistance of funds received under any contract or agreement entered into under this title shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act. The Corporation shall not enter into any such contract or agreement without first obtaining adequate assurance that required labor standards will be maintained on the construction work. Health and safety standards promulgated by the Secretary of Labor pursuant to section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333) shall be applicable to all construction work performed under such contracts or agreements, except any construction work performed by a railroad employee. Wage rates provided for in collective bargaining agreements negotiated under and pursuant to the Railway Labor Act shall be considered as being in compliance with the Davis-Bacon Act.

(e) The Corporation shall not contract out any work normally performed by employees in any bargaining unit covered by a contract between the Corporation or any railroad providing intercity rail passenger service upon the date of enactment of this Act and any labor organization, if such contracting out shall result in the layoff of any employee or employees in such bargaining unit.

(f) The Corporation shall take such action as may be necessary to assure that, to the maximum extent practicable, any railroad employee eligible to receive free or reduced-rate transportation by railroad on April 30, 1971, under the terms of any policy or agreement in effect on such date will be eligible to receive, provided space is available, free or reduced-rate transportation on any intercity rail passenger service provided by the Corporation under this Act, on terms similar to those available on such date to such railroad employee under such policy or agreement. However, the Corporation may apply to all railroad employees eligible to receive free or reduced-rate transportation under such policies or agreements, a single systemwide schedule of terms determined by the Corporation to reflect terms applicable to the majority of such employees under those policies or agreements in effect on April 30, 1971. The Corporation shall be reimbursed by the railroads by way of payment or offset for such costs as may be incurred in providing transportation services to railroad employees under any policy or agreement referred to in the first sentence of this subsection, including the costs of implementing and administering this section. Within ninety days after the enactment of this sentence, each railroad shall enter into an agreement with the Corporation for the payment of such expenses. If the Corporation and a railroad are unable to agree as to the amount of any payment owed by the railroad under this subsection, the matter shall be referred to the Commission for decision. The Commission, upon investigation, shall decide the issue within ninety days following the date of referral, and its decision shall be binding on both parties. If any railroad company which operates intercity passenger service not under contract with the Corporation notifies the Corporation and railroads which have entered into the agreement specified above that it will accept the terms of the system-wide schedule of terms and the compensation specified in the agreements, such railroad company shall be reimbursed for services to railroad employees in accordance with the agreements. As used in this subsection, the term 'railroad employee' means (1) an active full-time employee, including any such employee during a period of furlough or while on leave of absence, of a railroad or terminal company, (2) a retired employee of a railroad or terminal company, and (3) the dependents of any employee referred to in clause (1) or (2) of this sentence.

TITLE VI—FEDERAL FINANCIAL ASSISTANCE

Section 601. AUTHORIZATION FOR APPROPRIATIONS. [*45 U.S.C. §601.*] (a) There are authorized to be appropriated to the Secretary for the benefit of the Corporation in fiscal year 1971, $40,000,000, and in subsequent fiscal years through June 30, 1975, a total of $597,300,000. There are authorized to be appropriated to the Secretary for the benefit of the Corporation (1) for the payment of operating expenses for the basic system, and for operating and capital expenses of intercity rail passenger service provided pursuant to section 403(b) of this Act, $350,000,000 for fiscal year 1976, $105,000,000 for the transition period of July 1, 1976, through September 30, 1976 (hereafter in this section referred to as the 'transition period') and $355,000,000 for fiscal year 1977; and (2) for the payment of capital expenditures of the basic system, $110,000,000 for fiscal year 1976; $25,000,000 for the transition period; and $110,000,000 for fiscal year 1977. Of the amounts authorized by clause (1) of the preceding sentence, not more than $25,000,000 for fiscal year 1976, $7,000,000 for the transition period, and $30,000,000 for fiscal year 1977 shall be available for payment of operating and capital expenses of intercity rail passenger service provided pursuant to section 403(b) of this Act. Funds appropriated pursuant to such authorization shall be made available to the Secretary during the fiscal year for which appropriated and shall remain available until expended. Such sums shall be paid by the Secretary to the Corporation for expenditure by it in accordance with spending plans approved by Congress at the time of appropriation and general guidelines established annually by the Secretary. Payments by the Secretary to the Corporation of appropriated funds shall be made more frequently than every 90 days, unless the Corporation, for good cause, requests more frequent payment before the expiration of any 90-day period.

(b)(1) Whenever the Corporation submits any budget estimate or request to the President, the Department of Transportation, or the Office of Management and Budget, it shall concurrently transmit a copy of that estimate or request to the Congress.

(2) Whenever the Corporation submits any legislative recommendation, proposed testimony, or comments on legislation to the President, the Department of Transportation, or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have any authority to require the Corporation to submit its legislative recommendations, proposed testimony, or comments on legislation to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

Section 602. GUARANTEE OF LOANS. [*45 U.S.C. §602*] (a) The Secretary is authorized, on such terms and conditions as he may prescribe, and with the approval of the Secretary of the Treasury, to guarantee any lender or lessor against loss of principal and interest or other contractual commitments, including rentals, on securities, obligations, leases, or loans (including refinancing thereof) issued to finance the upgrading of roadbeds, and the purchase or lease by the Corporation or an agency of new rolling stock, rehabilitation of existing rolling stock, reservation systems, switch and signal systems, and other capital equipment and facilities necessary for the improvement of rail passenger service. The maturity date or term of such securities, obligations, leases, or loans, including all extensions and renewals thereof, shall not be later than 20 years from their date of issuance.;

(b) All guarantees entered into by the Secretary under this section shall constitute general obligations of the United States of America backed by the full faith and credit of the Government of the United States of America.

(c) Any guarantee made by the Secretary under this section shall not be terminated, canceled or otherwise revoked; shall be conclusive evidence that such guarantee complies fully with the provisions of this Act and of the approval and legality of the principal amount, interest rate, lease rate, and all other terms of the securities, obligations, leases, or loans and of the guarantee, and shall be valid and incontestable in the hands of a holder of a guaranteed security, obligation, lease, or loan, except for fraud or material misrepresentation on the part of such holder.";

(d) 'The aggregate unpaid principal amount of securities, obligations, or loans outstanding at any one time, which are guaranteed by the Secretary under this section, may not exceed $900,000,000.'

(e) There are authorized to be appropriated to the Secretary such amounts, to remain available until expended, as are necessary to discharge all his responsibilities under this section.

(f) If at any time the moneys available to the Secretary are insufficient to enable him to discharge his responsibilities under guarantees issued by him under subsection (a) of this section, he shall issue to the Secretary of the Treasury notes or other obligations in such forms and denominations, bearing such maturities and subject to such terms and conditions, as may be prescribed by the Secretary of the Treasury. Redemption of such notes or obligations shall be made by the Secretary from appropriations available under subsection (e) of this section. Such notes or other obligations shall bear interest at a rate determined by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of such notes or other obligations. The Secretary of the Treasury shall purchase any notes or other obligations issued hereunder and for that purpose he is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under that Act, as amended, are extended to include any purchase of such notes or obligations. The Secretary of the Treasury may at any time sell any of the notes or other obligations as acquired by him under this subsection. All redemptions, purchases, and sales by the Secretary of the Treasury of such notes' or other obligations shall be treated as public debt transactions of the United States.

(g) Notwithstanding any other provision of this Act a guarantee may not be made of any security, obligation, lease or loan, if the nature of such security, obligation, or loan is such that the income therefrom is not includable in gross income for the purposes of chapter 1 of the Internal Revenue Code of 1954.

(h) The Secretary shall, within 180 days after the date of enactment of this subsection, issue general guidelines designed to assist the Corporation in the formulation of capital and budgetary plans.

(i) Any request made by the Corporation for the guarantee of a lease or loan pursuant to this section, which has been approved by the Board of Directors of the Corporation, shall be approved by the Secretary if, in the discretion of the Secretary, such request falls within the approved capital and budgetary guidelines issued under subsection (h).

TITLE VII—INTERIM EMERGENCY FEDERAL FINANCIAL ASSISTANCE

Section 701. INTERIM AUTHORITY TO PROVIDE EMERGENCY FINANCIAL ASSISTANCE FOR RAILROAD OPERATING PASSENGER SERVICE. [*45 U.S.C. §621.*] (a) For the purpose of permitting a railroad to enter into or carry out a contract entered into under this Act, the Secretary is authorized, on such terms and conditions as he may prescribe, to (1) make loans to such railroad, or (2) guarantee any lender against loss of principal or interest on any loan to such railroad.

(b) Before making a loan or a guarantee under this section, the Secretary must find in writing, that—

(1) the loan or guarantee is necessary to carry out the provisions of this Act;

(2) the proceeds of any loan made or guaranteed under this Act will be used solely to carry out contracts entered into under this Act;

(3) the loan or guarantee is not otherwise available on reasonable terms and conditions; and

(4) there is reasonable assurance that the business affairs of the railroad will be conducted in a prudent manner..

(c)(1) In any case in which there is a liquidation of the assets of any railroad which is the recipient of a loan made or guaranteed under this Act, the United States shall have the first right to redeem that portion of such assets consisting of those rights-of-way, tracks, and other facilities designated by the Secretary to be necessary for the purpose of providing intercity rail passenger service, including services employing innovative technology, within the basic system. In the case of a railroad in reorganization (as defined in section 102(12) of the Regional Rail Reorganization Act of 1973) which has an agreement with the Corporation to provide intercity rail passenger service on the date of enactment of this sentence, the sale by such railroad of any right-of-way or track over which the Corporation is required to provide intercity rail passenger service on such date of enactment (as an experimental route designated by the Secretary before such date of enactment) shall be deemed to be a liquidation of the assets of such railroad under the first sentence of this paragraph, and the Secretary shall acquire such right, title, and interest in such right-of-way or track, and restore it to such condition, as may be necessary to permit the Corporation to provide intercity rail passenger service over the designated route.

(2) It is the intent of the Congress that, in the case of a loan guarantee under this Act, the United States shall stand in the same position with respect to other creditors as in the case of a direct loan by the United States giving the United States priority over secured and unsecured creditors.

(d) Interest on loans made under this section shall be at a rate not less than a rate determined by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturity of such loans adjusted to the nearest one-eighth of one per centum.

(e) The maturity date on any loan made or guaranteed under this section, including renewals and extensions thereof, shall not be later than five years from the date of issuance.

(f) The aggregate amount of loans and loan guarantees made under this section shall not exceed $200,000,000.

Section 702. AUTHORIZATION FOR APPROPRIATIONS. [*45 U.S.C. §622.*] There are hereby authorized to be appropriated such amounts not to exceed $200,000,000 as may be necessary to carry out the purposes of this title. Any sums appropriated shall be available until expended.

TITLE VIII—MISCELLANEOUS PROVISIONS

Section 801. ADEQUACY OF SERVICE. [*45 U.S.C. §641.*] (a) The Commission shall promulgate, within 60 days from the date of enactment of the Amtrak Improvement Act of 1973, and shall from time to time revise, such regulations as it considers necessary to provide adequate service, equipment, tracks, and other facilities for quality intercity rail passenger service. The Corporation may contract with railroads or with regional transportation agencies for the improvement of service, equipment, tracks and other facilities necessary to meet such regulations promulgated by the Commission. In the event of a failure to agree, the Commission shall by rule establish procedures for allocating between the Corporation and a railroad any cost required to be incurred to meet the regulations establishing adequate service, equipment, tracks, and other facilities.

(b) A civil action may be brought by the Commission to enforce any provision of subsection (a) of this section. The Department of Justice shall represent the Commission in all court proceedings pursuant to this subsection, except that in any case in which the Commission seeks to challenge action or inaction on the part of any party which the Department of Justice is representing, the Commission may be represented by its own attorneys. Unless the Attorney General notifies the Commission within 45 days of a request for representation that he will represent the Commission, such representation may be made by attorneys designated by the Commission. Any action to enforce the provisions of subsection (a) may be maintained in the district court of the United States for any district in which a defendant is found, resides, transacts business, or maintains an agent for service of process. All process in any such suit may be served in any judicial district in which the person to be served is an inhabitant or in which he may be found.

1. Enforcement, jurisdiction.—Section 801 gives the Commission authority to require upgrading of track used for intercity rail passenger service. The Commission, however, is not responsible for safety standards, which are set by the Federal Railroad Administration.—Annual Report, 1975, p. 19.

Section 802. EFFECT ON PENDING PROCEEDINGS. [*45 U.S.C. §642.*] Upon enactment of this Act, no railroad may discontinue any intercity rail passenger service whatsoever other than in accordance with the provisions of this Act, notwithstanding the provisions of any other Act, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any Federal or State court, agency or authority.

Section 803. SEPARABILITY. [*45 U.S.C. §643.*] If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

Section 805. RECORDS AND AUDIT OF THE CORPORATION AND CERTAIN RAILROADS. [*45 U.S.C. §644.*] (1) (A) The accounts of the Corporation shall be audited annually in accordance with generally accepted auditing standards by independent certified public accountants or independent licensed public accountants certified or licensed by a regulatory authority of a State or other political subdivision of the United States. The audit shall be conducted at the place or places where the accounts of the Corporation are normally kept. All books accounts, financial records, reports, files, and other papers, things, or property belonging to or in use by the Corporation and necessary to facilitate the audit shall be made available to the person conducting the audit; and full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians shall be afforded to such person.

(B) The report of each such independent audit shall be included in the annual report required by section 308(a) of this Act. The audit report shall set forth the scope of the audit and include such statements as are necessary to present fairly the Corporation's assets and liabilities, surplus or deficit, with an analysis of the changes therein during the year, supplemented in reasonable detail by a statement of the Corporation's income and expenses during the year, and a statement of the sources and application of funds, together with the independent auditor's opinion of those statements.

(2) (A) The Comptroller General of the United States shall conduct annually a performance audit of the activities and transactions of the Corporation in accordance with generally accepted management principles, and under such rules and regulations as may be prescribed by the Comptroller General. Any such audit shall be conducted at such place or places as the Comptroller General may deem appropriate. The representative of the Comptroller General shall have access to all books, accounts, records, reports, files, and other papers, things, or property belonging to or in use by the Corporation pertaining to its financial and other transactions and necessary to facilitate the audit, and they shall be afforded full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians. All such books, accounts, records, reports, files, papers, and property of the Corporation shall remain in possession and custody of the Corporation.

(B) To the extent the Comptroller General deems necessary in connection with audits as he may make of the financial transactions of the Corporation pursuant to paragraph (A) of this subsection, his representatives shall have access to all books, accounts, records, reports, files, and other papers, things, or property belonging to or in use by any railroad with which the Corporation has entered into a contract for the performance of intercity rail passenger service, pertaining to such railroad's financial transactions and necessary to facilitate the audit, and such representatives shall be afforded full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians. All such books, accounts, records, reports, files, papers, and property of such railroad shall remain in the possession and custody of the railroad.

(C) A report of each such audit shall be made by the Comptroller General to the Congress. The report to the Congress shall contain such comments and information as the Comptroller General may deem necessary to inform Congress of the financial operations and condition of the Corporation, together with such recommendations with respect thereto as he may deem advisable. The report shall also show specifically any program, expenditure, or other financial transaction or undertaking observed in the course of the audit, which, in the opinion of the Comptroller General, has been carried on or made without authority of law. A copy of each report shall be furnished to the President, to the Secretary, and to the Corporation at the time submitted to the Congress.

Section 806. REPORT BY SECRETARY OF TRANSPORTATION. [*45 U.S.C. §645.*] (a) The Secretary shall, on or before March 15, 1973, transmit to the Congress a comprehensive report on the effectiveness of this Act in achieving and promoting intercity rail passenger service and on the effectiveness of the Corporation in implementing the purposes of this Act. Such report shall include an evaluation by the Secretary of the intercity rail passenger service operations assumed by the Corporation including, but not limited to adequacy and effectiveness of services, on time performance, reservations and ticketing, scheduling, equipment, fare structures, routes, and immediate and long-term financial needs.

(b) In addition to the general evaluation and assessment required under subsection (a) of this section, the report by the Secretary shall include—

(1) recommendations for the orderly assumption by the Corporation of the operation and control of all aspects of its intercity rail passenger service, including the performance by the Corporation of all full-time

functions solely related to the intercity rail passenger service provided by it under this Act;

(2) an assessment of whether the board of directors of the Corporation adequately and fairly represents the members of the public who utilize intercity rail passenger services and, if necessary, recommendations for appropriate changes in the composition of such board of directors;

(3) estimates of potential revenues for the Corporation from the transportation of mail and express on intercity passenger trains;

(4) a detailed analysis of the on-time performance of intercity rail passenger service operations assumed by the Corporation, together with such recommendations as the Secretary may deem advisable to eliminate delays in such intercity rail passenger service operations caused by freight train operations;

(5) recommendations with respect to the establishment of the optimum intercity rail passenger service system as soon as possible after July 1, 1973, taking into account economic feasibility, requirements as to public convenience and necessity, and the ability of the Corporation to provide adequate service over the total system, which optimum system shall include recommended routes and discontinuances; and

(6) recommendations with respect to the improvement of tracks and roadbeds on routes over which the Corporation operates intercity passenger trains.

(c) Such report shall contain such additional recommendations as the Secretary may deem advisable to assist the Corporation in carrying out the purposes of this Act, including recommendations for legislative enactments or administrative actions which would enable the Corporation, after July 1, 1973, to discontinue more rapidly and efficiently those routes which do not meet the criteria recommended by the Secretary for the establishment of the optimum intercity rail passenger service system.

(d) In carrying out the provisions of this section, the Secretary may use available services and facilities of other departments, agencies, and instrumentalities of the Federal Government with their consent and on a reimbursable basis.

(e) Departments, agencies, and instrumentalities of the Federal Government shall exercise their powers, duties, and functions in such manner as will assist in carrying out the provisions of this section.

(Public Law 91-518, Oct. 30, 1970, 84 Stat. 1327; as amended by Public Laws 92-316, June 22, 1972, 86 Stat. 227; 93-146, Nov. 3, 1973, 87 Stat. 548; 93-496, Oct. 28, 1974, 88 Stat. 1526; 94-25, May 26, 1975, 89 Stat. 90; 94-210, Feb. 5, 1976, 90 Stat. 31)

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TITLE I—GENERAL PROVISIONS

DECLARATION OF POLICY

Section 101. [*45 U.S.C. §701*] (a) FINDINGS.—The Congress finds and declares that—

(1) Essential rail service in the midwest and northeast region of the United States is provided by railroads which are today insolvent and attempting to undergo reorganization under the Bankruptcy Act.

(2) This essential rail service is threatened with cessation or significant curtailment because of the inability of the trustees of such railroads to formulate acceptable plans of reorganization. This rail service is operated over rail properties which were acquired for a public use, but which have been permitted to deteriorate and now require extensive rehabilitation and modernization.

(3)The public convenience and necessity require adequate and efficient rail service in this region and throughout the Nation to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, States and their political subdivisions, and consumers.

(4) Continuation and improvement of essential rail service in this region is also necessary to preserve and maintain adequate national rail services and an efficient national rail transportation system.

(5) Rail service and rail transportation offer economic and environmental advantages with respect to land use, air pollution, noise levels, energy efficiency and conservation, resource allocation, safety, and cost per ton-mile of movement to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest.

(6) These needs cannot be met without substantial action by the Federal Government.

(b)PURPOSES.—It is therefore declared to be the purpose of Congress in this Act to provide for—

(1) the identification of a rail service system in the midwest and northeast region which is adequate to meet the needs and service requirements of this region and of the national rail transportation system;

(2) the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region;

(3) the establishment of the United States Railway Association, with enumerated powers and responsibilities;

(4) the establishment of the Consolidated Rail Corporation, with enumerated powers and responsibilities;

(5) assistance to States and local and regional transportation authorities for continuation of local rail services threatened with cessation; and

(6) necessary Federal financial assistance at the lowest possible cost to the general taxpayer.

DEFINITIONS

Section 102. [*45 U.S.C. §702*] As used in this Act, unless the context otherwise requires—

(1) "Association" means the United States Railway Association, established under section 201 of this Act;

(2) "Commission" means the Interstate Commerce Commission;

(3) "Corporation" means the Consolidated Rail Corporation required to be established under section 301 of this Act or its successor by merger, consolidation or other form of succession carried out under applicable law for the purpose of changing the State of its incorporation;

(4) "effective date of the final system plan" means the date on which the final system plan or any revised final system plan is deemed approved by Congress, in accordance with section 208 of this Act;

(5) "employee stock ownership plan" means a technique of corporate finance that uses a stock bonus trust or a company stock money purchase pension trust which qualifies under section 401 (a) of the Internal Revenue Code of 1954 (26 U.S.C. 401(a)) in connection with the financing of corporate improvements, transfers in the ownership of corporate assets, and other capital requirements of a corporation and which is designed to build beneficial equity ownership of shares in the employer corporation into its employees substantially in proportion to their relative incomes, without requiring any cash outlay, any reduction in pay or other employee benefits, or the surrender of any other rights on the part of such employees.

(6) "final system plan" means the plan of reorganization for the restructure, rehabilitation, and modernization of railroads in reorganization prepared pursuant to section 206 and approved pursuant to section 208 of this Act;

(7) "Finance Committee" means the Finance Committee of the Board of Directors of the Association established under section 201(i) of this Act;

(8) "includes" and variants thereof should be read as if the phrase "but is not limited to" were also set forth;

(9) "local or regional transportation authority" includes a political subdivision of a State.

(10) "Office" means the Rail Services Planning Office established under section 205 of this Act;

(11) "profitable railroad" means a railroad which is not a railroad in reorganization. The term does not include the Corporation, the National Railroad Passenger Corporation, or a railroad leased, operated, or controlled by a railroad in reorganization in the region.

(12) "rail properties" means assets or rights owned, leased, or otherwise controlled by a railroad (or a person owned, leased, or otherwise controlled by a railroad) which are used or useful in rail transportation service; except that the term, when used in conjunction with the phrase "railroads leased, operated, or controlled by a railroad in reorganization", shall not include assets or rights owned, leased, or otherwise controlled by a Class I railroad which is not wholly owned, operated, or leased by a railroad in reorganization but is controlled by a railroad in reorganization;

(13) "railroad" means a common carrier by railroad as defined in section 1(3) of part I of the Interstate Commerce Act (49 U.S.C. 1(3)). The term includes the Corporation and the National Railroad Passenger Corporation;

(14) "railroad in reorganization" means a railroad which is subject to a bankruptcy proceeding and which has not been determined by a court to be reorganizable or not subject to reorganization pursuant to this Act as prescribed in section 207(b) of this Act. A "bankruptcy proceeding" includes a proceeding pursuant to section 77 of the Bankruptcy Act (11 U.S.C. 205) and an equity receivership or equivalent proceeding;

(15) "Region" means the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan, and Illinois; the District of Columbia; and those portions of contiguous States in which are located rail properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions (as determined by the Commission by order);

(16) 'Secretary' means the Secretary of Transportation or the person at the time performing the duties of the Office of the Secretary of Transportation in accordance with law, or the duly authorized representative of either of them;

(17) "State" means any State of the District of Columbia;

(18) 'subsidiary' means any corporation 100 percent of whose total combined voting shares are, directly or indirectly, owned or controlled by the Corporation; and

(19) 'supplemental transaction' means any transaction set forth in a proposal under section 305 of this Act, within 6 years after the date on which the special court orders conveyances of rail properties to the Corporation under section 303(b) of this Act, under which the Corporation or a subsidiary thereof would (A) acquire rail properties not designated for transfer or conveyance to it under the final system plan, (B) convey rail properties to a profitable railroad, a subsidiary of the Corporation or, other than as designated in the final system plan, to the National Railroad Passenger Corporation or to a State or a local or regional transportation authority, or to any other responsible person for use in providing rail service, or (C) enter into contractual or other arrangements with any person for the joint use of rail properties or the coordination or separation of rail operations or services.

TITLE II—UNITED STATES RAILWAY ASSOCIATION

FORMATION AND STRUCTURE

Section 201.— [*45 U.S.C. §711*] (a) ESTABLISHMENT.—There is established, in accordance with the provisions of this section, an incorporated nonprofit association to be known as the United States Railway Association.

(b) ADMINISTRATION.—The Association shall be directed by a Board of Directors. The individuals designated, pursuant to subsection (d)(2) of this section, as the Government members of such Board shall be deemed the incorporators of the Association and shall take whatever steps are necessary to establish the Association, including filing of articles of incorporation, and serving as an acting Board of Directors for a period of not more than 45 days after the date of incorporation of the Association.

(c) STATUS.—The Association shall be a government corporation of the District of Columbia subject, to the extent not inconsistent with this title, to the District of Columbia Nonprofit Corporation Act (D.C. Code, sec. 29—1001 et seq.). Except as otherwise provided, employees of the Association shall not be deemed employees of the Federal Government. The Association shall have succession until dissolved by Act of Congress, shall maintain its principal office in the District of Columbia, and shall be deemed to be a resident of the District of Columbia with respect to venue in any legal proceeding.

(d) BOARD OF DIRECTORS.—The Board of Directors of the Association shall consist of 11 individuals, as follows:

(1) the Chairman, a qualified individual who shall be appointed by the President, by and with the advice and consent of the Senate;

(2) three Government members, who shall be the Secretary, the Chairman of the Commission, and the Secretary of the Treasury acting directly or at any time through their duly authorized representatives; and

(3) seven nongovernment members, who shall be appointed by the President, by and with the advice and consent of the Senate, on the following basis—

(A) one to be selected from a list of qualified individuals recommended by the Association of American Railroads or its successor who are representatives of profitable railroads;

(B) one to be selected from a list of qualified individuals recommended by the American Federation of Labor and Congress of Industrial Organizations or its successor who are representative of railroad labor;

(C) one to be selected from a list of qualified individuals recommended by the National Governors Conference;

(D) one to be selected from a list of qualified individuals recommended by the National League of Cities and Conference of Mayors;

(E) two to be selected from lists of qualified individuals recommended by shippers and organizations representative of significant shipping interests including small shippers;

(F) one to be selected from lists of qualified individuals recommended by financial institutions, the financial community, and recognized financial leaders.

As used in this paragraph, a list of qualified individuals shall consist of not less than three individuals.

Except for the members appointed under paragraphs (1) and (3) (A), (B), (E), and (F), no member of the Board may have any employment or other direct financial relationship with any railroad. A member of the Board who is not otherwise an employee of the Federal Government may receive $300 per diem when engaged in the actual performance of his duties plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such duties.

(e) TERMS OF OFFICE.—The terms of office of the nongovernment members of the Board of Directors of the Association first taking office shall expire as designated by the President at the time of nomination—two at the end of the second year; two at the end of the fourth year; and three at the end of the sixth year. The term of office of the Chairman of such Board shall be 6 years. Successors to members of such Board shall be appointed in the same manner as the original members and, except in the case of government members, shall have terms of office expiring 6 years from the date of expiration of the terms for which their predecessors were appointed. Any individual appointed to fill a vacancy occurring prior to the expiration of any term of office shall be appointed for the remainder of that term.

(f) QUORUM.—Beginning 45 days after the date of incorporation of the Association, six members of the Board, including three of the nongovernment members shall constitute a quorum for the transaction of any function of the Association.

(g) PRESIDENT.—The Board of Directors of the Association, upon the recommendation of the Secretary, shall appoint a qualified individual to serve as the President of the Association at the pleasure of the Board.The President of the Association, subject to the direction of the Board, shall manage and supervise the affairs of the Association.

(h) EXECUTIVE COMMITTEE.—The Board of Directors of the Association shall have an executive committee which shall consist of the Chairman of the Board, the Secretary, the Chairman of the Commission, and two other members who shall be selected by the members of the Board. The Secretary and the Chairman of the Commission may act in such capacity directly or at any time through their duly authorized representatives.

(i) FINANCE COMMITTEE.—The Board of Directors of the Association shall have a Finance Committee which shall consist of the Chairman of such Board, the Secretary, and the Secretary of the Treasury (acting directly or, at any time, through their respective duly authorized representatives). The Finance Committee is authorized to exercise only such powers as are vested in it pursuant to any provision of this Act. The vesting of such powers in the Finance Committee shall not be deemed to relieve the Board of Directors of its authority to exercise any other powers of the Association, none of which may be delegated to the Finance Committee, or of its general authority to study, analyze, and make advisory findings with respect to any matter relevant to the role of the Association as an investor in securities of the Corporation. Notwithstanding any provision of State law, (1) the Finance Committee, without any requirement of review or approval by the Board of Directors of the Association, is authorized to establish, revise, and maintain its own rules and procedures, by majority vote of the members thereof, and (2) the Board of Directors of the Association shall not have power to take, and shall not take, any action affecting the membership of the Finance Committee or limiting the exercise by the Finance Committee of the powers vested in it pursuant to any provision of this Act.

(j) MISCELLANEOUS.—The Association shall have a seal which shall be judicially recognized.

(2) The Administrator of General Services shall furnish the Association with such offices, equipment, supplies, and services as he is au-

thorized to furnish to any other agency or instrumentality of the United States.

(3) The Secretary is authorized to transfer to the Association or the Corporation rights in intellectual property which are directly related to the conduct of the functions of the Association or the Corporation, to the extent that the Federal Government has such rights and to the extent that transfer is necessary to carry out the purposes of this Act.

(4) Any reference in this Act to the Secretary of the Treasury is to the Secretary of the Treasury or the person at the time performing the duties of the Office of the Secretary of the Treasury in accordance with law, or the duly authorized representative of either of them. Any reference in this Act to the Chairman of the Commission is to the Chairman of the Commission or the person at the time performing the duties of the Chairman of the Commission in accordance with law, or the duly authorized representative of either of them.

(k) USE OF NAMES.—No person, except the Association, shall hereafter use the words "United States Railway Association" as a name for any business purpose. Violations of this provision may be enjoined by any court of general jurisdiction in an action commenced by the Association. In any such action, the Association may recover any actual damages flowing from such violation, and, in addition, shall be entitled to punitive damages (regardless of the existence or nonexistence of actual damage) in an amount not to exceed $100 for each day during which such violation was committed. The district courts of the United States shall have jurisdiction over actions brought under this subsection, without regard to the amount in controversy or the citizenship of the parties.

GENERAL POWERS AND DUTIES OF THE ASSOCIATION

Section 202. [*45 U.S.C. §712*] (a) GENERAL.—To carry out the purpose of this Act, the Association is authorized to—

(1) engage in the preparation and implementation of the final system plan;

(2) issue obligations under section 210 of this title; make loans under section 211 of this title; purchase of otherwise acquire or receive and hold and dispose of securities (whether debt or equity) of the Corporation under section 216 of this title and exercise all of the rights, privileges, and powers of a holder of any such securities; and issue certificates of value under section 306 of this Act;

(3) provide assistance to States and local or regional transportation authorities in accordance with section 403 of this Act;

(4) sue and be sued, complain and defend, in the name of the Association and through its own attorneys; adopt, amend, and repeal bylaws governing the operation of the Association and such rules and regulations as are necessary to carry out the authority granted under this Act; conduct its affairs, carry on operations, and maintain offices;

(5) appoint, fix the compensation, and assign the duties of such attorneys, agents, consultants, and other full- and part-time employees as it deems necessary or appropriate; except that (1) no officer of the Association, including the Chairman, may receive compensation at a rate in excess of that prescribed for level I of the Executive Schedule under section 5312 of title 5, United States Code; and (2) no individual may hold a position in violation of regulations which the Secretary shall establish to avoid conflicts of interest and to protect the interests of the public;

(6) acquire and hold such real and personal property as it deems necessary or appropriate in the exercise of its responsibilities under this Act, and to dispose of any such property held by it;

(7) consult with the Secretary of the Army and the Chief of Engineers and request the assistance of the Corps of Engineers, and the Secretary of the Army may direct the Corps of Engineers to cooperate fully with the Association, the Corporation, or any entity designated in accordance with section 206(c) (1) (C) in order to carry out the purposes of this Act;

(8) consult on an ongoing basis with the Chairman of the Federal Trade Commission and the Attorney General to assess the possible anticompetitive effects of various proposals and to negotiate provisions which would, to the greatest extent practicable in accordance with the purposes of this Act and the goal set forth in section 206(a) (5) of this title, alleviate any such anticompetitive effects;

(9) consult with representatives of science, industry, agriculture, labor, environmental protection and consumer organizations, and other groups, as it deems advisable; and

(10) enter into, without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its functions and duties with any person (including a government entity).

(b) DUTIES.—In addition to its duties and responsibilities under other provisions of this Act, the Association shall—

(1) prepare a survey of existing rail services in the region, including patterns of traffic movement; traffic density over identified lines; pertinent costs and revenues of lines; and plant, equipment, and facilities (including yards and terminals);

(2) prepare an economic and operational study and analysis of present and future rail and express service needs in the region; the nature and volume of the traffic in the region now being moved by rail and

express or likely to be moved by rail and express in the future; the extent to which available alternative modes of transportation could move such traffic as is now carried by railroads in reorganization; the relative economic, social and environmental costs that would be involved in the use of such available alternative modes, including energy resource costs; and the competitive or other effects on profitable railroads;

(3) prepare a study of rail passenger services in the region, in terms of scope and quality;

(4) consider the views of the Office and of all government officials and persons who submit views, reports, or testimony under section 205(d) (1) of this title or in the course of proceedings conducted by the Office;

(5) consider methods of achieving economies in the cost of rail system operations in the region including consolidation, pooling, and joint use or operation of lines, facilities, and operating equipment; relocation; rehabilitation and modernization of equipment, track, and other facilities; and abandonment of lines consistent with meeting needs and service requirements; together with the anticipated economic, social, and environmental costs and benefits of each such method;

(6) consider the effect on railroad employees of any restructuring of rail services in the region;

(7) make available to the Secretary, the Director of the Office and appropriate committees of the Congress all studies, data, and other information acquired or developed by the Association and

(8) study the feasibility of coordinating rail and express service in the region.

(c) INVESTMENT OF FUNDS.—Uncommitted funds of the Association shall be kept in cash on hand or on deposit, or invested in obligations of the United States or guaranteed thereby, or in obligations, participations, or other investments which are lawful investments for fiduciary, trust, or public funds.

(d) EXEMPTION FROM TAXATION.—The Association, including its franchise, capital reserves, surplus, security holdings, and income shall be exempt from all taxation now or hereafter imposed by the United States, any commonwealth, territory, dependency, or possession thereof, or by any State or political subdivision thereof, except that any real property of the Association shall be subject to taxation to the same extent according to its value as other real property is taxed.

(e) ANNUAL REPORT.—The Association shall transmit to the Congress and the President, not later than 90 days after the end of each fiscal year, a comprehensive and detailed report on all activities of the Association during the preceding fiscal year. Each such report shall include (1) the Association's statement of specific and detailed objectives for the activities and programs conducted and assisted under this Act; (2) statements of the Association's conclusions as to the effectiveness of such activities and programs in meeting the stated objectives and the purposes of this Act, measured through the end of the preceding fiscal year; (3) recommendations with respect to any legislation or administrative action which the Association deems necessary or desirable; (4) a statistical compilation of the obligations issued, certificates of value issued, securities purchased, and loans made under this Act; (5) a summary of outstanding problems confronting the Association, in order of priority; (6) all other information required to be submitted to the Congress pursuant to any other provision of this Act; and (7) the Association's projections and plans for its activities and programs during the next fiscal year.

(f) BUDGET.—The receipts and disbursements of the Association other than administrative expenses referred to in subsection (g) of this section and receipts and disbursements under section 216 of this title and section 306 of this Act) in the discharge of its functions shall not be included in the totals of the budget of the United States Government, and shall be exempt from any annual expenditure and net lending (budget outlays) limitations imposed on a budget of the United States Government. The Chairman of the Association shall transmit annually to the Congress a budget for program activities and for administrative expenses of the Association. The Chairman shall report annually to the Congress the amount of net lending of the Association, which would be included in the totals of the budgets of the United States Government, if the Association's activities were not excluded from those totals as a result of this section.

(g) ACCOUNTABILITY.—(1) Section 201 of the Government Corporation Control Act (31 U.S.C. 856) is amended by striking out "and" at the end of clause (6) and by inserting immediately before the period at the end thereof the following: ", (8) the United States Railway Association".

(2) The Chairman of the Association shall transmit annually to the Office of Management and Budget a budget for administrative expenses of the Association. Whenever the Association submits any budget estimate or request to the Office of Management and Budget, it shall concurrently transmit a copy of the estimate or request to the Congress. Within budgetary constraints of the Congress, the maximum feasible and prudent budgetary flexibility shall be provided to the Association to permit effective operations.

ACCESS TO INFORMATION

Section 203. [*45 U.S.C. §713*] (a) PLANNING.—Each railroad operating in the region shall provide such relevant information as may be requested by the Secretary, the Office, or the Association in connection with the performance of their respective functions under any provision of this Act.

(b) OTHER.—Each railroad or other person or government entity seeking financial assistance from the Association shall maintain and make available such records, make and submit such reports, and provide such data, materials, or other relevant information as may be requested by the Association.

(c) ENFORCEMENT.—Where authorized under subsection (a) or (b) of this section and upon presenting appropriate credentials and a written notice of inspection authority, any officer or employee duly designated by the Secretary, the Office, or the Association may, at reasonable times, inspect records, papers, processes, rolling stock, systems, equipment, or facilities and may, in furtherance of their respective functions under this Act, hold such hearings, sit and act at such times and places, administer such oaths, and require by subpoena or other order the attendance and testimony of such witnesses and the production of such information as is deemed advisable. Subpoenas shall be issued under the signature of the Secretary, the Director of the Office, or the Chairman or President of the Association and may be served by any duly designated individual. In case of contumacy or refusal to obey such a subpoena or order by any person who resides, in found, or transacts business within the jurisdiction of any district court of the United States, such district court shall, upon petition, have jurisdiction to issue to such person an order requiring him to comply forthwith. Failure to obey such an order is punishable by such court as a contempt of court.

(d) CONGRESS.—Nothing in this section shall authorize the withholding of information from any duly authorized committee of the Congress.

REPORT

Section 204. [*45 U.S.C. §714*] (a) PREPARATION.—Within 30 days after the date of enactment of this Act, the Secretary shall prepare a comprehensive report containing his conclusions and recommendations with respect to the geographic zones within the region in and between which rail service should be provided and the criteria upon which such conclusions and recommendations are based. The Secretary may use as a basis for the identification of such geographic zones the standard metropolitan statistical areas, groups of such areas, counties, or groups of counties having similar economic characteristics such as mining, manufacturing, or farming.

(b) SUBMISSION.—The Secretary shall submit the report required by subsection (a) of this section to the Office, the Association, the Governor and public utilities commission of each State studied in the report, local governments, consumer organizations, environmental groups, the public, and the Congress. The Secretary shall further cause a copy of the report to be published in the Federal Register.

RAIL SERVICES PLANNING OFFICE

Section 205. [*45 U.S.C. §715*] (a) ESTABLISHMENT.—The Rail Services Planning Office is established as an office in the Commission. The Office shall function continuously pursuant to the provisions of this Act, and shall be administered by a director.

(b) DIRECTOR.—The Director of the Office shall be appointed for a term of 6 years by the Chairman of the Commission with the concurrence of 5 members of the Commission. He shall be appointed and compensated, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, classification, and General Schedule pay rates, at a rate not in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of such title. The Director of the Office shall administer and be responsible for the discharge of the functions and duties of the Office from the date he takes office unless removed for cause by the Commission.

(c) POWERS.—The Director of the Office is subject to the direction of, and shall report to, such member of the Commission as the Chairman thereof shall designate. The Chairman may designate himself as that member. Such Director is authorized with the concurrence of such member or (in case of disagreement) the Chairman of the Commission, to enter into, without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. 5) such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of the functions and duties of the Office with any person (including a government entity). Each department, agency, and instrumentality of the executive branch of the Federal Government and each independent regulatory agency of the United States is authorized, and shall give careful consideration to a request, to furnish to the Director of the Office, upon written request, on a reimbursable basis or otherwise, such assistance as the Director deems necessary to carry out the functions and duties of the Office. Such assistance includes transfer of personnel with their consent and without prejudice to their position and rating.

(d) DUTIES.—In addition to its duties and responsibilities under other provisions of this Act and under the Railroad Revitalization and Regulatory Reform Act of 1976, the Office shall—

(1) assist the Commission in studying and evaluating any proposal, submitted to the Commission pursuant to section 5(2) or (3) of the Interstate Commerce Act (49 U.S.C. 5 (2) or (3)), for a merger, consolidation, unification or coordination project, joint use of tracks or other facilities, or acquisition or sale of assets, which involves any common carrier by railroad subject to part I of such Act;

(2) assist the Commission in developing, with respect to economic regulation of transportation, policies which are likely to result in a more

competitive, energy-efficient, and coordinated transportation system which utilizes each mode of transportation to its maximum advantage to meet the transportation service needs of the Nation;

(3) assist States and local and regional transportation agencies in making determinations whether to provide rail service continuation subsidies to maintain in operation particular rail properties, by establishing criteria for determining whether particular rail properties are suitable for rail service continuation subsidies, with such criteria to include the following considerations: rail properties are suitable if the cost of the required subsidy for such properties per year to the taxpayers is less than (A) the cost of termination of rail service over such properties measured by increased fuel consumption and operational costs for alternative modes of transportation, (B) the cost to the gross national product in terms of reduced output of goods and services, (C) the cost of relocating or assisting through unemployment, retraining, and welfare benefits to individuals and firms adversely affected thereby, and (D) the cost to the environment measured by damage caused by increased pollution;

(4) conduct an ongoing analysis of the national rail transportation needs, evaluate the policies, plans, and programs of the Commission on the basis of such analysis, and advise the Commission of the results of such evaluation;

(5) within 180 days after the date of enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, issue additional regulations, after conducting a proceeding in accordance with the provisions of section 553 of title 5, United States Code, which contain—

(A) standards for the computation of subsidies for rail passenger service (except passenger service compensation disputes subject to the jurisdiction of the Commission under section 402(a) of the Rail Passenger Service Act (45 U.S.C. 562(a)), which are consistent with the compensation principles described in the final system plan and which avoid cross subsidization among commuter, intercity, and freight rail services; and

(B) standards for the determination of emergency commuter rail passenger service operating payments pursuant to section 17 of the Urban Mass Transportation Act of 1964;

(6) determine and publish, and from time to time revise and reissue, standards for determining (A) the 'revenue attributable to the rail properties', (B) the 'avoidable costs of providing service', (C) a'reasonable return on the value,' and (D) a 'reasonable management fee', as those phrases are used in section 304 of this Act, after a proceeding in accordance with the provisions of section 553 of title 5, United States Code; and

(7) employ and utilize the services of attorneys and such other personnel as may be required in order properly to protect the interests of

those communities and users of rail service which, for whatever reason (such as their size or location) might not otherwise be adequately represented in the course of the reorganization process under this Act, until the assumption of such duties by the Office of Rail Public Counsel pursuant to section 27 (4) (d) of the Interstate Commerce Act (49 U.S.C. 27(4) (d)).

(e)ADDITIONAL DUTIES.—(1) Within 270 days after the date of enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, the Office shall issue additional regulations, after conducting a proceeding in accordance with section 553 of title 5, United States Code. Such regulations shall (A) develop an accounting system which will permit the collection and publication by the Corporation or by profitable railroads providing service over lines scheduled for abandonment, of information necessary for an accurate determination of the attributable revenues, avoidable costs, and operations of light density lines as operating and economic units, and (B) determine the 'avoidable costs of providing rail freight service', as that phrase is used in section 1a(6) (a) (ii) (A) of the Interstate Commerce Act. The Office may, at any time, revise and republish the standards and regulations required by this section to incorporate changes made necessary by the accounting system developed pursuant to this subsection.

(2) Upon the request of a State in the region, within 90 days after the date of enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, the Office shall prepare and publish an evaluation of the economic viability of any or all light density lines within such State which are not designated for inclusion in the final system plan. Such an evaluation shall include an analysis of the actions which may be necessary to make the operation of rail services over any such line economical. The results of each such evaluation shall be transmitted to the requesting State and published in the Federal Register, not later than 1 year after the date such request is received by the Office.

FINAL SYSTEM PLAN

Section 206. [*45 U.S.C. §716*] (a) GOALS.—The final system plan shall be formulated in such a way as to effectuate the following goals:

(1) the creation, through a process of reorganization, of a financially self-sustaining rail and express service system in the region;

(2) the establishment and maintenance of a rail service system adequate to meet the rail transportation needs and service requirements of the region;

(3) the establishment of improved high-speed rail passenger service, consonant with the recommendations of the Secretary in his report of

September 1971, entitled "Recommendations for Northeast Corridor Transportation";

(4) the preservation, to the extent consistent with other goals, of existing patterns of service by railroads (including short-line and terminal railroads), and of existing railroad trackage in areas in which fossil fuel natural resources are located, and the utilization of those modes of transportation in the region which require the smallest amount of scarce energy resources and which can most efficiently transport energy resources;

(5) the retention and promotion of competition in the provision of rail and other transportation services in the region;

(6) the attainment and maintenance of any environmental standards, particularly the applicable national ambient air quality standards and plans established under the Clean Air Act Amendments of 1970, taking into consideration the environmental impact of alternative choices of action;

(7) the movement of passengers and freight in rail transportation in the region in the most efficient manner consistent with safe operation, including the requirements of commuter and intercity rail passenger service; the extent to which there should be coordination with the National Railroad Passenger Corporation and similar entities; and the identification of all short-to-medium distance corridors in densely populated areas in which the major upgrading of rail lines for high-speed passenger operation would return substantial public benefits; and

(8) the minimization of job losses and associated increases in unemployment and community benefit costs in areas in the region presently served by rail service.

(b) FACTORS.—The final system plan shall be based upon due consideration of all factors relevant to the realization of the goals set forth in subsection (a) of this section. Such factors include the need for and the cost of rehabilitation and modernization of track, equipment, and other facilities; methods of achieving economies in the cost of rail operations in the region; means of achieving rationalization of rail services and the rail service system in the region; marketing studies; the impact on railroad employees; consumer needs; traffic analyses; financial studies; and any other factors identified by the Association under section 202(b) of this title or in the report of the Secretary required under section 204(a) of this title.

(c) DESIGNATIONS.—The final system plan shall designate—

(1) which rail properties of railroads in reorganization in the region or of railroads leased, operated, or controlled by any railroad in reorganization in the region—

(A) shall be transferred to the Corporation: *Provided*, That the Corporation shall, within 95 days after the effective date of the final system plan, give notice to the Association of which such rail properties, if any, are to be transferred to a subsidiary of the Corporation in the event that the Board of Directors of the Association finds that such transfer would be consistent with the final system plan;

(B) shall be offered for sale to a profitable railroad operating in the region and, if such offer is accepted, operated by such railroad; the plan shall designate what additions shall be made to the designation under subparagraph (A) of this paragraph and what alternative designations shall be made under this paragraph in the event such profitable railroad fails to accept such offer;

(C) shall be purchased, leased, or otherwise acquired from the Corporation by the National Railroad Passenger Corporation in accordance with the exercise of its option under section 601(d) of this Act for improvement to achieve the goal set forth in subsection (a)(3) of this section;

(D) may be purchased or leased from the Corporation by (i) a State or a local or regional transportation authority to meet the needs of commuter and intercity rail passenger service, of (ii) the National Railroad Passenger Corporation to meet the needs of improved rail passenger service over intercity routes, other than properties designated pursuant to subparagraph (C) of this paragraph; and

(E) if not otherwise required to be operated by the Corporation, a government entity, or a responsible person, are suitable for use for other public purposes, including highways, other forms of transportation, conservation, energy transmission, education or health care facilities, or recreation. In carrying out this subparagraph, the Association shall solicit the views and recommendations of the Secretary, the Secretary of the Interior, the Administrator of the Environmental Protection Agency, and other agencies of the Federal Government and of the States and political subdivisions thereof within the region, and the general public; and

(2) which rail properties of profitable railroads operating in the region may be offered for sale to the Corporation or to other profitable railroads operating in the region subject to paragraphs (3) and (4) of subsection (d) of this section. Any rail properties designated to be offered for sale to the Corporation may be sold instead to a subsidiary of the Corporation.

(d) TRANSFERS.—All transfers or conveyances pursuant to the final system plan shall be made in accordance with, and subject to, the following principles:

(1) All rail properties to be transferred to the Corporation or any subsidiary thereof by a profitable railroad, by trustees of a railroad in reorganization, or by any railroad leased, operated, or controlled by a railroad in reorganization in the region, shall be transferred in exchange for stock and other securities of the Corporation or any subsidiary

thereof (including obligations of the Association) and the other benefits accruing to such railroad by reason of such transfer.

(2) All rail properties to be conveyed to a profitable railroad operating in the region by trustees of a railroad in reorganization, or by any railroad leased, operated, or controlled by a railroad in reorganization in the region, shall be conveyed in exchange for compensation from the profitable railroad.

(3) Notwithstanding any other provision of this Act, no acquisition under this Act shall be made by any profitable railroad operating in the region without a determination with respect to each such transaction and all such transactions cumulatively (A) by the Association, upon adoption and release of the preliminary system plan, that such acquisition or acquisitions will not materially impair the profitability of any other profitable railroad operating in the region or of the Corporation, and (B) by the Commission, which shall be made within 90 days after adoption and release by the Association of the preliminary system plan, that such acquisition or acquisitions will be in full accord and comply with the provisions and standards of section 5 of part I of the Interstate Commerce Act (49 U.S.C.5). All determinations made by the Association in the correction to the preliminary system plan published on April 11, 1975 (40 Fed. Reg. 16377), shall be treated for all purposes as if they had been made upon adoption and release by the Association of the preliminary system plan. All determinations made by the Commission with respect to such correction shall be treated for all purposes as if they had been made within 90 days after adoption and release by the Association of the preliminary system plan. All determinations made by the Commission with respect to acquisitions by profitable railroads referred to in any supplement to the preliminary system plan published under section 207(b)(2) of this title shall be deemed to be timely if made prior to the adoption of the final system plan under section 207(c) of this title. The determination by the Association shall not be reviewable in any court. The determination by the Commission shall not be reviewable in any court.

(4) Where the final system plan designates specified rail properties of a railroad in reorganization in the region, or of a railroad leased, operated, or controlled by a railroad in reorganization in the region, to be offered for sale to and operated by a profitable railroad operating in the region, such designation shall terminate 7 days after the date of the enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 unless, prior to such date, such profitable railroad has notified the Association in writing of its acceptance of such offer. Any such offer may be modified until the date of acceptance thereof, unless such modification results in an offer for the sale of rail properties at less than the net liquidation value thereof. Where the final system plan designates specified rail properties of a profitable railroad operating in the region

as authorized to be offered for sale or lease to the Corporation or to other profitable railroads operating in the region, such designation and authorization shall terminate 95 days after the effective date of the final system plan unless, prior to such date, a binding agreement with respect to such properties has been entered into and concluded.

(5)All properties—

(A) transferred by the Corporation pursuant to sections 206(c)(1)(C) and 601(d) of this Act;

(B) transferred by the Corporation to any State (or local or regional transporation authority), pursuant to subsection (c)(1)(D) of this section, or

(C) transferred by the Corporation to any State, local or regional transportation authority, or the National Railroad Passenger Corporation, within 900 days after the date of conveyance, pursuant to section 303(b)(1) of this Act, to meet the needs of commuter or intercity rail passenger service, shall be transferred at a value related to the value received from the Corporation pursuant to the final system plan for the transfer to such Corporation of such properties. The value of any such properties, which are transferred pursuant to subparagraph (B) or (C) of this paragraph, shall be adjusted to reflect the value attributable to any applicable maintenance and improvement provided by the Corporation (to the extent the Corporation has not been released from the obligation to pay for such improvements) and the cost to the Corporation of transferring such properties.

(6) Notwithstanding any statement to the contrary in the final system plan, a State (or a local or regional transportation authority) shall not be required to deliver to the Corporation a firm commitment to acquire rail properties designated to such State or authority prior to 7 days after the date of enactment of this paragraph.

(e) CORPORATION FEATURES.—The final system plan shall set forth—

(1) pro forma earnings for the Corporation, as reasonably projected and considering the additions or changes in the designation of rail properties to be operated by the Corporation which may be made under subsection (d)(4) of this section;

(2) the capital structure of the Corporation, based on the pro forma earnings of the Corporation as set forth, including such debt capitalization as shall be reasonably deemed to conform to the requirements of the public interest with respect to railroad debt securities, including the adequacy of coverage of fixed charges; and (3) the manner in which employee stock ownership plans may, to the extent practicable, be utilized for meeting the capitalization requirements of the Corporation, taking into account (A) the relative cost savings compared to conventional methods of corporate finance; (B) the labor cost savings; (C) the potential for minimizing strikes and producing more harmonious rela-

tions between labor organizations and railway management; (D) the projected employee dividend incomes; (E) the impact on quality of service and prices to railway users; and (F) the promotion of the objectives of this Act of creating a financially self-sustaining railway system in the region which also meets the service needs of the region and the Nation.

(f) VALUE.—The final system plan shall designate the value of all rail properties to be transferred under the final system plan and the value of the securities and other benefits to be received for transferring those rail properties to the Corporation in accordance with the final system plan.

(g) OTHER PROVISIONS.—The final system plan may recommend arrangements among various railroads for joint use or operation of rail properties on a shared ownership, cooperative, pooled, or condominium-type basis, subject to such terms and conditions as may be specified in the final system plan. The final system plan shall also make such designations as are determined to be necessary in accordance with the provisions of section 402 or 403 of this Act.

(h) OBLIGATIONAL AUTHORITY.—The final system plan shall recommend the amount of obligations of the Association which are necessary to enable it to implement the final system plan.

(i) TERMS AND CONDITIONS FOR SECURITIES.—The final system plan may include terms and conditions for any securities to be issued by the Corporation in exchange for the conveyance of rail properties under the final system plan which in the judgement of the Association will minimize any actual or potential debt burden on the Corporation. Any such terms and conditions for securities of the Corporation which purport to directly obligate the Association shall not become effective without affirmative approval, with or without modification by a joint resolution of the Congress.

(j) Any rail properties over which rail service was being provided as of the date of enactment of this Act, and which were recommended in the preliminary system plan for transfer to the Corporation, shall be deemed to be designated in the final system plan for transfer to the Corporation under subsection (c)(1)(A) of this section. Any designation in the final system plan, pursuant to subsection (c)(1)(B) of this section, of overhead trackage rights to be acquired by a profitable railroad operating in the region over specified rail properties to be acquired by the Corporation, where such designation does not (1) authorize such profitable railroad to interchange traffic with at least one railroad, or (2) provide for the connection of portions of such profitable railroad's rail properties, and where the transfer of ownership of such rail properties (including trackage rights) to such profitable railroad was recommended in the preliminary system plan, and the Commission has made a determination with respect thereto, in accordance with subsection (d)(3) of this section, shall be deemed to authorize such profitable railroad to interchange traffic with the Corporation and any other profitable railroad connecting with such specified rail properties.

ADOPTION OF FINAL SYSTEM PLAN

Section 207. [*45 U.S.C. §717*] (a) PRELIMINARY SYSTEM PLAN.—(1) Within 420 days after the date of enactment of this Act, the Association shall adopt and release a preliminary system plan prepared by it on the basis of reports and other information submitted to it by the Secretary, the Office, and interested persons in accordance with this Act and on the basis of its own investigations, consultations, research, evaluation, and analysis pursuant to this Act. Copies of the preliminary system plan shall be transmitted by the Association to the Secretary, the Office, the Governor and public utility commission of each State in the region, the Congress, each court having jurisdiction over a railroad in reorganization in the region, the special court, and interested persons, and a copy shall be published in the Federal Register. The Association shall invite and afford interested persons an opportunity to submit comments on the preliminary system plan to the Association within 60 days after the date of its release.

(2) The Office is authorized and directed to hold public hearings on the preliminary system plan and to make available to the Association a summary and analysis of the evidence received in the course of such proceedings, together with its critique and evaluation of the preliminary system plan, not later than 60 days after the date of release of such plan. The Office is authorized to hold public hearings on any supplement to the preliminary system plan and to make available to the Association a summary and analysis of the evidence received in the course of such proceedings, together with its critique and evaluation of such supplement, not later than 30 days after the release of such supplement.

(b) APPROVAL.—(1) Within 120 days after the date of enactment of this Act each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act. Within 60 days after the submission of the report by the Office, under section 205(d)(1) of this title, on the Secretary's report on rail services in the region, each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether or not such railroad shall be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act. Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding. If a court does not enter an order or make a finding as required by this subsection, the reorganization shall be proceeded with pursuant to this Act. An appeal from an order made under this section may be made only to the special court. Appeal to the special court shall be taken within 10 days following entry of an order pursuant to this subsection, and the special court shall complete its review and render its decision within 80 days after such appeal is taken. There shall be no review of the decision of the special court.

(2) Whenever it has been finally determined pursuant to the procedures of paragraph (1) of this subsection, that the reorganization of a railroad subject to reorganization under section 77 of the Bankruptcy Act (11 U.S.C.205) shall not be proceeded with pursuant to this Act, the court having jurisdiction over such railroad may, upon a petition which is filed within 10 days after the date of enactment of this subsection by the trustees of such railroad, reconsider such order. Such reorganization court shall (i) affirm its previous order or (ii) issue an order that the reorganization of such railroad be proceeded with pursuant to this Act unless it finds that this Act does not provide a process which would be fair and equitable. The provisions of paragraph (1) of this subsection are applicable in such reconsideration, except that (A) such reorganization court shall make its decision within 30 days after such petition is filed, and (B) any decision by the special court on appeal from such a decision shall be rendered within 30 days after such reorganization court decision is made. There shall be no review of the decision of the special court. The Association shall take any steps it finds necessary, consistent with time limitations and other provisions of this Act, to effectuate the consequences of such a revised order, including the preparation and submission of any necessary or appropriate supplements to the preliminary system plan.

(c) ADOPTION.—Within 540 days after the date of enactment of this Act, the executive committee of the Association shall prepare and submit a final system plan for the approval of the Board of Directors of the Association. A copy of such submission shall be simultaneously presented to the Commission. The submission shall reflect evaluation of all responses and summaries of responses received, testimony at any public hearings, and the results of additional study and review. Within 30 days thereafter, the Board of Directors of the Association shall by a majority vote of all its members approve a final system plan which meets all of the requirements of section 206 of this title.

(d) REVIEW OF COMMISSION.—Within 30 days following the adoption of the final system plan by the Association under subsection (c) of this section and the submission of such plan to Congress under section 208 (a) of this title, the Commission shall submit to the Congress an evaluation of the final system plan delivered to both Houses of Congress.

REVIEW BY CONGRESS

Section 208. [*45 U.S.C. §718*] (a) GENERAL.—The Board of Directors of the Association shall deliver the final system plan adopted by the Association to both Houses of Congress and to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committee on Commerce of the Senate. The final system plan shall be deemed approved at the end of the first period of 60 calendar days of continuous session of Congress after such date of transmittal unless either the House of Representatives or the Senate passes a resolution during such period stating that it does not favor the final system plan

(b) REVISED PLAN.—If either the House or the Senate passes a resolution of disapproval under subsection (a) of this section, the Association, with the cooperation and assistance of the Secretary and the Office, shall prepare, determine, and adopt a revised final system plan. Each such revised plan shall be submitted to Congress for review pursuant to subsection (a) of this section.

(c) COMPUTATION.—For purposes of this section—

(1) continuity of session of Congress is broken only by an adjournment sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 60-day period.

(d) ADDITIONS.—(1) The supplemental report. dated September 18, 1975, to the final system plan, and the provisions of the Association's official errata supplement to the final system plan, dated December 1, 1975, including all designations made therein, shall be treated for all purposes as if they had been part of and included in the final system plan adopted by the Association and reviewed by the Congress. The final system plan shall, for all purposes, be deemed to be approved as modified and amended by such supplemental report and such supplement.

(2) The Association may, upon petition of any State, modify the final system plan to make further designations with respect to rail properties of railroads in reorganization in the region designated for transfer to the Corporation under such plan, if such designations (A) are likely to re-

sult in improved rail service on such rail properties and connecting rail properties, and (B) would not materially impair the profitability of the Corporation. Such designations, including designations of such rail properties to a State, a profitable railroad, or a responsible person, may be made at any time prior to delivery of the final system plan to the special court under section 209(c) of this title. Such further designations shall be treated for all purposes as if they had been included in the final system plan adopted by the Association and reviewed by the Congress, and the final system plan shall for all purposes be deemed to be approved as modified by such designations. Any action of the Association with respect to any such petition shall not be subject to review by any court.

(3) (A) Within 20 days after the date of enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, the Association may, by notice to the Congress and by publication in the Federal Register, modify, supplement, or add to the designations of rail properties in the final system plan if the Association finds such actions are necessary to—

(i) achieve the efficient implementation of the final system plan, or

(ii) provide for the offer to profitable railroads of rail properties designated in the final system plan to the Corporation, if such properties are not essential in the operation of other rail properties of the Corporation but are or would be integrally related to the operation of rail properties of (or which are offered pursuant to the final system plan to) such profitable railroad, or

(iii) provide for the designation of additional rail properties to the Corporation or to a subsidiary thereof to enable the Corporation to serve efficiently a line of railroad designated to the Corporation in the final system plan if such line does not connect with any other line of railroad so designated to the Corporation or if such line would be served more efficiently as a consequence of such designation.

Any designation to a profitable railroad pursuant to this paragraph shall comply with the second sentence of section 206(d)(4) of this title, and shall only be made upon a finding by the Association that such designation is integrally related to an offer of rail properties to a profitable railroad in the final system plan, that the goals of the final system plan require that the rail properties be operated as a part of the rail properties included in such offer, and that the implementation of such designation will not materially and adversely affect the impact of such offer on the profitability of the Corporation or any profitable railroad operating in the region. Any designation to a profitable railroad pursuant to this subsection, which amends any prior offer, shall terminate 30 days after the date of enactment of this paragraph unless, prior to such date, such profitable railroad has notified the Association in writing of its acceptance of such amendment to the prior offer.

(B) If a line of railroad or any segment thereof is designated for rail service in the final system plan, no designation may be made by the Association pursuant to this paragraph which would result in such line or segment not being so designated. Any designations made pursuant to this paragraph shall be treated for all purposes as if they had been included in the final system plan adopted by the Association and reviewed by the Congress. The final system plan shall for all purposes be deemed to be approved as amended by such designations.

(C) Any designations made pursuant to this paragraph shall not be subject to review by any court.

(D) Any labor agreements entered into under section 508 of this Act shall be subject to further negotiations for any modifications which may be necessary to implement designations made pursuant to this paragraph.

JUDICIAL REVIEW

Section 209. [*45 U.S.C. §719*] (a) GENERAL.—Notwithstanding any other provision of law, the final system plan which is adopted by the Association and which becomes effective after review by the Congress is not subject to review by any court except in accordance with this section. After the final system plan becomes effective under section 208 of this title, it may be reviewed with respect to matters concerning the value of the rail properties to be conveyed under the plan and the value of the consideration to be received for such properties.

(b) SPECIAL COURT.—Within 30 days after the date of enactment of this Act, the Association shall make application to the judicial panel on multi-district litigation authorized by section 1407 of title 28, United States Code, for the consolidation in a single, three-judge district court of the United States of all judicial proceedings with respect to the final system plan. Within 30 days after such application is received, the panel shall make the consolidation in a district court (cited herein as the "special court") which the panel determines to be convenient to the parties and the one most likely to be able to conduct any proceedings under this section with the least delay and the greatest possible fairness and ability. Such proceedings shall be conducted by the special court which shall be composed of three Federal judges who shall be selected by the panel, except that none of the judges selected may be a judge assigned to a proceeding involving any railroad in reorganization in the region under section 77 of the Bankruptcy Act (11 U.S.C.205). The special court is authorized to exercise the powers of a district judge in any judicial district with respect to such proceedings and such powers shall include those of a reorganization court. The special court shall have the power to order the conveyance of rail properties of railroads leased, operated, or controlled by a railroad in reorganization in the region. The special court may issue rules for the conduct of any proceedings under this section and under section 305 of this Act, including rules with respect to the time within which motions may be filed, and with respect to appropriate representation of interests not otherwise represented (including the Secretary with respect to a petition by the Association in the case of a proposal developed by the Secretary, under such section 305). No determination by the panel under this subsection may be reviewed in any court.

(c) DELIVERY OF PLAN TO SPECIAL COURT.—Within 90 days after its effective date, the Association shall deliver a certified copy of the final system plan to the special court and shall certify to the special court—

(1) which rail properties of the respective railroads in reorganization in the region and of any leased, operated, or controlled by such railroads in reorganization are to be transferred to the Corporation or any subsidiary thereof, in accordance with the final system plan;

(2) which rail properties of the respective railroads in reorganization in the region or person leased, operated, or controlled by such railroads in reorganization are to be conveyed to profitable railroads, in accordance with the final system plan;

(3) the amount, terms, and value of the securities of the Corporation or any subsidiary thereof (including any certificates of value of the Association) to be exchanged for those rail properties to be transferred to the Corporation or any subsidiary thereof pursuant to the final system plan, and as indicated in paragraph (1) of this subsection; and

(4) that the transfer of rail properties in exchange for securities of the Corporation or any subsidiary thereof (including any certificates of value of the Association) and other benefits is fair and equitable and in the public interest. Notwithstanding any other provisions of this subsection and subsection (d) of this section, the time for the delivery of a certified copy of the final system plan shall be March 12, 1976, and may be extended to a date not more than 30 days thereafter, prescribed in a notice filed by the Association not later than February 17, 1976, with the special court, the Congress, and each court referred to in such subsection (d). Such notice shall contain the certification of the Association than an orderly conveyance of rail properties cannot reasonably be effected before the date for conveyance determined with respect to such notice. The time prescribed in section 303(a) of this Act shall be determined with respect to the date prescribed in such notice.

(d) BANKRUPTCY COURTS.—Within 90 days after its effective date, the Association shall deliver a certified copy of the final system plan to each district court of the United States or any other court having jurisdiction over a railroad in reorganization in the region and shall certify to each such court—

(1) which rail properties of that railroad in reorganization are to be transferred to the Corporation or any subsidiary thereof under the final system plan; and

(2) which rail properties of that railroad in reorganization, if any, are to be conveyed to profitable railroads operating in the region, under the final system plan.

(e) ORIGINAL AND EXCLUSIVE JURISDICTION.—(1) Notwithstanding any other provision of law, any civil action—

(A) for injunctive or other relief against the Association from the enforcement, operation, or execution of this Act or any provision thereof, or from any action taken by the Association pursuant to authority conferred or purportedly conferred under this Act;

(B) challenging the constitutionality of this Act or any provision thereof;

(C) challenging the legality of any action of the Association, or any failure of the Association to take any action, pursuant to authority conferred or purportedly conferred under this Act;

(D) to obtain, inspect, copy, or review any document in the possession or control of the Association that would be discoverable in litigation pursuant to section 303(c) of this Act;

(E) brought after a conveyance, pursuant to section 303(b) of this Act, to set aside or annul such conveyance or to secure in any way the reconveyance of any rail properties so conveyed; or

(F) with respect to continuing reorganization and supplemental transactions, in accordance with section 305 of this Act; shall be within the original and exclusive jurisdiction of the special court. The special court shall not hear or determine any such action prior to the date of conveyance, pursuant to section 303(b)(1) of this Act, except as the Constitution may require. Relief shall not be granted in any action referred to in subparagraph (A), (C), or (E) unless the person seeking such relief establishes that the Association acted in reckless or deliberate disregard of applicable law.

(2) The original and exclusive jurisdiction of the special court shall include any action, whether filed by any interested person or initiated by the special court itself, to interpret, alter, amend, modify, or implement any of the orders entered by such court pursuant to section 303 (b) of this Act in order to effect the purposes of this Act or the goals of the final system plan. During the pendency of any proceeding described in this paragraph, the special court may enter such orders as it determines to be appropriate, including orders enjoining, restraining, conditioning, or limiting any conveyance, transfer, or use of any asset or right which is subject to such an order or which is at issue in such a proceeding, or which involves the enforcement of any liens or encumbrances upon such assets or rights. Any orders pursuant to this para-

graph which interpret, alter, amend, modify, or implement orders entered by the special court shall be final and shall not be restrained or enjoined by any court.

(3) A final order or judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of this Act, in whole or in part, or of any action taken under this Act, shall be reviewable by direct appeal to the Supreme Court of the United States in the same manner that an injunctive order may be appealed under section 1253 of title 28, United States Code. Such review is exclusive and any petition or appeal shall be filed not more than 20 days after entry of such order or judgment.

(f) DISPOSITION OF CASH DEPOSITS.—Whenever the compensation which is deposited with the special court under section 303(a) of this Act is in the form of cash, such cash shall be invested and reinvested upon such terms and conditions as the special court shall determine, pending the making of the findings referred to in paragraphs (1),(2), and (3) of section 303(c) of this Act. Notwithstanding section 303(c)(4) of this Act, the special court may order (1) the income from such investments, (2) the dividends or interest, if any, received on any securities or obligations deposited with the special court under such section 303(a), and (3) the income, if any, received with respect to any other form of compensation so deposited, to be distributed to the trustee of each railroad in reorganization and to any person leased, operated or controlled by such a railroad which conveyed the right, title, and interest in the rail properties with respect to which such cash, securities, obligations, or other compensation have been so deposited with the special court. Notwithstanding section 303(c)(4) of this Act, the special court may, within 90 days after the date of conveyance of rail properties pursuant to section 303(b) of this Act, order up to 25 percent of any cash (including investments made with cash) and other compensation deposited with the special court to be distributed to such trustee or person. On petition of the applicable trustee or person, the special court may order such additional distributions as it finds reasonable and appropriate, prior to the making of the findings referred to in paragraphs (1),(2), and (3) of such section 303(c).

(g) STAY OF COURT PROCEEDINGS.—The special court may stay or enjoin any action or proceeding in any State court or in any court of the United States other than the Supreme Court if such action or proceeding is contrary to any provision of this Act, impairs the effective implementation of this Act, or interferes with the execution of any order of the special court pursuant to this Act.

OBLIGATIONS OF THE ASSOCIATION

Section 210. [*45 U.S.C. §720*] (a) GENERAL.—To carry out the purposes of this Act, the Association is authorized to issue bonds, debentures, trust certificates, securities, or other obligations (herein cited as "obligations") in accordance with this section. Such obligations shall have such maturities and bear such rate or rates of interest as are determined by the Association with the approval of the Secretary of the Treasury. Such obligations shall be redeemable at the option of the Association prior to maturity in the manner stipulated in each such obligation, and may be purchased by the Association in the open market at a price which is reasonable.

(b) MAXIMUM OBLIGATIONAL AUTHORITY.—The aggregate amount of obligations of the Association issued under this section which may be outstanding at any one time shall not exceed $275,000,000. No obligations or proceeds thereof shall be issued or made available after the date of enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 except—

(1) to meet existing or potential commitments for loans under section 211 of this title made or applied for prior to January 1, 1976; and

(2) for the purpose of providing loans pursuant to subsections (g) and (h) of section 211 of this title.

(c) GUARANTEES.—The Secretary shall guarantee the payment of principal and interest on all obligations issued by the Association in accordance with this Act and which the Association requests be guaranteed. All guarantees entered into by the Secretary under this section shall constitute general obligations of the United States for the payment of which its full faith and credit are pledged.

(d) VALIDITY.—No obligation issued by the Association under this section shall be terminated, canceled, or otherwise revoked, except in accordance with lawful terms and conditions prescribed by the Association. Such an obligation shall be conclusive evidence that it is in compliance with this section, has been approved, and is legal as to principal, interest, and other terms. An obligation of the Association shall be valid and incontestable in the hands of a holder, except as to fraud, duress, mutual mistake of fact, or material misrepresentation by or involving such holder.

(e) THE SECRETARY OF THE TREASURY.—If at any time the moneys available to the Secretary are insufficient to enable him to discharge his responsibilities under subsection (c) of this section, he shall issue notes or other obligations to the Secretary of the Treasury in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be prescribed by the Secretary of the Treasury. Such obligations shall bear interest at a rate to be determined by the Secretary of the Treasury taking into consideration the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of such obligations. The Secretary of the Treasury is authorized and directed to purchase any such obligations and for such purpose is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act, as amended. The purposes for which securities may be issued under such Act are extended to include any purchase of notes or other obligations issued under this subsection. At any time, the Secretary of the Treasury may sell any such obligations, and all sales, purchases, and redemptions of such obligations by the Secretary of the Treasury shall be treated as public debt transactions of the United States.

(f) AUTHORIZATION FOR APPROPRIATIONS.—There are hereby authorized to be appropriated to the Secretary such amounts as are necessary to discharge the obligations of the United States arising under this section.

(g) LAWFUL INVESTMENTS.—All obligations issued by the Association shall be lawful investments and may be accepted as security for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority and control of the United States or any officer or officers thereof. All such obligations issued pursuant to this section shall be exempt securities within the meaning of laws administered by the Securities and Exchange Commission.

LOANS

Section 211. [*45 U.S.C. §721*] (a) GENERAL.—The Association is authorized, in accordance with the provisions of this section and such rules and regulations as it shall prescribe, to make loans to the Corporation, the National Railroad Passenger Corporation, and other railroads (including a railroad in reorganization which has been found to be reorganizable under section 77 of the Bankruptcy Act pursuant to section 207(b) of this title) in the region for purposes of achieving the goals of this Act, to a State or local or regional transportation authority pursuant to section 403 of this Act; and to provide assistance in the form of loans to any railroad which (A) connects with a railroad in reorganization, and (B) is in need of financial assistance to avoid reorganization proceedings under section 77 of the Bankruptcy Act (11 U.S.C.205). No such loan shall be made by the Association to a railroad unless such loans shall, where applicable, be treated as an expense of administration. The rights referred to in the last sentence of section 77(j) of the Bankruptcy Act (11 U.S.C. 205(j)) shall in no way be affected by this Act.

(b) APPLICATIONS.—Each application for such a loan shall be made in writing to the Association in such form and with such content and other submissions as the Association shall prescribe to protect reasonably the interests of the United States. The Association shall publish a notice of the receipt of each such application in the Federal Register and shall afford interested persons an opportunity to comment thereon.

(c) TERMS AND CONDITIONS.—Each loan shall be extended in such form, under such terms and conditions, and pursuant to such regulations as the Association deems appropriate. Such loan shall bear interest at a rate not less than the greater of a rate determined by the Secretary of the Treasury taking into consideration (1) the rate prevailing in the private market for similar loans as determined by the Secretary of the Treasury, or (2) the current average yield on outstanding marketable obligations of the Association with remaining periods of maturity comparable to the average maturities of such loans, plus such additional charge, if any, toward covering costs of the Association as the Association may determine to be consistent with the purposes of this Act.

(d) MODIFICATIONS.—The Association is authorized to approve any modification of any provision of a loan under this section, including the rate of interest, time of payment of interest or principal, security, or any other term or condition, upon agreement of the recipient of the loan and upon a finding by the Association that such modification is equitable and necessary or appropriate to achieve the policy declared in subsection (f) of this section.

(e) PREREQUISITES.—The Association shall make a finding in writing, before making a loan to any applicant under this section, that—

(1) the loan is necessary to achieve the goals of this Act or to prevent insolvency;

(2) it is satisfied that the business affairs of the applicant will be conducted in a reasonable and prudent manner; and

(3) the applicant has offered such security as the Association deems necessary to protect reasonably the interests of the United States.

(f) POLICY.—It is the intent of Congress that loans made under this section shall be made on terms and conditions which furnish reasonable assurance that the Corporation or the railroads to which such loans are granted will be able to repay them within the time fixed and that the goals of this Act are reasonably likely to be achieved.

(g) PRE-CONVEYANCE LOANS TO THE CORPORATION.—During the period between the effective date of the final system plan and the date of the conveyance of rail properties pursuant to section 303(b) of this Act, the Association may make such loans in such amounts to the Corporation as the Association deems essential to provide for the purchase by the Corporation of material, supplies, equipment, and services necessary to permit the orderly and efficient implementation of the final system plan. Notwithstanding any inability of the Association during such period to make the finding required by subsection(e)(3) of this section because of any existing contingencies, the Association may make any such loans to the Corporation, subject to—

(1) the most favorable terms and conditions for assuring timely repayment and security as may then be reasonably available, and

(2) the requirement that any loan to the Corporation under this subsection be refinanced immediately out of the proceeds of the first sale by the issuance of debentures under section 216 of this title.

In order to assure that necessary funds are available to the Corporation for implementation of the final system plan, the Corporation is authorized to accept such loans as may be approved by the Association under this subsection, and any such acceptance shall be deemed for all purposes to constitute a reasonable and prudent business judgment in compliance with any fiduciary obligations imposed on the Corporation or its directors. For purposes of this subsection, the term 'Corporation' includes a subsidiary of the Corporation.

(h) LOANS FOR PAYMENT OF OBLIGATIONS.—(1) The Association is authorized, subject to the limitations set forth in section 210(b) of this title, to enter into loan agreements, in amounts not to exceed $230,000,000 in the aggregate, with the Corporation, the National Railroad Passenger Corporation, and any profitable railroad to which rail properties are transferred or conveyed pursuant to section 303 (b)(1) of this Act. under which the Corporation, the National Railroad Passenger Corporation, and any profitable railroad entering into such agreement will agree to meet existing or prospective obligations of the railroads in reorganization in the region which the Association, in accordance with procedures established by the Association, determines should be paid by the Corporation, the National Railroad Passenger Corporation, or a profitable railroad, on behalf of the transferors, in order to avoid disruptions in ordinary business relationships. Such obligations shall be limited to amounts claimed by suppliers (including private car lines) of materials or services utilized in current rail operations, claims by shippers arising from current rail services, payments to railroads for settlement of current interline accounts, claims of employees arising under the collective bargaining agreements of the railroads in reorganization in the region and subject to section 3 of the Railway Labor Act, claims of all employees or their personal representatives for personal injuries or death and subject to the provisions of Employers' Liability Acts (45 U.S.C. 51-60), and amounts required for adequate funding of accrued pension benefits existing at the time of a conveyance or discontinuance of service under employee pension benefit plans described in section 505(a) of this Act. The Association shall not make such a loan unless it first finds that the loan is for the purpose of paving obligations with respect to accrued pension plans referred to in the preceding sentence or that the Corporation, the National Railroad Passenger Corporation, or a profitable railroad is entitled to a loan pursuant to subsections (e) and (g) of section 504 of this Act, or unless it first finds that—

(A) provision for the payment of such obligations was not included in the financial projections of the final system plan;

(B) such obligations arose from rail operations prior to the date of conveyance of rail properties pursuant to section 303(b)(1) of this Act and are, under other applicable law, the responsibility of a railroad in reorganization in the region;

(C) the Corporation, the National Railroad Passenger Corporation, or a profitable railroad has advised the Association that the direct payment of such obligations by the Corporation, the National Railroad Passenger Corporation or profitable railroad is necessary to avoid disruptions in ordinary business relationships;

(D) the transferor is unable to pay such obligations within a reasonable period of time; and

(E) with respect to loans made to the Corporation, the procedures to be followed by the Corporation, in seeking reimbursement from the railroads in reorganization in the region for obligations paid on their behalf under this subsection, have been jointly agreed to by the Finance Committee and the Corporation.

(2) The trustees of each railroad in reorganization in the region shall attempt to negotiate agency agreements with the Corporation, the National Railroad Passenger Corporation, or a profitable railroad for the processing of all accounts receivable and accounts payable attributable to operations prior to the conveyance of property pursuant to section 303(b)(1) of this Act. If any railroad in reorganization in the region fails to conclude such an agreement within a reasonable time prior to such conveyance, the applicable reorganization courts, after giving all parties an opportunity to be heard, shall prescribe the terms of such an agency arrangement by order, giving due consideration to the need, wherever possible, to make such agreements uniform among the various estates.

(3) The Association may, not less than 30 days prior to the date of conveyance pursuant to section 303(b)(1) of this Act, petition each district court of the United States having jurisdiction over the reorganization of a railroad in reorganization in the region for an order, which shall be entered prior to such conveyance, and which—

(A) identifies that cash and other current assets of the estate of such railroad which shall be utilized to satisfy obligations of the estates identified in paragraphs (1) of this subsection; and

(B) provides for the application by the trustees of such railroads and their agents, consistent with the principles of reorganization under section 77 of the Bankruptcy Act (11 U.S.C.205) and with the agency agreement specified in paragraph (2) of this subsection, of all such current assets, including cash available as of or subsequent to such date of conveyance, to the payment in the postconveyance period of the obligations of the estates identified in paragraph (1) of this subsection.

(4)(A) Each obligation of a railroad in reorganization in the region which is paid with financial assistance under paragraph (1) of this subsection shall be processed, on behalf of such railroad, by the Corporation, the National Railroad Passenger Corporation, or a profitable railroad, whichever is appropriate. An obligation of a railroad in reorganization in the region shall be paid, on behalf of such railroad, by the Corporation, the National Railroad Passenger Corporation, or a profitable railroad, whichever is appropriate, if—

(i) such obligation is deemed by the Corporation, the National Railroad Passenger Corporation, or a profitable railroad, whichever is appropriate, to have been, on the date of conveyance of rail properties pursuant to section 303(b)(1) of this Act, the obligation of a railroad in reorganization in the region;

(ii) such obligation accrues after such date of conveyance but as a result of rail operations conducted prior to such date, and the trustees of such railroad in reorganization acknowledge that it is an obligation of such railroad; of

(iii) the district court of the United States having jurisdiction over such railroad in reorganization in the region approves such obligation as a valid administrative claim against such railroad; to the extent that payment is required under a loan agreement with the Association under such paragraph (1).

(B) The Association shall resolve any disputes among the Corporation, the National Railroad Passenger Corporation, and a profitable railroad concerning which of them shall process and pay any particular obligation on behalf of a particular railroad in reorganization.

(C) The Corporation, the National Railroad Passenger Corporation, or a profitable railroad shall have a direct claim, as a current expense of administration, for reimbursement from the estate of a railroad in reorganization in the region for all obligations of such estate (plus interest thereon) which are paid by the Corporation, the National Railroad Passenger Corporation, or a profitable railroad, as the case may be. The right of the Corporation or the National Railroad Passenger Corporation to receive reimbursement under this subparagraph from the estate of a railroad in reorganization in the region shall be reduced by the amount, if any, of loans, plus interest forgiven under paragraph (5) of this subsection.

(5)(A) If, at any time, the Finance Committee of the Association determines that the failure of the Corporation to receive full reimbursement with interest from the estate of a railroad in reorganization in the region for any obligation of such estate paid pursuant to this subsection could adversely affect the fairness and equity of the transfers and conveyances pursuant to section 303(b)(1) of this Act, or that the failure of the National Railroad Passenger Corporation to receive such full reimbursement plus interest for any such obligation would be contrary to the public interest, the Association shall forgive the indebtedness, plus accrued interest, of the Corporation or of the National Railroad Passenger Corporation incurred pursuant to paragraph (1) of this subsection in the amount recommended by the Finance Committee. The Association shall have a direct claim, as a current expense of administration of the estate of such railroad in reorganization, equal to the amount by which loans of the Corporation or of the National Railroad Passenger Corporation, plus interest, have been forgiven. Such direct claim shall not be subject to any reduction by way of setoff, cross-claim, or counter-claim which the estate of such railroad in reorganization may be entitled to assert against the Corporation, the National Railroad Passenger Corporation, the Association, or the United States.

(B) The direct claim of the Association under this paragraph, and any direct claim authorized under paragraph (4) of this subsection, shall be prior to all other administrative claims of the estate of a railroad in reorganization, except claims arising under trustee's certificates or from default on the payment of such certificates.

(6) Notwithstanding any other provision of this subsection, the Association shall forgive any loan made to the Corporation or the National Railroad Passenger Corporation pursuant to this subsection, plus accrued interest thereon, on the 3rd anniversary date of any such loan, except that the Association shall not forgive any loan or portion thereof, in accordance with this paragraph, if—

(A) the Finance Committee makes an affirmative finding, with respect to such loan or portion thereof, that—

(i) the Corporation has not exercised due diligence in executing the procedures adopted pursuant to paragraph (1)(E) of this subsection, and

(ii) the failure of the Association to forgive such loan or portion thereof will not adversely affect the ability of the Corporation to become financially self-sustaining;

(B) the Finance Committee so directs the Association; and

(C) neither House of the Congress disapproves such affirmative finding and direction, in accordance with the following provisions of this paragraph.

A copy of each such finding, the reasons therefor, and such direction made by the Finance Committee, together with the comments and recommendations thereon of the Board of Directors of the Association, shall be transmitted to the Congress by the Association within 10 days after the date on which the Finance Committee makes such finding and direction, or if not so transmitted, shall be transmitted by the Finance Committee. Each such finding and direction so transmitted shall become effective immediately, and shall remain in effect, unless, within the first period of 30 calendar days of continuous session of Congress after the date of transmittal of such finding and direction to Congress, either House of Congress disapproves such finding and direction in accordance with the procedures specified in section 1017 of the Congressional Budget and Impoundment Control Act of 1974 (31 U.S.C.1407). For purposes of this paragraph, continuity of session of Congress is broken only in the circumstances described in section 1011(5) of that Act (31 U.S.C. 1401(5)).

(7) For purposes of this subsection, the term 'Corporation' includes a subsidiary of the Corporation.

(i) ELECTRIFICATION.—Upon application by the Corporation, the Secretary shall, pursuant to the provisions of and within the obligational limitations contained in sections 511 through 513 of the Railroad revitalization and Regulatory Reform Act of 1976, guarantee obligations of the Corporation for the purpose of electrifying high-density mainline routes if the Secretary finds that such electrification will return operating and financial benefits to the Corporation and will facilitate compatibility with existing or renewed electrification systems. The aggregate unpaid principal amount of obligations which may be guaranteed by the Secretary under this paragraph shall not exceed $200,000,000 at any one time.

RECORDS, AUDIT, AND EXAMINATION

Section 212. [*45 U.S.C. §722*] (a) RECORDS.—Each recipient of financial assistance under this title, whether in the form of loans, obligations, or other arrangements, shall keep such records as the Association or the Secretary shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance and such other records as will facilitate an effective audit.

(b) AUDIT AND EXAMINATION.—The Association, the Secretary, and the Comptroller General of the United States, or any of their duly authorized representative shall, until the expiration of 3 years after the implementation of the final system plan, have access for the purpose of audit and examination to any books, documents, papers, and records of such recipients which in the opinion of the Association, the Secretary, or the Comptroller General may be related or pertinent to the loans, obligations or other arrangements referred to in subsection (a) of this section. The Association or any of its duly authorized representatives shall, until any financial assistance received under this title has been repaid to the Association, have access to any such materials which concern any matter that may bear upon—

(1) the ability of the recipient of such financial assistance to make repayment within the time fixed therefor;

(2) the effectiveness with which the proceeds of such assistance is used; and

(3) the implementation of the final system plan and the realization of the declaration of policy of this Act.

EMERGENCY ASSISTANCE PENDING IMPLEMENTATION

Section 213. (a) [*45 U.S.C. §723*] EMERGENCY ASSISTANCE.—The Secretary is authorized, pending the implementation of the final system plan, to pay to the trustees of railroads in reorganization such sums as are necessary for the continued provision of essential transportation services by such railroads. Such payments shall be made by the Secretary upon such reasonable terms and conditions as the Secretary establishes, except that recipients must agree to maintain and provide service at a level no less than that in effect on the date of enactment of this Act. Where the Secretary and the trustees agree that funds provided pursuant to this section are to be used (together with funds provided pursuant to section 215 of this Act, if any) to perform program maintenance on designated rail properties until the date rail properties are conveyed under this Act or to improve such designated properties, such agreement shall contain the conditions set forth in section 215(b) of this Act.

(b) AUTHORIZATION FOR APPROPRIATIONS.—There are authorized to be appropriated to the Secretary for carrying out this section such sums as are necessary, not to exceed $282,000,000, to remain available until expended. Of amounts authorized to be appropriated under this subsection, $50,000,000 shall be available solely to pay to the trustees of railroads in reorganization such sums as may be necessary to provide such railroads with amounts equal to revenues attributable to tariff increases proposed by such railroads and suspended by the Interstate Commerce Commission during the calendar year 1975, if the Secretary determines that such payments are necessary to carry out this section.

AUTHORIZATION FOR APPROPRIATIONS

Section 214. [*45 U.S.C. §724*] (a) SECRETARY.—There are authorized to be appropriated to the Secretary for purposes of preparing the reports and exercising other functions to be performed by him under this Act such sums as are necessary, not to exceed $12,500,000, to remain available until expended. There are authorized to be appropriated to the Secretary such sums as may be necessary to discharge the obligations of the United States arising under section 303(c)(5) of this Act.

(h) OFFICE.—There are authorized to be appropriated to the Commission for the use of the Office in carrying out its functions under this Act such sums as are necessary, not to exceed $7,000,000, to remain available until expended. The budget for the Office shall be submitted by the Commission directly to the Congress and shall not be subject to review of any kind by any other agency or official of the United States. Moneys appropriated for the Office shall not be withheld by any agency or official of the United States or used by the Commission for any purpose other than the use of the Office. No part of any other moneys appropriated to the Commission shall be withheld by any other agency or official of the United States to offset any moneys appropriated pursuant to this subsection.

(c) ASSOCIATION.—There are authorized to be appropriated to the Association for purposes of carrying out its administrative expenses under this act such sums as are necessary, not to exceed $40,000,000, to remain available until expended, and not to exceed $14,000,000 for the fiscal period which includes the period ending September 30, 1977.

INTERIM AGREEMENTS

Section 215. [*45 U.S.C. §725*] (a) PURPOSES.—Prior to the date upon which rail properties are conveyed to the Corporation under this Act, the Secretary, with the approval of the Association, is authorized to enter into agreements with the trustees of the railroads in reorganization in the region (or railroads leased, operated, or controlled by railroads in reorganization)—

(1) to perform the program maintenance on designated rail properties of such railroads until the date rail properties are conveyed under this Act;

(2) to improve rail properties of such railroads; and

(3) to acquire rail properties for lease or loan to any such railroads until the date such rail properties are conveyed under this Act, and subsequently for conveyance pursuant to the final system plan, or to acquire interests in such rail properties owned by or leased to any such railroads or in purchase money obligations therefor.

(b) CONDITIONS.—Agreements pursuant to subsection (a) of this section shall contain such reasonable terms and conditions as the Secretary may prescribe. In addition, agreements under paragraphs (1) and (2) of subsection (a) of this section shall provide that—

(1) to the extent that physical condition is used as a basis for determining, under section 206(f) or 303(c) of this Act, the value of properties subject to such an agreement and designated for transfer to the Corporation under the final system plan, the physical condition of the properties on the effective date of the agreement shall be used; and

(2) in the event that property subject to the agreement is sold, leased, or transferred to an entity other than the Corporation, the trustees or railroad shall pay or assign to the Secretary that portion of the pro-

ceeds of such sale, lease, or transfer which reflects value attributable to the maintenance and improvement provided pursuant to the agreement.

(c) OBLIGATIONS.—Notwithstanding section 210(b) of this title, the Association shall issue obligations under section 210(a) of this title in an amount sufficient to finance such agreements and shall require the Corporation to assume any such obligations. The aggregate amount of obligations issued under this section and outstanding as any one time shall not exceed $300,000,000. The Association, with the approval of the Secretary, shall designate in the final system plan that portion of such obligations issued or to be issued which shall be refinanced and the terms thereof, and that portion from which the Corporation shall be released of its obligations.

(d) CONVEYANCE.—The Secretary may convey to the Corporation, or any subsidiary thereof, with or without receipt of consideration, any property or interests acquired by, transferred to, or otherwise held by the Secretary pursuant to this section or section 213 of this Act.

DEBENTURES AND SERIES A PREFERRED STOCK

Section 216. [*45 U.S.C. §726*] (a) GENERAL.—The Association is authorized, in accordance with the provisions of this section, and such rules and regulations as it may prescribe, to invest from time to time in the securities of the Corporation by purchasing (1) up to $1,000,000,000 of debentures issued by the Corporation, and (2) after the acquisition of such debentures, up to $1,100,000,000 of the series A preferred stock of the Corporation.

(b) PURPOSES AND PROCEDURE FOR INVESTMENT.—(1) The Association is authorized to purchase debentures and, thereafter, series A preferred stock of the Corporation at such times and in such amounts as may be required and requested by the Corporation in accordance with the terms and conditions governing such purchases (which shall be prescribed by the Association), to provide—

(A) for the modernization, rehabilitation and maintenance of rail properties of the Corporation;

(B) for the acquisition of equipment and other capital needs;

(C) for the refinancing of indebtedness which was incurred by the Corporation under section 211 of this title or which was incurred under section 215 of this title and assumed by the Corporation; or

(D) working capital as contemplated by the final system plan.

(2) Purchases of up to $1,000,000,000 of debentures and, thereafter, of up to $1,100,000,000 of series A preferred stock shall be made by the Association as required and requested by the Corporation, unless the Finance Committee makes an affirmative finding that—

(A) the Corporation has failed in any material respect to comply with any covenants or undertakings made to the Association and such failure remains uncorrected;

(B) the Corporation has failed substantially (as determined by performance within the margins prescribed by the Board of Directors) to attain the overall operating (including rehabilitation) and financial results projected for the Corporation in the final system plan (including any modifications of such projected results and of the performance margins applicable to such projected results which are jointly approved by the Finance Committee and the Board of Directors and which would improve the possibility that the Corporation will attain such projected results and perform within such margins, as modified); or

(C) it is not reasonably likely, taking into consideration all relevant factors including the overall operating (including rehabilitation) and financial results achieved by the Corporation, that the Corporation will be able to become financially self-sustaining without requiring Federal financial assistance substantially in excess of the amounts authorized in this section.

(c) FINDING, DIRECTION, AND REVIEW BY CONGRESS.—(1) If the Finance Committee makes an affirmative finding pursuant to subsection (b)(2) of this section, it may direct the Association—

(A) not to purchase any debentures or series A preferred stock of the Corporation after the date of such affirmative finding; or

(B) to purchase debentures or series A preferred stock of the Corporation, after the date of such affirmative finding, only in such amounts, at such times, and on such terms and conditions (notwithstanding subsection (e)(1) of this section) as the Finance Committee determines to be appropriate to the role of the Association as an investor in such debentures and series A preferred stock.

(2) A copy of each affirmative finding, the reasons therefor, and each direction made by the Finance Committee under paragraph (1) of this subsection, together with the comments and recommendations thereon of the Board of Directors of the Association, shall be transmitted to the Congress by the Association within 10 days after the date on which the Finance Committee makes such finding and direction, or if not so transmitted, shall be transmitted by the Finance Committee. Each such direction so transmitted shall become finally effective and is required to be implemented by the Association, unless within the first period of 30 calendar days of continuous session of Congress after the date of its transmittal to Congress either House of Congress disapproves such direction (except that such direction shall become finally effective immediately upon approval of such direction by both Houses of Congress) in accordance with the procedures specified in section 1017 of the Congressional Budget and Impoundment Control Act of 1974 (31 U.S.C.

1407). For purposes of this paragraph, continuity of session of Congress is broken only in the circumstances described in section 1011(5) of that Act (31 U.S.C. 1401(5)). During review by the Association and Congress, the Association shall take no action inconsistent with the direction of the Finance Committee pursuant to paragraph (c)(1) of this section, except to the extent the Association finds necessary, in its discretion, to assure continuous orderly operation of the Corporation.

(3) If the Congress, pursuant to paragraph (2) of this subsection, disapproves a direction submitted to the Association pursuant to paragraph (1) of this subsection, the Association shall continue to purchase the debentures or series A preferred stock of the Corporation as otherwise provided in this title until such time as a direction is submitted under this section which is not so disapproved (or affirmatively approved). The powers of the Association and of the Board of Directors of the Association shall remain in effect except to the extent modified by any such direction. If any such direction is disapproved by either House of Congress, the Finance Committee may, not earlier than 30 days after the date of such disapproval, make (and the Board of Directors of the Association shall transmit) any additional affirmative finding and direction with respect to the same matter, which direction shall become effective in accordance with paragraph (2) of this subsection. An affirmative finding and direction under this subsection, or action by the Association during a review thereof by the Congress, may not be held unlawful or set aside by any reviewing court on the ground that such finding and direction or action were not adequate to meet the requirements of subparagraph (A), (E), or (F) of section 706(2) of title 5, United States Code.

(4) Notwithstanding any other provision of this section, or any terms and conditions governing its purchase of securities of the Corporation, the Association shall, upon written application by the Corporation at least 30 days prior to such investment, make an initial investment in debentures of the Corporation within 60 days after the date of conveyance of rail properties pursuant to section 303(b)(1) of this Act. Such initial investment shall be limited to such amounts as the Association and Finance Committee, acting jointly, determine are necessary for the continued and orderly operations of the Corporation prior to any additional investment.

(5) Not later than 60 days after the date of conveyance pursuant to section 303(b)(1) of this Act, the Association shall select 6 individuals to serve as members of the Board of Directors of the Corporation, subject to the provisions of section 301(d) of this Act.

(d) TERMS AND CONDITIONS.—Notwithstanding any other provision of State law, the debentures and the series A preferred stock of the Corporation shall have such terms and conditions, not inconsistent with the final system plan or this title, as may be prescribed by the Association, except as follows:

(1) The Corporation shall not be required to issue to the Association additional shares of series A preferred stock of the Corporation as a dividend on any such stock.

(2) The dividends payable on series A preferred stock of the Corporation shall not be cumulative and shall be paid in cash when and to the extent that there is 'cash available for restricted cash payments', as that term is defined in the final system plan.

(3) After the Association calls for redemption of the certificates of value, no shares of series A preferred stock of the Corporation shall be issued in lieu of interest on the debentures of the Corporation and, to the extent such interest is not payable in cash by reason of the absence of sufficient 'cash available for restricted cash payment', the Corporation shall deliver to the holders of the debentures contingent interest notes in a face amount equal to such unpaid interest.

(4) If the Board of Directors of the Association and the Finance Committee, acting jointly, modify the terms or conditions governing the purchase of debentures or series A preferred stock of the Corporation pursuant to subsection (e)(1) of this section, or if the Finance Committee waives compliance with any term, condition, provision, or covenant of such securities pursuant to subsection (e)(2) of this section, the Finance Committee may require the Corporation to issue contingent interest notes in such amount as, in the determination of the Finance Committee, will provide protection for the United States, in the event of bankruptcy, reorganization, or receivership of the Corporation, equal to the protection the United States would have had in the absence of such modification or waiver.

(5) The contingent interest notes issued pursuant to this section shall bear interest compounded annually at the rate of 8 percent per annum and such notes and the accumulated interest thereon shall be payable only in the event of bankruptcy, reorganization, or receivership of the Corporation occurring prior to the repayment and redemption of all outstanding debentures and accumulated series A preferred stock of the Corporation. The contingent interest notes and the accumulated interest thereon shall have the same priority in bankruptcy, reorganization, or receivership as the debentures of the Corporation. The other terms and conditions of the contingent interest notes shall be as set forth in an agreement to be entered into between the Association and the Corporation prior to issuance of any debentures.

(e) MODIFICATIONS, WAIVERS, AND CONVERSIONS.—(1) The Board of Directors of the Association and the Finance Committee, acting jointly, may agree with the Corporation to modify any of the terms and conditions governing the purchase by the Association of securities of the Corporation, upon a finding that such action is necessary or appropriate to achieve the purposes of this Act or the goals of the final system plan. final system plan.

(2) The Finance Committee may, in its discretion and upon a finding that such action is necessary or appropriate to achieve the purposes of this Act or the goals of the final system plan, waive compliance with any terms, condition, provision, or covenant of the securities of the Corporation held by the Association, including any provision of such securities with respect to redemption of principal or issuance price, payment of interest or dividends, or any term or condition governing the purchase of such securities.

(3) Notwithstanding any provision of State law, there shall be no conversion of the debentures of the Corporation into series A preferred stock of the Corporation, as provided in the terms and conditions of the debentures and pursuant to the final system plan, unless the Board of Directors of the Association and the Finance Committee jointly determine to effect such conversion.

(f) APPROPRIATION.—There is authorized to be appropriated to the Association $2,100,000,000 to be used for the purchase of securities of the Corporation in accordance with this section. All sums received by the Association on account of the holding or disposition of any such securities shall be deposited in the general fund of the Treasury.

TITLE III—CONSOLIDATED RAIL CORPORATION

FORMATION AND STRUCTURE

Section 301. [*45 U.S.C. §741*] (a) ESTABLISHMENT.—There shall be established within 300 days after the date of enactment of this Act, in accordance with the provisions of this section, a corporation to be known as the Consolidated Rail Corporation or such other corporate name as may be duly adopted by the Corporation.

(b) STATUS.—The Corporation shall be a for-profit corporation established under the laws of a State and shall not be an agency or instrumentality of the Federal Government. The Corporation shall be deemed a common carrier by railraod under section 1(3) of the Interstate Commerce Act (49 U.S.C. 1(3)), shall be subject to the provisions of this Act and, to the extent not inconsistent with such Acts, shall be subject to applicable State law. The principal office of the Corporation or of its principal railroad operating subsidiary shall be located in Philadelphia in the Commonwealth of Pennsylvania.

(c) INCORPORATORS.—(1) The members of the executive committee of the Association shall be the incorporators of the Corporation and shall take whatever steps are necessary to establish the Corporation, including the filing of articles of incorporation.

(2) Notwithstanding any provision of State law, after the date of enactment of this paragraph, the members of the executive committee of the Association (including duly authorized representatives of members who are authorized by this Act to be represented) and the chief executive officer and chief operating officer of the Corporation shall adopt the bylaws of the Corporation and serve as the Board of Directors of the Corporation until all members of the Board of Directors of the Corporation have been selected in accordance with subsection (d) of this section. The chief executive officer shall serve as chairman of such Board until a chairman thereof is selected pursuant to subsection (d) of this section, after which time such chairman shall serve at the pleasure of such Board.

(d) BOARD OF DIRECTORS.—(1) Notwithstanding any provision of State law, the articles of incorporation and by laws of the Corporation shall provide that the Board of Directors of the Corporation shall consist of 13 members selected in accordance with the articles and bylaws of the Corporation, as follows:

(a) six individuals selected by the holders of the Corporation's debentures and series A preferred stock voting as one class, with every $100 principal amount of debentures, and every $100 liquidation amount of series A preferred stock each receiving one vote for directors;

(B) three individuals selected by the holders of the Corporation's series B preferred stock; and

(C) two individuals selected by the holders of the Corporation's common stock.

(2) The chief executive officer and the chief operating officer of the Corporation shall also serve on the Board, but the chief executive officer and chief operating officer of the Corporation shall not be entitled to vote on the election or removal of either. In the event a vacancy occurs on the Board of Directors due to death, disability or resignation of a director (other than resignations pursuant to this subsection), such vacancy shall be filled only by a vote of the holders of the class of securities that initially elected such director. Two members of the Board selected by the holders of the Corporation's debentures and series A preferred stock shall resign when the total of the principal amount of the outstanding debentures and the amount of the liquidation amount of the outstanding series A preferred stock, once having exceeded $1.-500,000,000, has been reduced below that amount; two additional members of the Board selected by the holders of the Corporation's debentures and series A preferred stock of the Corporation shall resign when the total of the principal amount of the outstanding debentures and the amount of the liquidation amount of the outstanding series A preferred

stock, once having exceeded $1,500,000,000, has been reduced below $750,000,000. The two remaining members of the Board selected by the holders of the Corporation's debentures and series A preferred stock shall resign when all the debentures and series A preferred stock have been redeemed by the Corporation. As directors resign in accordance with the foregoing provisions, the election of corporate directors to fill the vacancies created by their resignations shall be governed by applicable State law and the articles and bylaws of the Corporation.

(e) INITIAL CAPITALIZATION.—(1) In order to carry out the final system plan, the Corporation is authorized to issue debentures, series A preferred stock, series B preferred stock, common stock, contingent interest notes, and other securities.

(2) Debentures and series A preferred stock shall be issued initially to the Association. Series B preferred stock and common stock shall be issued initially to the estates of railroads in reorganization in the region, to railroads leased, operated, and controlled by railroads in reorganization in the region, and to other persons leased, operated or controlled by a railroad in reorganization who are transferors of rail properties in exchange for rail properties transferred to the Corporation pursuant to the final system plan. Notwithstanding any other provisions of State or Federal law, the series B preferred stock and common stock shall have terms and conditions not inconsistent wiht the final system plan. As a condition of its investment in the Corporation, the Association may require that the Corporation adopt limitations consistent with the final system plan on the circumstances under which dividends on the series B preferred stock and common stock are payable so long as any of the debentures or series A preferred stock are outstanding. Notwithstanding anything to the contrary in the final system plan, the initial authorized number of shares of series B preferred stock may be 35,000,000, and the Corporation may issue initially for the purpose of the deposit required under section 303(a)(1) of this Act such numbers of shares of series B preferred and common stock as the Association shall certify to the Special Court pursuant to section 209(c)(1)(3) of this Act, including any modifications in such numbers of shares as may be ordered by the Special Court for the purpose of, and in connection with, such deposit and certification.

(f) OFFICERS.—The officers of the Corporation shall include a chief executive officer and a chief operating officer, who shall be appointed by the Board of Directors and who shall serve at the pleasure of the Board; and such other officers as shall be provided for in the bylaws of the Corporation.

(g) VOTING TRUSTEES.—For and during the period between the deposit of securities of the Corporation with the special court, in accordance with section 303(a) of this title, and the distribution of such securities, in accordance with section 303(c) of this title, the special court shall, within 30 days after the date of conveyance pursuant to section 303(b)(1) of this Act, appoint one or more voting trustees for each class of securities which is so deposited. Such voting trustees shall, on behalf of the distributees, exercise the rights of the holders of such securities as their interests may appear. Within 30 days after such appointment, such voting trustees shall select members of the Board of Directors of the Corporation on behalf of the holders of the class of securities whose rights they exercise pursuant to this subsection.

(h) ANNUAL REPORT.—The Corporation shall transmit to the Congress and the President, not later than 90 days after the end of each fiscal year, a comprehensive and detailed report on all activities and accomplishments of the Corporation during the preceding fiscal year.

(i) LIABILITY OF DIRECTORS.—No director of the Corporation shall be liable, for money damages or otherwise, to any party by reason of the fact that such person is or was a director, if, with respect to the subject matter of the action, suit, or proceeding, such person was fulfilling a duty which he in good faith reasonably believed to be required by law or vested in him in his capacity as a director of the Association or as an officer of the United States. The United States shall indemnify such person against all judgments, amounts paid in settlement, and costs and expenses (including fees of accountants, experts, and attorneys), actually and reasonably incurred in connection with any such action, suit, or proceeding in which such person is determined to have met such standard of conduct. This subsection shall not be construed to grant any immunity from any criminal law of the United States.

(j) CORPORATE SIMPLIFICATION.—In the interest of corporate simplification, the Corporation, in implementing the final system plan, shall undertake, as soon as possible and pursuant to financial assistance provided by the Railroad Revitalization and Regulatory Reform Act of 1976, to acquire all interests in rail lines and related rail properties otherwise conveyed to the Corporation, upon the tender of such interests to it, so as to eliminate any remaining intermediate layers of ownership or interest, such as leaseholds, owned or held by persons who are neither a railroad, a railroad in reorganization, nor controlled by a railroad in reorganization. Any option conditions regarding the purchase price for such interests, in existence since prior to January 2, 1974, shall be deemed to be conclusive of fair and equitable value.

POWERS AND DUTIES OF THE CORPORATION

Section 302. [*45 U.S.C. §742*] The Corporation shall have all of the powers and is subject to all of the duties vested in it under this Act, in addition to the powers conferred upon it under the laws of the State or States in which it is incorporated and the powers of a railroad in any

State in which it operates. The Corporation is authorized and directed to—

(a) acquire rail properties designated in the final system plan to be transferred or conveyed to it;

(b) operate rail service over such rail properties except as provided under sections 304(e) and 601(d)(3) of this Act;

(c) rehabilitate, improve, and modernize such rail properties; and

(d) maintain adequate and efficient rail services.

So long as 50 per centum or more, as determined by the Secretary of the Treasury, of the outstanding indebtedness of the Corporation consists of obligations of the Association or other debts owing to or guaranteed by the United States, the Corporation shall not engage in activities which are not related to transportation.

VALUATION AND CONVEYANCE OF RAIL PROPERTIES

Section 303. [*45 U.S.C. §743*] (a) DEPOSIT WITH COURT.— Within 10 days after delivery of a certified copy of a final system plan pursuant to section 209(c) of this Act—

(1) the Corporation, in exchange for the rail properties of the railroads in reorganization in the region and of railroads leased, operated, or controlled by railroads in reorganization in the region to be transferred to the Corporation or any subsidiary thereof shall deposit with the special court all of the stock and other securities of the Corporation and certificates of value issued by the Association designated in the final system plan to be exchanged for such rail properties;

(2) each profitable railroad operating in the region and each State or responsible person (including a government entity) purchasing rail properties from a railroad in reorganization in the region, or from a railroad leased, operated, or controlled by a railroad in reorganization in the region, as provided in the final system plan shall deposit with the special court the compensation to be paid for such rail properties.

(b) CONVEYANCE OF RAIL PROPERTIES.—(1) The special court shall, within 10 days after deposit under subsection (a) of this section of the securities of the Corporation, certificates of value issued by the Association, and compensation from the profitable railroads operating in the region, States, and responsible persons, order the trustee or trustees of each railroad in reorganization in the region to convey forthwith to the Corporation or any subsidiary thereof, the respective profitable railroads operating in the region, States, and responsible persons, all right, title, and interest in the rail properties of such railroad in reorganization and shall itself order the conveyance of all right, title, and interest in the rail properties of any person leased, operated, or controlled by such railroad in reorganization that are to be conveyed to them under the final system plan as certified to such court under section 209(d) of this Act. In any case where the special court orders the trustee or trustees of a railroad in reorganization in the region to execute and deliver deeds or other instruments conveying rail properties to the Corporation or a subsidiary thereof or to a profitable railroad operating in the region or a State or responsible person, those deeds or other instruments may be executed, acknowledged, and delivered on behalf of the trustee or trustees by any person or persons who have been duly authorized to perform such acts on behalf of the trustee or trustees by the district court of the United States or any other court having jurisdiction over the respective railroad in reorganization in the region. Notwithstanding any provision of State or local law, in any case where deeds or other instruments have been executed, acknowledged, or delivered by a representative of the trustee or trustees of a railroad in reorganization in the region in accordance with the previous sentence, such execution, acknowledgment, and delivery, and the deeds or other instruments to which they pertain, shall have the same legal effect as they would have had if the trustee or trustees had themselves executed, acknowledged and delivered such deeds or other instruments.

(2) All rail properties conveyed to the Corporation or any subsidiary thereof, the respective profitable railroads operating in the region, States, and responsible persons under this section shall be conveyed free and clear of any liens or encumbrances, but subject to such leases and agreements as shall have previously burdened such properties or bound the owner or operator thereof in pursuance of an arrangement with any State, or local or regional transportation authority under which financial support from such State, or local or regional transportation authority was being provided at the time of enactment of this Act for the continuance of rail passenger service or any lien or encumbrance of no greater than 5 years' duration which is necessary for the contractual performance by any person of duties related to public health or sanitation. Such conveyances shall not be restrained or enjoined by any court.

(3)(A)(i) Notwithstanding any other provision of this Act, if an interest in railroad rolling stock is included in the rail properties conveyed pursuant to subsection (b)(1) of this section, and if such conveyance is in accordance with the requirements of clause (ii) of this subparagraph, the conveyance of such properties shall be deemed an assignment. Any such assignment shall relieve the assignor of liability for any breach which occurs after the date of such conveyance, except that such assignor shall remain liable for any breach, event of default, or violation of covenant which occurred (and any changes or obligations which accrued) prior to the date of such conveyance regardless of whether the assignee thereof assumes such liabilities, charges or certificates of value. If any such liabilities, charges, or certificates of value (accrued prior to the date of such conveyance) are paid by or on behalf of any person or entity other than such assignor, such person or entity shall have a claim to direct reimbursement, as a current expense of administration, from such assignor, together with interest on the amount so paid.

(ii) A conveyance referred to in clause (i) of this subparagraph may be effected only if—

(I) the Corporation or a subsidiary thereof, the profitable railroad operating in the region, or the State or responsible person to whom such conveyance is made assumes all of the certificates of value under any applicable conditional sale agreement, equipment trust agreement, or lease with respect to such rolling stock (including any obligations which accrued prior to the date on which such properties are conveyed), and

(II) such conveyance is made subject ot such certificates of value. As used in this subparagraph, the term 'railroad rolling stock' means assets which could be carried in Interstate Commerce Commission account numbers 52,53,54, and 57.

(B) Subject to the provisions of this paragraph, the provisions of this Act shall not affect the title and interests of any lessor, equipment trust trustee, or conditional sale vendor under any conditional sale agreement, equipment trust agreement, or lease under section 77(j) of the Bankruptcy Act (11 U.S.C.205(j)). A profitable railroad operating in the region, the Corporation or a subsidiary thereof, or a State or responsible person, to whom such a conveyance is made as assignee or as lessee, shall assume all liability under such conditional sale agreement, equipment trust agreement, or lease. Such an assignment or conveyance to, and such an assumption of liability by, such a profitable railroad, Corporation, subsidiary, State or responsible person shall not be deemed a breach, an event of default, or a violation of any covenant of any such conditional sale agreement, equipment trust agreement, or lease so assigned or conveyed, notwithstanding any provisions of any such agreement or lease.

(4) Notwithstanding anything to the contrary contained in this Act, if a railroad in reorganization has leased rail properties from a lessor that is neither a railroad nor controlled by or affiliated with a railroad, and such lease has been approved by the lessee railroad's reorganization court prior to the date of enactment of this Act, conveyance of such lease may only be effected if the Corporation, profitable railroad, State or responsible person to whom the conveyance is made assumes all future liability under such lease and all of the terms and conditions specified in the lease, including the obligation to pay the specified rent to the non-railroad lessor.

(5) Notwithstanding any covenant, undertaking, condition, or provision of any sort in any lease, agreement, or contract, the conveyance, transfer, assignment, or other disposition of such lease, agreement, or contract or of any interest therein to, or the assumption by, the Corporation or any subsidiary thereof, or a profitable railroad of obligations thereunder, shall not be deemed a breach, an event of default, or a violation of any covenant of such lease, agreement, or contract.

(6) Notwithstanding anything to the contrary contained in this Act or any other provision of law, the special court shall include in its order such further directions as may be necessary to assure (A) that the operation and administration of the employee pension benefit plans described in section 505(a) of this Act shall be continued, without termination or interruption, by the Corporation until such time as the Corporation elects to amend or terminate any such plan, in whole or in part; and (B) that appropriate transfers and assignments with respect to all rights and obligations relating to such plans shall be made to the Corporation for such purposes, without prejudice to payment of consideration for whatever rights any railroad in reorganization may have in any residual assets under any such employee pension benefit plan. No court shall enter any judgment against the Corporation with respect to any such rights, except that the special court may enter such a judgment in an order issued by it pursuant to subsection (c) of this section, after taking into consideration the rights and obligations transferred pursuant to this paragraph. All liabilities as an employer shall be imposed solely upon the railroad in reorganization in the event such plan is terminated, in whole or in part, by the Corporation within 1 year after the date of such transfer or assignment (except liabilities as an employer under the Employee Retirement Income Security Act of 1974 for benefits accruing during such period).

(c) FINDINGS AND DISTRIBUTION.—(1) After the rail properties have been conveyed to the Corporation or any subsidiary thereof, profitable railroads operating in the region, States, and responsible persons under subsection (b) of this section, the special court, giving due consideration to the findings contained in the final system plan, shall decide—

(A) whether the transfers or conveyances—

(i) of rail properties of each railroad in reorganization, or of each railroad leased, operated, or controlled by a railroad in reorganization, to the Corporation or any subsidiary thereof in exchange for the securities, certificates of value and the other benefits accruing to such railroad as a result of such exchange (taking into consideration compensable unconstitutional erosion, if any, which the special court finds to have occurred in the estate of such railroad, during the bankruptcy proceeding with respect to such railroad), as provided in the final system plan and this Act, and

(ii) of rail properties of each railroad in reorganization, or of each railroad leased, operated, or controlled by a railroad in reorganization, to a profitable railroad operating in the region, State, or responsible person in exchange for compensation and other benefits accruing to such transferor as a result of such exchange (taking into consideration compensable unconstitutional erosion, if any, which the special court finds to have occurred in the estate of such railroad, during the bankruptcy proceeding with respect to such railroad) in accordance with the final system plan, are in the public interest and are fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such plan under section 77 of the Bankruptcy Act (11 U.S.C. 205), or fair and equitable to a railroad that is not itself in reorganization but which is leased, operated, or controlled by a railroad in reorganization;

(B) whether the transfers or conveyances are more fair and equitable than is required as a constitutional minimum; and

(C) what portion of the proceeds received by a railroad in reorganization from an entity other than the Corporation or any subsidiary thereof for the sale, lease, or transfer of property subject to an agreement under section 213 or section 215(a)(1) or (2) of this Act reflects value attributable to the maintenance or improvement provided pursuant to the agreement.

(2) If the special court finds that the terms of one or more exchanges for securities, certificates of value and other benefits are not fair and equitable to an estate of a railroad in reorganization, or to a railroad leased, operated, or controlled by a railroad in reorganization (taking into consideration compensable unconstitutional erosion, if any, which the special court finds to have occurred in the estate of each such railroad, during the bankruptcy proceeding with respect to such railroad), which has transferred rail properties pursuant to the final system plan, it may—

(A) enter a judgment reallocating the securities of the Corporation and certificates of value in a fair and equitable manner if it has not been fairly allocated among the railroads transferring rail properties to the Corporation or any subsidiary thereof, except that at least one share of series B preferred stock and one certificate of value shall be allocated to each such railroad;

(B) if the lack of fairness and equity cannot be completely cured by a reallocation of the Corporation's securities and certificates of value, order the Corporation to provide for the transfer to the railroad of other securities of the Corporation or certificates of value issued by the Association as designated in the final system plan in such nature and amount as would make the exchange or exchanges fair and equitable; and (C) enter a judgment against the Corporation if the judgment would not endanger the viability or solvency of the Corporation.

(3) If the special court finds that the terms of one or more conveyances of rail properties to a profitable railroad operating in the region, State, or responsible person in accordance with the final system plan are not fair and equitable, it shall enter a judgment against such profitable railroad, State or responsible person. If the special court finds that the terms of one or more conveyances or exchanges for securities, certificates of value or other benefits are fairer and more equitable than is required as a constitutional minimum, then it shall order the return of any excess securities, certificates of value or compensation to the Corporation or a profitable railroad, State, or responsible person so as not to exceed the constitutional minimum standard of fairness and equity. The special court shall also find the amount of the payments, if any, which each profitable railroad has made on behalf of a transferor railroad in reorganization in accordance with section 211 (h) of this Act, for which payment the profitable railroad has not been reimbursed, as provided in section 211(h). Notwithstanding any other provision of this paragraph or of paragraph (4), the special court shall order the return to any such profitable railroad from compensation deposited by such profitable railroad pursuant to section 303(a)(2), of any such amount so found together with interest at the rate provided in section 211(h). In making any finding under this paragraph, the special court shall take into consideration compensable unconstitutional erosion, if any, which it finds to have occurred in the estate of a railroad in reorganization in the region, or of a railroad leased, operated, or controlled by such a railroad, during the bankruptcy proceeding with respect to such railroad.

(4) Upon making the findings referred to in this subsection, the special court shall order distribution of the securities, certificates of value, and compensation deposited with it under subsection (a) of this section to the trustee or trustees of each railroad in reorganization in the region and to persons leased, operated, or controlled by such railroads who so transferred or conveyed rail properties who conveyed right, title, and interest in rail properties to the Corporation and the respective profitable railroads, States, and responsible persons under such subsection.

(5) Whenever the special court orders, pursuant to section 303(b)(1) of this title, the transfer or conveyance to the Corporation or any subsidiary thereof of rail properties designated under section 206 (c)(1) (C) of (D) of this Act, to the National Railroad Passenger Corporation, to a profitable railroad, or to a State, or responsible person (including a government entity), the United States shall pay any judgment entered against the Corporation with respect to the conveyance of any such rail properties or against the National Railroad Passenger Corporation, such profitable railroad, State, or responsible person, plus interest thereon at

such rate as is constitutionally required. The United States may, in its discretion, represent the Corporation or the National Railroad Passenger Corporation, such profitable railroad, State or responsible person, in any proceedings before the special court that could result in such a judgment against the Corporation under paragraph (2) of this subsection or against the National Railroad Passenger Corporation, such profitable railroad, State or responsible person, under paragraph (3) of this subsection. The Corporation, the National Railroad Passenger Corporation, any profitable railroad, State, or responsible person, which is represented by the United States of America shall cooperate diligently in whatever manner the United States shall reasonably request of it in connection with such proceedings. Neither the Corporation, or its subsidiaries, nor the National Railroad Passenger Corporation, any profitable railroad, State or responsible person, shall be obligated to reimburse the United States for any moneys paid by the United States pursuant to this section.

(d) APPEAL.—A finding or determination entered pursuant to subsection (c) of this section may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of title 28, United States Code: *Provided*, That such appeal is exclusive and shall be filed in the Supreme Court not more that 20 days after such finding or determination is entered by the special court. The Supreme Court shall dismiss any such appeal within 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings and shall grant the highest priority to the determination of any such appeals which it determines not to dismiss.

(e) TRANSFER AND OTHER TAXES AND RECORDING FEES.—All transfers or conveyances of rail properties (whether real, personal, or mixed) which are made under this Act (including transfers and conveyances which are made in accordance with a supplemental transaction pursuant to section 305 of this title) shall be exempt from any taxes, imposts, or levies now or hereafter imposed, by the United States or by any State or any political subdivision of a State, on or in connection with such transfers or conveyances or on the recording of deeds, bills of sale, liens, encumbrances, or other instruments evidencing, effectuating, or incident to any such transfers or conveyances, whether imposed on the transferor or one the transferee. Such transferors and transferees shall be entitled to record any such deeds, bills of sale, liens, encumbrances, or other instruments and, consistent with the designations and applicable principles in the final system plan, to record the release or removal of any pre-existing liens or encumbrances of record with respect to properties so transferred or conveyed, upon payment of any appropriate and generally applicable charges to compensate for the cost of the service performed.

TERMINATION AND CONTINUATION OF RAIL SERVICES

Section 304. [*45 U.S.C. §744*] (a) DISCONTINUANCE.—(1) Except as provided in subsections (c) and (f) of this section, rail service on rail properties of a railroad in reorganization in the region, or of a person leased, operated, or controlled by such a railroad, which transfers to the Corporation or to profitable railroads operating in the region all or substantially all of its rail properties designated for such conveyance in the final system plan, and rail service properties of a profitable railroad operating in the region which transfers substantially all of its rail properties to the Corporation or to other railroads pursuant to the final system plan, may be discontinued, to the extent such discontinuance is not precluded by the terms of the leases and agreements referred to in section 303(b)(2) of this title, if—

(A) the final system plan does not designate rail service to be operated over such rail properties;

(B) not sooner than 30 days following the effective date of the final system plan, the trustee or trustees of the applicable railroad in reorganization or a profitable railroad give notice in writing of intent to discontinue such service on a date certain which is not less that 60 days after the date of such notice or on the date of any conveyance ordered by the special court pursuant to section 303(b)(1) of this title, whichever is later; and

(C) the notice reauired bv subparagraph (B) of this paragraph is sent by certified mail to the Commission; to the chief executive officer, the transportation agencies, and the government of each political subdivision of each State in which such rail properties are located; and to each shipper who has used such rail service during the previous 12 months.

(2)(A) If rail properties are not, in accordance with the designations in the final system plan, required to be operated, as a consequence of a recommended arrangement for joint use or operation of rail properties (under section 206(g) of this Act) or as part of a coordination project (under sections 206(c) and (g) of this Act, rail service on such properties may be discontinued, subsequent to the date of conveyance of rail properties pursuant to such section 303(b)(1), if the Commission determines that such rail service on such rail properties is not compensatory and if

(i) the petitioner and any other railroad involved in such arrangement or coordination project have, prior to filing an application for such discontinuance, entered into a binding agreement (effective on or before the effective date of such discontinuance) to carry out such arrangement or project;

(ii) such application is filed with the Commission not later than 1 year after the effective date of the final system plan; and

(iii) such discontinuance is not precluded by the terms of the leases and agreements referred to in such section 303(b)(2).

(B) For purposes of this paragraph, rail service on rail properties is compensatory if the revenue attributable to such properties from such service equals or exceeds the sum of the avoidable cost of providing such service on such properties plus a reasonable return on the value of such rail properties, as determined in accordance with the standards developed pursuant to section 205(d)(6) of this Act.

(C) The Commission shall make its final determination, with respect to any discontinuance requested under this paragraph, not later than 120 days after the date of filing of an application therefor. The applicant shall have the burden of proving that the service involved is not compensatory. If the Commission fails to make a final determination within such time, the application shall be deemed to be granted.

(D) The Commission may issue such rules, regulations, and procedures as it deems necessary for the conduct of its functions under this paragraph.

(b) ABANDONMENT.—(1) Except as provided in subsections (c) and (f) of this section, rail properties over which rail service has been discontinued under subsection (a) of this section may not be abandoned sooner than 120 days after the effective date of the discontinuance. Thereafter, except as provided in subsection (c) of this section, such rail properties may be abandoned upon 30 days' notice in writing to any person (including a government entity) required to receive notice under subsection (a)(1)(C) of this section.

(2) In any case in which rail properties proposed to be abandoned under this section are designated by the final system plan as rail properties which are suitable for use for other public purposes (including roads or highways, other forms of mass transportation, conservation, and recreation), such rail properties shall not be sold, leased, exchanged, or otherwise disposed of during the 240-day period beginning on the date of notice of proposed abandonment under this section unless such rail properties have first been offered, upon reasonable terms, for acquisition for public purposes.

(3) Rail service may be discontinued, under subsection (a) of this section, and rail properties may be abandoned, under this section, notwithstanding any provision of the Interstate Commerce Act, the consitution or law of any State, or the decision of any court or administrative agency of the United States or of any State.

(c) CONTINUATION OF RAIL SERVICES.—No rail service may be discontinued and no rail properties may be abandoned, pursuant to this section—

(1) in the case of service and properties referred to in subsections (a)(1) and (b)(1) of this section, after 2 years from the effective date of the final system plan or more than 2 years after the date on which the final rail service continuation payment is received, whichever is later; or

(2) if a financially responsible person (including a government entity) offers—

(A) to provide a rail service continuation payment which is designed to cover the difference between the revenue attributable to such rail properties and the avoidable costs of providing rail service on such properties, together with a reasonable return on the value of such properties;

(B) to provide a rail service continuation payment which is payable pursuant to a lease or agreement with a State or with a local or regional transportation authority under which financial support was being provided on January 2, 1974 for the continuation of rail passenger service; or

(C) to purchase, pursuant to subsection (f) of this section, such rail properties in order to operate rail services thereon.

If a rail service continuation payment is offered, pursuant to paragraph (2)(A) of this subsection, for both freight and passenger service on the same rail properties, the owner of such properties may not be entitled to more than one payment of a reasonable return on the value of such properties.

(d) RAIL FREIGHT SERVICE.—(1) If a rail service continuation payment is offered, pursuant to subsection (c)(2)(A) of this section, for rail freight service, the person offering such payment shall designate the operator of such service and enter into an operating agreement with such operator. The person offering such payment shall designate as the operator of such service—

(A) the Corporation, if rail properties of the Corporation connect with the line of railroad involved, unless the Commission determines that such rail service continuation could be performed more efficiently and economically by another railroad;

(B) any other railroad whose rail properties connect with such line, if the Corporation's rail properties do not so connect or if the Commission makes a determination in accordance with subparagraph (A) of this paragraph; or

(C) any responsible person (including a government entity) which is willing to operate rail service over such rail properties. A designated railroad may refuse to enter into such an operating agreement only if the Commission determines, on petition by any affected party, that the agreement would substantially impair such railroad's ability to serve adequately its own patrons or to meet its outstanding common carrier obligations. The designated operator shall, pursuant to each such operating agreement (i) be obligated to operate rail freight service on such rail properties, and (ii) be entitled to receive, from the person offering such payment, the difference between the revenue attributable to such properties and the avoidable costs of providing service on such rail properties, together with a reasonable management fee, as determined by the Office.

(2) The trustees of a railroad in reorganization shall permit rail service to be continued on any rail properties with respect to which a rail service continuation payment operating agreement has been entered into under this subsection. Such trustees shall receive a reasonable return on the value of such properties, as determined in accordance with the standards developed pursuant to section 205(d)(6) of this Act.

(3) If necessary to prevent any disruption or loss of rail service, at any time after the date of conveyance, pursuant to section 303(b)(1) of this title, the Commission—

(A) shall take such action as may be appropriate under its existing authority (including the enforcement of common carrier requirements applicable to railroads in reorganization in the region) to ensure compliance with obligations imposed under this subsection; and

(B) shall have authority, in accordance with the provisions of section 1(16)(b) of the Interstate Commerce Act (49 U.S.C. 1(16)(b)), to direct rail service to be provided by any designated railroad or by the trustees of a railroad in reorganization in the region, if a rail service continuation payment has been offered but an applicable operating or lease agreement is not in effect.

For purposes of the preceding sentence, any compensation required as a result of such directed service shall be determined in accordance with the standards developed pursuant to section 205(d)(6) of this Act. The district courts of the United States shall have jurisdiction, upon petition by the Commission or any interested person (including a government entity), to enforce any order of the Commission issued pursuant to the exercise of its authority under this subsection, or to enjoin any designated entity or the trustees of a railroad in reorganization in the region from refusing to comply with the provisions of this subsection.

(e) RAIL PASSENGER SERVICE.—(1) The Corporation (or a profitable railroad) shall provide rail passenger service for a period of 180 days immediately following the date of conveyance (pursuant to section 303(b)(1) of this title), with respect to any rail properties over which a railroad in reorganization in the region, or a person leased, operated, or controlled by such a railroad, was providing rail passenger service immediately prior to such date of conveyance. Such service shall be provided on such properties regardless of whether or not such properties are designated in the final system plan as rail properties over which rail service is required to be operated, except with respect to properties over which such service is provided by the National Railroad Passenger Corporation.

(2) If a State (or a local or regional transportation authority) was providing financial assistance to support the operation of rail passenger service, pursuant to a lease or agreement which was in effect immediately prior to the date of conveyance (pursuant to such section 303(b)(1)), the Corporation (or a profitable railroad) shall be bound by the service provisions of such lease or agreement for the duration of the 180-day mandatory operation period specified in paragraph (1) of this subsection. If a State or such an authority was providing financial assistance for the continuation of rail passenger service on rail properties immediately prior to such date of conveyance, it shall provide the same level of financial assistance during such 180-day mandatory operation period. If no such financial assistance was being provided or if no such lease or agreement was in effect immediately prior to such date of conveyance, with respect to any such rail properties, the Corporation (or a profitable railroad) shall provide the same level of rail passenger service, for the duration of such 180-day mandatory operation period, that was provided prior to such date by the applicable railroad. If—

(A) such financial assistance is not provided;

(B) a State (or a local or regional transportation authority) has not, by the end of such 180-day mandatory operation period, offered a rail service continuation payment pursuant to subsection (c)(2)(A) of this section;

(C) an applicable rail service continuation payment pursuant to such subsection (c)(2)(A) is not paid when it is due; or

(D) a payment required under a lease or agreement, pursuant to section 303(b)(2) of this title or subsection (c)(2)(B) of this section, is not paid when it is due,

the Corporation (or, where applicable, the National Railroad Passenger Corporation, a profitable railroad, or the trustee or trustees of a railroad in reorganization in the region) may (i) discontinue such rail passenger service, and (ii) with respect to rail properties not designated for inclusion in the final system plan, abandon such properties pursuant to subsections (a) and (b) of this section.

(3) Nothing in this subsection shall be construed to affect the obligation of the Corporation (or a profitable railroad), or of the trustees of the railroads in reorganization in the region, to provide rail passenger service pursuant to section 303(b)(2) of this title or subsection (c)(2)(B) of this section.

(4) If a State (or a local or regional transportation authority)—

(A) offers a rail service continuation payment, pursuant to subsection (c)(2)(A) of the section and under regulations issued by the Office pursuant to section 205(d)(5) of this Act, for the operation of rail passenger service after the 180-day mandatory operation period, and

(B) provides compensation, pursuant to paragraph (2) of this subsection, for operations conducted furing the 180-day mandatory operation period,

the Corporation (of a profitable railroad) shall continue to provide such service after the end of such period, except as otherwise provided in this subsection.

(5)(A) The Secretary shall reimburse the Corporation (or a profitable railroad) for any loss which is incurred by it during the 180-day mandatory operation period specified in paragraph (1) of this subsection which is not compensated for by a State (or a local or regional transportation authority). The amount of such reimbursement shall be determined pursuant to section 17(a)(1) of the Urban Mass Transportation Act of 1964 and under regulations issued by the Office pursuant to section 205(d)(5) of this Act.

(B) The Secretary shall reimburse States, local public bodies, and agencies thereof for additional costs incurred by such States, bodies, and agencies for rail service continuation payments for rail passenger service pursuant to section 17(a)(2) of the Urban Mass Transportation Act of 1964 and under regulations issued by the Office pursuant to section 205(d)(5) of this Act.

(C) If a dispute arises with respect to the application of any such regulations, the parties to such dispute may submit such dispute to arbitration by a third party. If the parties are unable to agree upon the selection of an arbitrator, the Chairman of the Commission shall serve in that capacity (except as to matters required to be decided by the Commission, pursuant to section 402(a) of the Rail Passenger Service Act (45 U.S.C. 562(a))).

(6) Notwithstanding any other provision of this subsection, the Corporation is not obligated to provide rail passenger service on rail properties if a State (or a local or regional transportation authority) contracts for such service to be provided on such properties by an operator other than the Corporation, except that the Corporation shall, where appropriate, provide such operator with access to such properties for such purpose.

(f) PURCHASE.—If an offer to purchase is made under subsection (c)(2)(C) of this section, such offer shall be accompanied by an offer of a rail service continuation payment. Such payment shall continue until the purchase transaction is completed, unless a railroad assumes operations over such rail properties of its own account pursuant to an order or authorization of the Commission. Whenever a railroad in reorganization in the region or a profitable railroad gives notice of intent to discontinue service pursuant to subsection (a) of this section, such railroad shall, upon the request of anyone apparently qualified to make an offer to purchase or to provide a rail service continuation payment, promptly make available its most recent reports on the physical condition of such property, together with such traffic and revenue data as would be required under subpart B of part 1121 of chapter X of title 49 of the Code of Federal Regulations and such other data as are necessary to ascertain the avoidable costs of providing service over such rail properties.

(g) ABANDONMENT BY CORPORATION.—After the rail system to be operated by the Corporation or a subsidiary thereof under the final system plan has been in operation for 2 years, the Commission may authorize the Corporation or a subsidiary thereof to abandon any rail properties as to which it determines that rail service over such properties is not required by the public convenience and necessity, if the Corporation or a subsidiary thereof can demonstrate that no State (or local or regional transportation authority) is willing to offer a rail service continuation payment pursuant to subsection (c) of this section. The Commission may, at any time after the effective date of the final system plan, authorize additional rail service in the region or authorize the abandonment of rail properties which are not being operated by the Corporation or any subsidiary or affiliate thereof or by any other person. Determinations by the Commission under this subsection shall be made pursuant to applicable provisions of the Interstate Commerce Act.

(h) INTERIM ABANDONMENT.—After the date of enactment of this section and prior to the date of conveyance (pursuant to section 303(b)(1) of this title), no railroad in reorganization in the region may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless (1) it is authorized to do so by the Association, and (2) no affected State (or local or regional transportation authority) reasonably opposes such action, notwithstanding any provision of any other Federal law, the constitution or law of any State, or the decision or order of, or the pendency of any proceeding before any Federal or State court, agency, or authority.

(i) DISPOSITION OF DESIGNATED RAIL PROPERTIES.—No railroad in reorganization in the region and no person leased, operated or controlled by such a railroad shall sell, transfer, encumber, or otherwise dispose of rail property, or any right or interest therein, designated for transfer to the Corporation or conveyance to a profitable railroad in the final system plan, except pursuant to section 303(b) of this title. The provisions of this subsection shall not apply to any such sale, transfer, encumbrance, or other disposition—

(1) as to which the Association generally or specifically consents in writing;

(2) which, prior to enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, had been specifically approved by a United States district court having jurisdiction over the reorganization of a railroad in reorganization under section 77 of the Bankruptcy Act (11 U.S.C.205); or

(3) following certification to the special court, pursuant to section 209 (c) of the Regional Rail Reorganization Act of 1973, of any such rail properties not previously so certified.

(j) EXEMPTION.—(1) No local public body which provides mass transportation services and which is otherwise subject to the Interstate Commerce Act shall, with respect to the provision of such services, be subject to the Interstate Commerce Act or to rules, regulations and orders promulgated under such Act, except that any such local public body shall continue to be subject to applicable Federal laws pertaining to (A) safety, (B) the representation of employees for purposes of collective bargaining, and (C) employment retirement, annuity, and unemployment systems or any other provision pertaining to dealings between employees and employers.

(2) For purposes of this subsection, the term—

(A) 'local public body' has the meaning prescribed for such term in section 12(c)(2) of the Urban Mass Transportation Act (49 U.S.C. 1608(c)(2)) and includes any person or entity which contracts with a local public body to provide transportation services; and

(B) 'mass transportation' has the meaning prescribed for such term in section 12(c)(5) of the Urban Mass Transportation Act (49 U.S.C. 1608(c)(5)).

CONTINUING REORGANIZATION; SUPPLEMENTAL TRANSACTIONS

Section 305. [*45 U.S.C. §745*] (a) PROPOSALS.—If the Secretary or the Association determines that, as part of continuing reorganization, further restructuring of rail properties in the region through transactions supplemental to the final system plan would promote the establishment and retention of a financially self-sustaining rail service system in the region adequate to meet the needs of the region, the Secretary or the Association, as the case may be, may devleop proposals for such supplemental transactions as are necessary or appropriate to implement the needed restructuring. Transfers of rail properties included in proposals developed by the Association shall be limited to (1) rail properties which would have qualified for designation under section 206(c)(1)(A) of this Act but which were not transferred or conveyed under the final system plan, and which the Association finds to be essential to the efficient operations of the Corporation, and (2) transfers, consistent with the final system plan, of rail properties from the Corporation to a subsidiary thereof. Each proposal (other than a proposal developed by the Association) shall be submitted in writing to the Association and shall state and describe any transactions proposed, the rail properties involved, the parties to such transactions, the financial and other terms of such transactions, the purposes of the

Act or the goals of the final system plan intended to be effectuated by such transactions, and such other information incidental thereto as the Association may prescribe. Within 10 days after receipt of a proposal developed by the Secretary, and upon the development of a proposal developed by the Association, the Association shall publish a summary of such proposal in the Federal Register, and shall afford interested persons (including the Corporation when property is to be transferred to or from the Corporation) an opportunity to comment thereon.

(b) EVALUATION BY ASSOCIATION.—The Association shall analyze each proposal containing one or more supplemental transactions, taking into account the comments of interested persons and statements and exhibits submitted at any public hearings which may have been held. The Association shall, within 120 days after the publication of a summary thereof under subsection (a) of this section, publish in the Federal Register a report evaluating such proposal. Such evaluation shall state whether the supplemental transactions contained in such proposal, considered in their entirety, are (1) in the public interest and consistent with the purposes of this Act and the goals of the final system plan, and (2) fair and equitable. If the Corporation opposes, or seeks modification of, any such proposed transfer, its written comments shall be given due consideration by the Association and shall be published as part of the evaluation. Within 30 days after the Association publishes its report, each proposed transferor or transferee shall notify the Association in writing as to whether any proposed supplemental transaction requiring the transfer of any property from or to such transferor or transferee is acceptable to such proposed transferor or transferee. If any such proposed transferor (other than the Corporation) or transferee fails to notify the Association that any proposed supplemental transaction requiring the transfer of any property from such transferor or to such transferee is acceptable to it, no further administrative or judicial proceedings shall be conducted with respect to such proposed supplemental transaction.

(c) REVIEW BY THE COMMISSION.—Within 90 days after the publication in the Federal Register of each report referred to in subsection (b) of this section, the Commission shall determine whether the supplemental transactions referred to in the report, considered in their entirety, would be in the public interest and consistent with the purposes of this Act and the goals of the final system plan. In making such determination, the Commission shall give due consideration to the views received by it, within 30 days after the publication of the applicable report, from the Corporation and the Secretary. The Commission may condition its approval of such supplemental transaction on such reasonable terms and conditions as it may deem necessary in the public interest. The approval by the Commission of such supplemental transactions shall not be a prerequisite to the consummation of such transactions, but any determination of the Commission modifying, approving, or disapproving any proposed supplemental transactions shall be given due weight and consideration by the special court in the proceedings prescribed in subsection (d) of this section. If the Commission fails to act within the time period provided in this subsection, the supplemental transactions involved shall be deemed to have been approved by the Commission. The Commission may prescribe such regulations as may be necessary for the administration of this section.

(d) SPECIAL COURT PROCEEDINGS.—(1) If the Association has made the determination pursuant to subsection (b) of this section that a proposal for supplemental transactions is in the public interest and consistent with the purposes of this Act and the goals of the final system plan, and is fair and equitable, the Association shall, within 40 days after the date of the Commission's determination under subsection (c) of this section, or after the expiration of the 90-day period referred to in such subsection (c), whichever is applicable, petition the special court for an order of such court finding that such proposal for supplemental transactions is in the public interest and consistent with the purposes of this Act and the goals of the final system plan, and is fair and equitable, and directing the Corporation to carry out the supplemental transactions specified in such proposal. If the Association has determined, pursuant to subsection (b) of this section that a proposal made by the Secretary is not in the public interest or is not consistent with the purposes of this Act and the goals of the final system plan or is not fair and equitable, the Secretary may, if he determines that such proposal is in the public interest and consistent with the purposes of this Act and the goals of the final system plan and is fair and equitable, petition the special court for an order of such court finding that such proposal for supplemental transactions is in the public interest and consistent with the purposes of this Act and the goals of the final system plan and is fair and equitable, and directing the Corporation to carry out any supplemental transactions specified in such proposal. Such a petition shall be submitted to the special court within 90 days after the date of the Commission's determination under such subsection (c), or after the expiration of the 90-day period referred to in such subsection (c), whichever is applicable.

(2) Within 180 days after the filing of a petition under paragraph (1) of this subsection, the special court shall decide, after a hearing, whether the proposed supplemental transactions contained in such petition, considered in their entirety, are in the public interest and consistent with the purposes of this Act and the goals of the final system plan and are fair and equitable. If the special court determines that such proposed supplemental transactions, considered in their entirety, are in the public interest and consistent with the purposes of this Act and the goals of the final system plan and are fair and equitable, it shall, upon making such determination, issue such orders as may be necessary to

direct the Corporation to consummate the transactions. If the special court determines that such proposed supplemental transactions, considered in their entirety, are not in the public interest or not consistent with the purposes of this Act and the goals of the final system plan, or are not fair and equitable, it shall file an opinion stating its conclusion and the reasons therefor. In such event the Association (in the case of a proposal developed by the Association) or the Secretary (in the case of a proposal developed by the Secretary) may, within 120 days after the filing of such opinion, certify to the special court that the terms and conditions of the proposal have been modified consistent with the opinion of the court and are acceptable to each proposed transferor (other than the Corporation) or transferee, and may petition the special court for reconsideration of the proposal as so modified. Within 90 days after the filing of such petition, the special court shall decide, after a hearing, whether the proposal as modified by the certification is in the public interest and consistent with the purposes of this Act and the goals of the final system plan and is fair and equitable, and shall enter such further orders as are consistent with its determination.

(3) The Corporation is authorized to petition the special court and to be represented regarding any proposed supplemental transaction, contained in a proposal developed by either the Association or the Secretary, which involves the properties of the Corporation.

(4) In proceedings under this subsection, the special court is authorized to exercise the powers of a judge of a United States district court with respect to such proceedings and such powers shall include those of a reorganization court.

(5) Any evaluation by the Association, the Secretary, or the Commission shall not be reviewable in any court except the special court in accordance with the provisions of this section. The supplemental transactions shall not be restrained or enjoined by any court nor shall they be otherwise reviewable by any court other than by the special court to the extent provided in this section.

(6) Notwithstanding any other provision of this Act, no findings, determinations, or proceedings shall be required with respect to any proposal for supplemental transactions other than as expressly set forth in this section.

(7) Any supplemental transaction under this section shall subject the transferor and transferee, in each such supplemental transaction, to the requirements and other provisions of title V of this Act, except that the

term 'effective date of this Act' contained in such title V shall be applied to such supplemental transaction as if it read 'effective date of the supplemental transaction'.

(8) A final order or judgment of the special court entering or denying an order pursuant to this subsection shall be reviewable in the same manner as provided in section 209(e)(3) of this Act.

(e) DEFINITION.—As used in this section, the term 'fair and equitable' means fair and equitable, in accordance with the standards applicable to the approval of a plan of reorganization (or a step in such plan) under section 77 of the Bankruptcy Act (11 U.S.C.205) to—

(1) the estates of railroads in reorganization in the region and persons leased, operated, or controlled by such railroads who have conveyed rail properties, under section 303(b)(1) of this title, in exchange for securities of the Corporation, the Association, or profitable railroads and other benefits provided as a consequence of this Act and to any subsequent holders of such securities at the time of the supplemental transaction involved; and

(2) the holders of other securities of the Corporation.

Whenever any property or securities of the Corporation are required to be valued in order to determine whether the terms of a supplemental transaction are fair and equitable, the special court shall give proper recognition to the contributions to the Corporation by all classes of security holders, except that such court shall not assign to the series B preferred stock or the common stock of the Corporation any values added to those securities, by reason of investment by the Association in debentures and series A preferred stock of the Corporation, in excess of any value required by constitutional principles applicable to a reorganization process.

CERTIFICATES OF VALUE

Section 306. [*45 U.S.C. §746*] (a) GENERAL.—On the date when the Corporation is required to deposit securities with the special court pursuant to section 303(a)(1) of this title, the Association shall deposit with the special court the certificates of value of the Association required by this section. The Secretary shall guarantee the payment of all certificates of value delivered in accordance with this title. All guarantees entered by the Secretary under this section shall constitute general obligations of the United States of America for the payment or redemption of which its full faith and credit are pledged. Such guarantees shall be valid and incontestable except as to mutual mistake of fact or as to fraud or material misrepresentation by the holder of such certificates or the transferor of rail properties to which certificates of value of any series so guaranteed are issued.

(b) NUMBER AND DISTRIBUTION.—A separate series of certificates of value shall be issued to each railroad in reorganization in the region and each person leased, operated, or controlled by such a railroad that transfers rail properties to the Corporation or a subsidiary thereof. The number of certificates of value of each series to be deposited pursuant to subsection (a) shall be equal to the number of shares of series B preferred stock of the Corporation which are required to be deposited by the Corporation with the special court, pursuant to section 303(a)(1) of this title in exchange for the rail properties transferred to the Corporation or a subsidiary thereof by such transferor. Certificates of value of the appropriate series shall be distributed by the special court, pursuant to section 303(c)(4) of this title, at the same time to the same transferors, and in the same numbers of units as shares of such series B preferred stock are distributed to such transferor.

(c) REDEMPTION.—(1) Certificates of value, of any series, shall be redeemed by the Association on December 31, 1987, or on such earlier date as the Board of Directors of the Association and the Finance Committee jointly may determine and specify.

(2) Each certificate of value of each series shall be redeemable for an amount, payable in cash, equal to its base value on the redemption date, minus—

(A) the sum of the fair market value of the series B preferred stock applicable to such certificate, the fair market value of the common stock applicable to such certificate, and all cash dividends theretofore paid on any such series B preferred stock and on any such common stock; and

(B) any sums paid to a transferor of rail properties to whom such series of certificates of value was issued resulting from sales or leases by the Corporation of properties transferred to it by such transferor divided by the number of certificates of value distributed to such transferor.

(3) The number of shares of series B preferred stock and common stock applicable to each certificate of value of any series, pursuant to paragraph (2) of this subsection, shall be—

(A) one share of series B preferred stock (adjusted to reflect any stock splits, stock combinations, reclassifications or similar transactions affecting the number of shares of outstanding series B preferred stock following the date of distribution pursuant to section 303(c)(4) of this title); and

(B) the number of shares of common stock determined by dividing the total number of shares of common stock distributed pursuant to section 303(c)(4) of this Act to the transferor receiving such series of certificates of value (adjusted to reflect any stock splits, stock combinations, reclassifications, or similar transactions affecting the number of shares of outstanding common stock following the date of distribution pursuant to section 303(c)(4) of this title) by the total number of certificates of value in the series so distributed to such transferor.

(4) The base value of each certificate of value of any series shall be the value obtained by (A) taking the net liquidation value, as determined by the special court, to which the transferor to whom such series of certificates of value is issued is entitled by virtue of transfers or rail properties, under section 303(b)(1) of this title to the Corporation or a subsidiary thereof; (B) subtracting the value of other benefits provided under this Act, as determined by the special court; (C) adding such amount, if any, as the special court may determine shall be required after taking into consideration compensable unconstitutional erosion, if any, in the estate of a railroad in reorganization, or of a railroad leased, operated , or controlled by such a railroad, which the special court finds to have occurred during any bankruptcy proceeding with respect to such railroad; (D) adding interest from the transfer date to the redemption date to be compounded annually at a rate of 8 percent per annum; and (E) dividing the resulting value by the number of certificates of value of such series distributed to such transferor. In determining such base value, the special court shall give due weight and consideration to the finding of the Association as to the net liquidation value to which each transferor is entitled by virtue of conveyances of rail properties under section 303 (b)(1) of this title. For purposes of this paragraph, the term 'rail properties' includes all rights with respect to employee benefit plans transferred and assigned to the Corporation pursuant to section 303(b)(6) of this title. Net liquidation value with respect to such rights shall be determined after taking into account all obligations finally transferred or assigned to the Corporation pursuant to such section.

(5) The fair market value of series B preferred stock and of common stock of the Corporation shall be determined in accordance with regulations prescribed by the Association, on the basis of the average price of each such security in the primary established market in which such securities are traded over a period of 120 consecutive trading days ending not less than 20 nor more than 40 trading days preceding the redemption date, or, in the case of a security for which there is not an established trading market, on the basis of the fair market value thereof as determined by the majority vote of three experts in the valuation of securities, one to be selected by the Association, one to be selected by the directors of the Corporation elected by the holders of the security to be valued, and one to be selected by the two first selected.

(d) AUTHORIZATION FOR APPROPRIATIONS.—There are authorized to be appropriated to the Secretary such sums as are necessary to discharge the obligations of the United States arising under this section.

PROTECTION OF FEDERAL FUNDS

Section 307. [*45 U.S.C. §747*] (a) AUDIT.—(1) The Comptroller General of the United States is authorized to audit the programs, activities, and financial operations of the Corporation for any period during which (A) Federal funds provided pursuant to this Act are being used to finance any portion of its operations, or (B) Federal funds have been invested therein pursuant to this Act. Any such audit may be conducted under such rules and regulations as the Comptroller General may prescribe. The Comptroller General shall report to the Congress at such times and to such extent as he considers necessary to keep the Congress informed on the security of such Federal funds and guarantees and, to the extent appropriate, make recommendations for achieving greater economy, efficiency, and effectiveness in such programs, activities, and operations.

(2) For the purpose of any audit conducted pursuant to subsection (a) of this section, the Comptroller General, or a designated representative of the Comptroller General, shall have access to and the right to examine all books, accounts, records, reports, files, and other papers, items, or property belonging to or in use by the Corporation.

(b) REPORT.—The Association shall prepare and submit an annual report to Congress on the performance of the Corporation in order to keep the Congress informed as to matters which may affect the quality of rail services in the region and which may affect the security of Federal funds referred to in subsection (a) of this section. Each such report shall be submitted within 150 days after the end of the fiscal year of the Corporation. Each such report shall include an evaluation of—

(1) the degree to which the goals of section 206(a) of this Act are being met;

(2) the amounts and causes of deviations, if any, from the financial projections of the final system plan;

(3) the amount of Federal funds made available to the Corporation and a clear description of the uses of such funds;

(4) the projected financial needs of the Corporation;

(5) the projected sources from which such financial needs are likely to be met; and

(6) the ability of the Corporation to become financially self-sustaining without requiring Federal funds in excess of those authorized by section 216(f) of this Act.

TITLE IV—LOCAL RAIL SERVICES

FINDINGS AND PURPOSE

Section 401. [*45 U.S.C. §761*] (a) FINDINGS.—The Congress finds and declares that—

(1) The Nation is facing an energy shortage of acute proportions in the next decade.

(2) Railroads are one of the most energy-efficient modes of transportation for the movement of passengers and freight and cause the least amount of pollution.

(3) Abandonment, termination, or substantial reduction of rail service in any locality will adversely affect the Nation's long-term and immediate goals with respect to energy conservation and environmental protection.

(4) Under certain circumstances the cost to the taxpayers of rail service continuation subsidies would be less than the cost of abandonment of rail service in terms of lost jobs, energy shortages, and degradation of the environment.

(b) PURPOSE.—Therefore, it is declared to be the purpose of the Congress to authorize the Secretary to maintain a program of rail service continuation subsidies.

RAIL SERVICE CONTINUATION ASSISTANCE

Section 402. [*45 U.S.C. §762*] (a) GENERAL.—(1) The Secretary shall provide financial assistance in accordance with this section to assist in the provision of rail service continuation payments, the acquisition or modernization of rail properties, including the preservation of rights-of-way for future rail service, the construction or improvement of facilities necessary to accommodate the transportation of freight previously moved by rail service, and the cost of operating and maintaining rail service facilities such as yards, shops, docks, or other facilities useful in facilitating and maintaining main line or local rail service. The Federal share of the costs of any such assistance shall be as follows: (A) 100 percent for the 12-month period following the date that rail properties are conveyed pursuant to section 303(b)(1) of this Act; and (B) 90 percent for the succeeding 12-month period.

(2) The Secretary shall, within one year after the date of enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, promulgate standards and procedures under which the State share of such cost may be provided through in-kind benefits such as forgiveness of taxes, trackage rights, and facilities which would not otherwise be provided.

(3) The Secretary, in cooperation with the Secretary of Labor, the Association, and the Commission, shall assist States and local or regional transportation authorities in negotiating initial operating or lease agreements and shall report to the Congress not later than 30 days after the date of enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 on the progress of such negotiations. The Secretary may, with the concurrence of a State, enter directly into operating or lease agreements with railroads designated to provide service under section 304(d) of this Act, and with the trustees of railroads in reorganization in the region over whose rail properties such service will be provided, to assure the uninterrupted continuation of rail service after such date of conveyance. Such agreements may be entered into only during the period when the Federal share is 100 percent. Payments shall be made from the funds to which a State would otherwise be entitled under this section.

(b) ENTITLEMENT.—(1) Each State in the region which is, pursuant to subsection (c) of this section, eligible to receive rail service continuation assistance is entitled to an amount equal to the total amount authorized and appropriated for such purpose multiplied by a fraction whose numerator is the rail mileage in such State which is eligible for rail service continuation assistance under this section and whose denominator is the rail mileage in all of the States in the region which are eligible for rail service continuation assistance under this section. Notwithstanding the preceding sentence, the entitlement of each State shall not be less than 3 percent of the funds appropriated. Not more than 5 percent of a State's entitlement may be used for rail planning activities. For purposes of this subsection, rail mileage shall be measured by the Secretary in consultation with the Interstate Commerce Commission. Any portion of the entitlement of any State which is withheld, in accordance with this section, and any such sums which are not used or committed by a State shall be reallocated immediately, to the extent practicable, among the other States in accordance with the formula set forth in this subsection. In addition to amounts provided pursuant to such rail mileage formula, funds shall also be made available to each State for the cost of operating and maintaining rail service facilities such as yards, shops, and docks which are useful in facilitating and maintaining mainline or local rail services and which are contained in each State's rail plan, except that (A) any such assistance shall extend for a period of only 12 months following the date rail properties are conveyed under section 303(b)(1) of this Act, and (B) no railroad shall be required to operate such facilities. With respect to the limitation on assistance for rail service facilities under the preceding sentence, the Secretary shall, not later than 90 days prior to the end of such 12-month period, submit a report to the Congress in conjunction with a designated State agency, recommending future action with respect to such facilities.

(2) For a period of not more than 1 year following the date rail properties are conveyed pursuant to section 303(b)(1) of this Act, the Secretary is authorized to provide financial assistance, from the funds to which a State would otherwise be entitled under this section for the continuation of local rail services, to any person determined by the Secretary to be financially responsible who will enter into any operating and lease agreements with railroads designated to provide service under section 304(d) of this Act, regardless of the eligibility of the State, where the applicable rail properties are located, to receive assistance under subsection (c) of this section. In any case in which a State is eligible to receive rail service continuation assistance under subsection (c) of this section, States shall have priority to receive such payments over any other person eligible under this paragraph and no other person eligible under this paragraph shall receive such payments unless his application therefor has been approved by the State agency designated under subsection (c) to administer the State plan.

(c) ELIGIBILITY.—(1) A State in the region is eligible to receive financial assistance pursuant to subsection (b) of this section if, in any fiscal year—

(A) the State has established a State plan for rail transportation and local rail services (herein referred to as the 'State rail plan') which is administered or coordinated by a designated State agency and such plan includes a suitable process for updating, revising, and amending such plan and provides for the equitable distribution of such financial assistance among State, local, and regional transportation authorities;

(B) the State agency (i) has authority and administrative jurisdiction to develop, promote, supervise, and support safe, adequate, and efficient rail services, (ii) employs or will employ, directly or indirectly, sufficient trained and qualified personnel, and (iii) maintains or will maintain adequate programs of investigation, research, promotion, and development with provision for public participation;

(C) the State provides satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this title to the State; and

(D) the State complies with the regulations of the Secretary issued under this section.

(2) The rail freight services which are eligible for rail service continuation assistance pursuant to this section are—

(A) those rail services of railroads in reorganization in the region, or persons leased, operated, or controlled by any such railroad, which the final system plan does not designate to be continued;

(B) those rail services on rail properties referred to in section 304(a)(2) of this Act;

(C) those rail services in the region which have been, at any time during the 5-year period prior to the date of enactment of this Act, or which, are subsequent to the date of enactment of this Act, owned, leased, or operated by a State agency or by a local or regional transportation authority, or with respect to which a State, a political subdivision thereof, or a local or regional transportation authority has invested (at any time during the 5-year period prior to the date of enactment of this Act), or invests (subsequent to the date of enactment of this Act), substantial sums for improvement or maintenance of rail service; or

(D) those rail services in the region with respect to which the Commission authorizes the discontinuance of rail services or the abandonment of rail properties, effective on or after the date of enactment of this Act.

(3) The rail freight properties which are eligible to be acquired or modernized with financial assistance pursuant to subsection (b) of this section are those rail properties which are used for services eligible for rail service continuation assistance, pursuant to paragraph (2) of this subsection, including those properties which are identified, in the applicable State rail plan as having potential for future use for rail freight service.

(4) The facilities which are eligible to be constructed or improved with financial assistance pursuant to subsection (b) of this section are those facilities in the region (including intermodal terminals and highways or bridges) which are needed in order to provide rail freight service which will no longer be available because of the discontinuance of rail freight service under section 304 of this Act or other lawful authority. No funds provided under this paragraph may be used to pay the State share of any highway projects under title 23, United States Code.

(5) Rail properties are eligible to be acquired with financial assistance pursuant to subsection (b) of this section if (A) they are to be used for intercity or commuter rail passenger service, and (B) they pertain to a line in the region (other than rail properties designated in accordance with section 206(c)(1)(C). of this Act) which, if so acquired (i) would enable the National Railroad Passenger Corporation to serve, more efficiently, a route which it operated on November 1, 1975, (ii) would provide intercity rail passenger service designated by the Secretary under title II of the Rail Passenger Service Act, or (iii) would provide such service over a route designated for service pursuant to section 403 (c) of the Rail Passenger Service Act (45 U.S.C. 563(c)).

(d) REGULATIONS.—Within 90 days after the date of enactment of this Act, the Secretary shall issue, and may from time to time amend, regulations with respect to the provision of financial assistance under this title.

(e) PAYMENT.—The Secretary shall pay to each eligible State in the region an amount equal to its entitlement under subsection (b) of this section.

(f) RECORDS, AUDIT, AND EXAMINATION.—(1) Each recipient of financial assistance under this section, whether in the form of grants, subgrants, contracts, subcontracts, or other arrangements, shall keep such records as the Secretary shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance was given or used, the amount of that portion of the cost of the project supplied by other sources, and such other records as will facilitate an effective audit. Such records shall be maintained for 3 years after the completion of such a project or undertaking.

(2) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of such receipts which in the opinion of the Secretary or the Comptroller General may be related or pertinent to the grants, contracts, or other arrangements referred to in such paragraph.

(g) WITHHOLDING.—If the Secretary, after reasonable notice and an opportunity for a hearing to any State agency, finds that a State is not eligible for financial assistance under subsections (c) and (d) of this section, payment to such State shall not be made until there is no longer any failure to comply.

(h) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to the Secretary to carry out the purposes of this section an amount not to exceed $180,000,000 without fiscal year limitation. Such sums as are appropriated shall remain available until expended.

(i) DEFINITION.—As used in this section, the term 'rail service continuation assistance' includes expenditures made by a State (or a local or regional transportation authority), at any time during a 1-year period preceding the date of enactment of this Act, or subsequent to the date of enactment of this Act, for acquisition, rehabilitation, or modernization of rail facilities on which rail freight services would have been curtailed or abandoned but for such expenditures.

ACQUISITION AND MODERNIZATION LOANS

Section 403. [*45 U.S.C. §763*] (a) ACQUISITION.—If a State which is eligible for assistance under section 402(c) of this title or a local or regional transportation authority has made an offer to purchase any rail properties of a railroad pursuant to section 304(c)(2)(c) of this Act or other lawful authority, the Secretary is authorized to direct the Association to provide loans to such State or local or regional transportation authority not to exceed 70 per centum of the purchase price.

(b) MODERNIZATION.—In addition to such acquisition loans, the Secretary is authorized to direct the Association to provide additional assistance not to exceed 70 per centum of the cost of restoring or repairing such rail properties to such condition as will enable safe and efficient rail transportation operations over such rail properties. Such financial assistance may be in the form of a loan or the guarantee of a loan. The Association shall provide such financial assistance as the Secretary may direct under this section and shall adopt regulations describing its procedures for such assistance. Notwithstanding any other provision of this title, a State may expend sums received by it under paragraphs (1) and (2) of section 402(b) of this title for acquisition and modernization pursuant to this section, or for any project designated pursuant to a State rail plan.

REPEAL

Effective on the date of the second anniversary of the date on which rail properties are conveyed, pursuant to section 303(b)(1) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 743), title IV of such Act is repealed. (Pub. L. 94-210, 90 Stat. 143)

TITLE V—EMPLOYEE PROTECTION

DEFINITIONS

Section 501. [*45 U.S.C. §771*] As used in this title unless the context otherwise requires—

(1) "acquiring railroad" means a railroad, except the Corporation or any subsidiary thereof, which seeks to acquire or has acquired, pursuant to the provisions of this Act, all or a part of the rail properties of one or more of the railroads in reorganization, the Corporation or any subsidiary thereof, or a profitable railroad;

(2) employee of a railroad in reorganization" means a person, who, on the effective date of a conveyance of rail properties of a railroad in reorganization to the Corporation or a subsidiary thereof, to the National Railroad Passenger Corporation, to an acquiring railroad, or to a State pursuant to section 208 (d)(2) of this Act, has an employment relationship with either said railroad in reorganization or any carrier (as defined in parts I and II of the Interstate Commerce Act) which is leased, controlled, or operated by the railroad in reorganization (except a Class I railroad which is not wholly owned, operated, or leased by a railroad in reorganization but is controlled by a railroad in reorganization), but does not include a president, vice president, treasurer, secretary, comptroller, and any other person who performs functions corresponding to those performed by the foregoing officers;

(3) 'protected employee' means any employee of—

(A) an acquiring or selling railroad who is adversely affected by a transaction;

(B) the Corporation who, immediately preceding such employment by the Corporation, was employed by a selling railroad and who is adversely affected by the sale of rail properties to the Corporation pursuant to an offer designated under section 206(c)(2) of this Act;

(C) a railroad in reorganization in the region; and

(D) a railroad who is adversely affected by a supplemental transaction under section 305 of this Act or by a project recommended under section 206(g) of this Act;

who, in any such case, has not reached age 65 on the effective date of this Act;

(4) "class or craft of employees" means a group of employees, recognized and treated as a unit for purposes of collective bargaining, which is represented by a labor organization that has been duly authorized or recognized pursuant to the Railway Labor Act as its representative for purposes of collective bargaining;

(5) "representative of a class or craft of employees" means a labor organization which has been duly authorized or recognized as the collective bargaining representative of a class or craft of employees pursuant to the Railway Labor Act;

(6) "deprived of employment" means the inability of a protected employee to obtain a position by the normal exercise of his seniority rights with the Corporation or any subsidiary thereof after properly electing to accept employment therewith or, the subsequent loss of a position and inability, by the normal exercise of his seniority rights under the applicable collective bargaining agreements, to obtain another position with the Corporation or any subsidiary thereof: *Provided, however,* That provisions in existing collective bargaining agreements of a railroad in reorganization, which do not require a protected employee, in the normal exercise of seniority rights, to make a change in residence, in order to maintain his protection, will be preserved and will also be extended and be applicable to all other protected employees of that same craft or class. It shall not, however, include any deprivation of employment by reason of death, retirement, resignation, dismissal or disciplinary suspension for cause, failure to work due to illness or disability, nor any severance of employment covered by subsections (d) and (e) of section 505 of this title;

(7) "employee adversely affected with respect to his compensation" means a protected employee who suffers a reduction in compensation;

(8) "transaction" means actions taken pursuant to the provisions of this Act, including section 305 thereof, or the results thereof;

(9) "change in residence" means transfer to a work location which is located either (A) outside a radius of 30 miles of the employee's former

work location and farther from his residence than was his former work location or (B) is located more than 30 normal highway route miles from his residence and also farther from his residence than was his former work location; and

(10) 'selling railroad' means a railroad which sells rail properties pursuant to an offer designated under section 206(c)(2) of this Act.

EMPLOYMENT OFFERS

Section 502. [*45 U.S.C. §772*] (a) APPLICABLE LAW.—The Corporation and, where applicable, the Association shall be subject to the provisions of the Railway Labor Act and shall be considered employers for purposes of the Railroad Retirement Act, Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act. The Corporation, in addition, shall, except as otherwise specifically provided by this Act, be subject to all Federal and State laws and regulations applicable to carriers by railroad. As used in this subsection, the term 'where applicable' refers to the relations of the Association, as an employer (A) to employees of the Association who, before the date of conveyance, under section 303(b)(1) of this Act, had creditable service under the relevant statute and who were offered and accepted coverage under such statute, and (B) to former employees of railroads in reorganization in the region, after the date of such conveyance.

(b) MANDATORY OFFER.—The Corporation shall offer employment, to be effective as of the date of a conveyance or discontinuance of service under the provisions of this Act, to each employee of a railroad in reorganization in the region who has not already accepted an offer of employment by the Association (where applicable), an acquiring railroad, or the Corporation. Such offers of employment to employees represented by labor organizations shall be confined to their same craft and class. The Corporation shall apply to such employees the protective provisions of this title.

(c) ASSOCIATION.—After the transfer of rail properties pursuant to section 303, the Association, in employing any additional employees, shall give priority consideration to employees of a railroad in reorganization and the provisions of this title shall apply to any such employees employed by the Association as if they were employees of the Corporation.

ASSIGNMENT OF WORK

Section 503. [*45 U.S.C. §773*] The Corporation shall have the right to assign, allocate, reassign, reallocate, and consolidate work formerly performed on the rail properties acquired pursuant to the provisions of this Act from a railroad in reorganization to any location, facility, or position on its system provided it does not remove said work from coverage of a collective-bargaining agreement and does not infringe upon the existing classification of work rights of any craft or class of employees at the location or facility to which said work is assigned, allocated, reassigned, reallocated, or consolidated and shall have the right to transfer to an acquiring railroad the work incident to the rail properties or facilities acquired by said acquiring railroad pursuant to this Act, subject, however, to the provisions of section 508 of this title.

COLLECTIVE-BARGAINING AGREEMENTS

Section 504. [*45 U.S.C. §774*] (a) INTERIM APPLICATION.—Until completion of the agreements provided for under subsection (d) of this section, the Corporation shall, as though an original party thereto, assume and apply on the particular lines, properties, or facilities acquired all obligations under existing collective-bargaining agreements covering all crafts and classes employed thereon, except that the Agreement of May 1936, Washinton, D.C. and provisions in other existing job stabilization agreements shall not be applicable to transactions effected pursuant to this Act with respect to which the provisions of section 505 of this title shall be superseding and controlling. During this period, employees of a railroad in reorganization who have seniority on the lines, properties, or facilities acquired by the Corporation pursuant to this Act shall have prior seniority roster rights on such acquired lines, properties, or facilities.

(b) SINGLE IMPLEMENTING AGREEMENT.—On or before the date of the adoption of the final system plan by the Board of Directors of the Association as provided in section 207(c) of this Act, the representatives of the various classes or crafts of the employees of a railroad in reorganization involved in a conveyance pursuant to this Act and representatives of the Corporation shall commence negotiation of a single implementing agreement for each class and craft of employees affected providing (1) the identification of the specific employees of the railroad in reorganization to whom the Corporation offers employment; (2) the procedure by which those employees of the railroad in reorganization may elect to accept employment with the Corporation; (3) the procedure for acceptance of such employees into the Corporation's employment and their assignment to positions on the Corporation's system; (4) the procedure for determining the seniority of such employees in their respective crafts or classes on the Corporation's system which shall, to the extent possible, preserve their prior seniority rights; and (5) the procedure for determining equitable adjustment in rates of comparable positions. If no agreement with respect to the matters referred to in this subsection is reached by the end of 30 days after the commencement of negotiations, the parties shall within an additional 10 days select a neutral referee and, in the event they are unable to agree upon the selection of such referee, then the National Mediation Board shall immediately appoint a referee. After a referee has been designated, a hearing on the dispute shall commence as soon as practicable. Not less than 10 days prior to the effective date of any conveyance pursuant to the provisions of this Act, the referee shall resolve and decide all matters in dispute with respect to the negotiation of said implementing agreement or agreements and shall render a decision which shall be final and binding and shall constitute the implementing agreement or agreements between the parties with respect to the transaction involved. The salary and expenses of the referee shall be paid pursuant to the provisions of the Railway Labor Act.

(c) RELATIONSHIP TO OTHER PROVISIONS.—Notwithstanding failure for any reason to complete implementing agreements provided for in subsection (b) of this section, the Corporation may proceed with a conveyance of properties, facilities, and equipment pursuant to the provisions of this Act and effectuate said transaction: *Provided,* That all protected employees shall be entitled to all of the provisions of such agreements, as finally determined, from the time they are adversely affected as a result of any such conveyance.

(d) NEW COLLECTIVE-BARGAINING AGREEMENTS.—Not later than 60 days after the effective date of any conveyance pursuant to the provisions of this Act, the representatives of the various classes or crafts of the employees of a railroad in reorganization involved in a conveyance and representatives of the Corporation shall commence negotiations of new collective-bargaining agreements for each class and craft of employees covering the rates of pay, rules, and working conditions of employees who are employees of the Corporation, which collective-bargaining agreements shall include appropriate provisions concerning rates of pay, rules, and working conditions but shall not include any provisions for job stabilization resulting from any transaction effected pursuant to this Act which may exceed or conflict with those established or prescribed herein.

(e) LIABILITY FOR EMPLOYEE CLAIMS.—In all cases of claims by employees, arising under the collective bargaining agreements of the railroads in reorganization in the region, and subject to section 3 of the Railway Labor Act (45 U.S.C.153), the Corporation, the National Railroad Passenger Corporation, or an acquiring carrier, as the case may be, shall assume responsibility for the processing of any such claims, and payment of those which are sustained or settled on or subsequent to the date of conveyance, under section 303(b)(1) of this Act, and shall be entitled to direct reimbursement from the Association pursuant to section 211 (h) of this Act. In those cases in which claims for employees were sustained or settled prior to such date of conveyance, it shall be the obligation of the employees to seek satisfication against the estates of the railroads in reorganization which were their former employers.

(f) TRANSFER OF EMPLOYEES TO THE NATIONAL RAILROAD PASSENGER CORPORATION OR ACQUIRING RAILROADS.—Notwithstanding any otherwise applicable provisions of this title, protected employees to whom the Corporation has made offers of employment may be transferred to the National Railroad Passenger Corporation in accordance with the following procedure:

(1) Not later than 90 days after the date of completion of the transaction required by section 206(c) of this Act, implementing agreement negotiations between representatives of the various crafts or classes of employees associated with the involved properties, the Corporation, and the National Railroad Passenger Corporation shall commence. These negotiations shall—

(A) identify the specific employees of the Corporation to whom the National Railroad Passenger Corporation offers employment;

(B) the procedure by which those employees of the Corporation may elect to accept employment with the National Railroad Passenger Corporation;

(C) the procedure for acceptance of such employees into the National Railroad Passenger Corporation's employment; and

(D) the procedure for determining the seniority of such employees in their respective crafts or classes on the National Railroad Passenger Corporation's system which shall, to the extent possible, preserve their prior seniority rights.

If no agreement regarding the matters referred to in this subsection is reached by the end of 60 days after the date of commencement of negotiations (which shall also be a date which is at least 90 days after the transaction contemplated by section 601(d) of this Act), upon notice of any party, all parties thereto shall within an additional 10 days select a neutral referee. If such parties are unable to agree upon the selection of such a referee, the National Mediation Board shall promptly appoint a referee. Hearings shall commence not later than 30 days after the date of selection or appointment of such referee, and a decision shall be rendered by such referee within 60 days after the date of commencement of the hearings. The referee shall resolve and decide all matters in dispute regarding the negotiation of the implementing agreement or agreements. All parties may participate, but the referee shall have the only vote. The referee's decision shall be final and binding and shall constitute the implementing agreement or agreements between the parties. The salary and expenses of the referee shall be paid pursuant to the provisions of the Railway Labor Act.

(2) Prior to implementation of an agreement or agreements pursuant to paragraph (1) of this subsection, the representatives of the various

crafts or classes of employees designated to be transferred to the National Railroad Passenger Corporation shall meet with representatives of the National Railroad Passenger Corporation for the purposes of negotiating agreements regarding rates of pay, rules, and working conditions. If, 60 days after the date of commencement of such negotiations, no agreement has been reached, the bargaining agreement in existence on the rail properties from which the employees are to be transferred and which is applicable to the craft or class of employees being transferred will apply and such implementing agreement will be put into effect.

(3) An employee of the Corporation who is entitled to protection and who is transferred as a result of an acquisition pursuant to this Act shall upon transfer to the National Railroad Passenger Corporation or to an acquiring railroad, carry with him his protected status. The National Railroad Passenger Corporation or an acquiring railroad, as new employers, shall be responsible for payment of protective benefits and shall be entitled to reimbursement pursuant to section 509 of this title.

(4) The National Railroad Passenger Corporation may prior to completion of any of the agreements referred to in this section, offer employment to any noncontract employee. Noncontract employees accepting employment with the National Railroad Passenger Corporation shall carry with them all rights and benefits accorded to them under this title.

(g) ASSUMPTION OF PERSONAL INJURY CLAIMS.—All cases or claims by employees or their personal representatives for personal injuries or death against a railroad in reorganization in the region arising prior to the date of conveyance of rail properties, pursuant to section 303 of this Act, shall be assumed by the Corporation or an acquiring railroad as the case may be. The Corporation or the acquiring railroad shall process and pay any such claims that are sustained or settled, and shall be entitled to direct reimbursement from the Association pursuant to section 211(h) of this Act.

EMPLOYEE PROTECTION

Section 505. [*45 U.S.C. §775*] **(a) EQUIVALENT POSITION.**—A protected employee whose employment is governed by a collective-bargaining agreement will not, except as explicitly provided in this title, during the period in which he is entitled to protection, be placed in a worse position with respect to compensation, fringe benefits, rules, working conditions, and rights and privileges pertaining thereto, including benefits under any employee pension benefit plan in effect on December 1, 1975, other than a plan maintained primarily for the purpose of providing deferred compensation for a select group of management personnel or other highly compensated employees. For purposes of protecting employee pension benefits under this title, the term 'protected employee whose employment is governed by a collective-bargaining agreement' includes any beneficiary of, and any participant in, such plan, including noncontract employees. The protected benefits of such beneficiary or participant, accrued as of the date of conveyance, may be limited to the amount guaranteed under terminated plans pursuant to title IV of the Employee Retirement Income Security Act of 1974. Pension benefits shall not be paid to any beneficiary of a terminated plan whose benefits are guaranteed by such Act.

(b) MONTHLY DISPLACEMENT ALLOWANCE.—A protected employee, who has been deprived of employment or adversely affected with respect to his compensation shall be entitled to a monthly displacement allowance computed as follows:

(1) Said allowance shall be determined by computing the total compensation received by the employee, including vacation allowances and monthly compensation guarantees, and his total time paid for during the 12 full calendar months immediately preceding February 26, 1975, or in the case of a supplementary transaction, the 12 full calendar months immediately preceding the effective date of such transaction in which he performed compensated service more than 50 per centum of each of such months, based upon his normal work schedule, and by dividing separately the total compensation and the total time paid for by 12, thereby producing the average monthly compensation and average monthly time paid for; and, if an employee's compensation in his current position is less in any month in which he performs work than the aforesaid average compensation, he shall be paid the difference, less any time lost on account of voluntary absences other than vacations, but said protected employee shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of his average monthly time, *Provided, however,* That—

(A) in determining compensation in his current employment the protected employee shall be treated as occupying the position, producing the highest rate of pay to which his qualifications and seniority entitle him under the applicable collective bargaining agreement and which does not require a change in residence;

(B) the said monthly displacement allowance shall be reduced by the full amount of any unemployment compensation benefits received by the protected employee and shall be reduced by an amount equivalent to any earnings of said protected employee in any employment subject to the Railroad Retirement Act and 50 per centum of any earnings in any employment not subject to the Railroad Retirement Act;

(C) a protected employee's average monthly compensation shall be adjusted from time to time thereafter to reflect subsequent general wage increases;

(D) should a protected employee's service total less than 12 months in which he performs more than 50 per centum compensated service based upon his normal work schedule in each of said months, his average monthly compensation shall be determined by dividing separately the total compensation received by the employee and the total time for which he was paid by the number of months in which he performed more than 50 per centum compensated service based upon his normal work schedule; and

(E) the monthly displacement allowance provided by this section shall in no event exceed the sum of $2,500 in any month except that such amount shall be adjusted to reflect subsequent general wage increases.

(2) A protected employee's average monthly compensation under this section shall be based upon the rate of pay applicable to his employment and shall include increases in rates of pay not in fact paid but which were provided for in national railroad labor agreements generally applicable during the period involved.

(3) If a protected employee who is entitled to a monthly displacement allowance served as an agent or a representative of a class or craft of employees on either a full- or part-time basis in the 12 months immediately preceding February 26, 1975, or the effective date of the supplemental transaction, as the case may be, his monthly displacement allowance shall be computed by taking the average of the average monthly compensation and average monthly time paid for of the protected employees immediately above and below him on the same seniority roster or his own monthly displacement allowance, whichever is greater.

(4) If a noncontract employee exercises seniority rights in a craft or class of employees protected under this Act, then, during the period such seniority is exercised, such noncontract employee shall be entitled to the same protection offered under this Act to employees in the craft or class in which such seniority is exercised. However, in computing the monthly displacement allowance, the last 12 months prior to February 26, 1975, during which such noncontract employee performed service under a collective bargaining agreement, shall be used.

(5) An employee and his representative shall be furnished with a protected employee's average monthly compensation and average monthly time paid for, computed in accordance with the terms of this subsection, together with the data upon which such computations are based, within 30 days after the protected employee notifies the Corporation in writing that he has been deprived of employment or adversely affected with respect to his compensation.

(c) DURATION OF DISPLACEMENT ALLOWANCE.—The monthly displacement allowance provided for in subsection (b) of this section shall continue until the attainment of age 65 by a protected employee with 5 or more years of service on the effective date of this Act and, in the case of a protected employee who has less than 5 years service on such date, shall continue for a period equal to his total prior years of service: *Provided*, That such monthly displacement allowance shall terminate upon the protected employee's death, retirement, resignation, or dismissal for cause; and shall be suspended for the period of disciplinary suspension for cause, failure to work due to illness or disability, voluntary furlough, or failure to retain or obtain a position available to him by the exercise of his seniority rights in accordance with the provisions of this section.

(d) TRANSFER.—(1) A protected employee who has been deprived of employment may be required by the Corporation, in inverse seniority order and upon reasonable notice, to transfer to any bona fide vacancy for which he is qualified in his same class or craft of employee on any part of the Corporation's system and shall then be governed by the collective-bargaining agreement applicable on the seniority district to which transferred. If such transfer requires a change in residence, any such protected employee may choose (A) to voluntarily furlough himself at his home location and have his monthly displacement allowance suspended during the period of voluntary furlough, or (B) to be severed from employment upon payment to him of a separation allowance computed as provided in subsections (e) and (f) of this section, which separation allowance shall be in lieu of all other benefits provided by this title.

(2) Such protected employee shall not be required to transfer to a location requiring a change in residence unless there is a bona fide need for his services at such location. Such bona fide need for services contemplates that the transfer be to a position which has not and cannot be filled by employees who are not required to make a change in residence in the seniority district involved and which, in the absence of this section, would have required the employment of a new employee.

(3) Such protected employee who, at the request of the Corporation, has once accepted and made a transfer to a location requiring a change in residence shall not be required again to so transfer for a period of 3 years.

(4) Transfers to vacancies requiring a change in residence shall be subject to the following:

(A) The vacancy shall be first offered to the junior qualified protected employee deprived of employment in the seniority district where the vacancy exists, and each such employee shall have 20 days to elect one of the options set forth in paragraph (1) of this subsection. If that employee elects not to accept the transfer, it will then be offered in inverse seniority order to the remaining qualified, protected employees deprived of employment on the seniority district, who will each have 20 days to elect one of the options set forth in paragraph (1) of this subsection.

(B) If the vacancy is not filled by the procedure in paragraph (4) (A) of this subsection, the vacancy will then be offered in the inverse order of seniority to the qualified protected employees deprived of employment on the system and each of such employees will be afforded 30 days to elect one of the options set forth in paragraph (1) of this subsection.

(C) The provisions of this paragraph shall not prevent the adoption of other procedures pursuant to an agreement made by the Corporation and representative of the class or craft of employees involved.

(e) SEPARATION ALLOWANCE.—A protected employee who is tendered and accepts an offer by the Corporation to resign and sever his employment relationship in consideration of payment to him of a separation allowance, and any protected employee whose employment relationship is severed in accordance with subsection (d) of this section, shall be entitled to receive a lump-sum separation allowance not to exceed $20,000 in lieu of all other benefits provided by this title. Said lump-sum separation allowance, in the case of a protected employee who had not less than 3 nor more than 5 years of service as of the date of this Act, shall amount to 270 days' pay at the rate of the position last held and, in the case of a protected employee having had 5 or more years' service, shall amount to the number of days' pay indicated below at the rate of the position last held dependent upon the age of the protected employee at the time of such termination of employment.

60 or under	360 days' pay
61	300 days' pay
62	240 days' pay
63	180 days' pay
64	120 days' pay.

(f) TERMINATION ALLOWANCE.—The Corporation may terminate the employment of an employee of a railroad in reorganization who has less than 3 years' service with such railroad, as of the date of enactment of this Act. The Corporation's right to terminate an employee must be exercised within a period of 1 year from the date of conveyance, pursuant to section 303 of this Act. Upon notification to the employee of the Corporation's intent to terminate his services, the employee shall have the option of accepting the termination allowance or of accepting a voluntary furlough without pay. If the employee entitled to receive a lump sum separation allowance accepts such an allowance, the amount shall be determined as follows:

2 to 3 years' service	180 days' pay at the rate of the position last held.
1 to 2 years' service	90 days' pay at the rate of the position last held.
Less than 1 year's service	5 days' pay at the rate of the position last held for each month of service.

(g) MOVING EXPENSE BENEFITS.—Any protected employee who is required to make a change of residence as the result of a transaction shall be entitled to the following benefits—

(1) Reimbursement for all expenses of moving his household and other personal effects, for the traveling expense of himself and members of his family, including living expenses for himself and his family, and for his own actual wage loss, not to exceed 10 working days. *Provided,* That the Corporation or acquiring railroad shall, to the same extent provided above, assume said expenses for any employee furloughed within 3 years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provisions of this section unless such claim is presented to the Corporation or acquiring railroad within 90 days after the date on which the expenses were incurred.

(2) (A) (i) If the protected employee owns, or is under a contract to purchase, his own home in the locality from which he is required to move and elects to sell said home, he shall be reimbursed for any loss suffered in the sale of his home for less than its fair market value. In each case the fair market value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The Corporation or an acquiring railroad shall in each instance be afforded an opportunity to purchase the home at such fair market value before it is sold by the employee to any other person.

(ii) A protected employee may elect to waive the provisions of paragraph (2) (A) (i) of this subsection and to receive, in lieu thereof, an amount equal to his closing costs which are ordinarily paid for and assumed by a seller of real estate in the jurisdiction in which the residence is located. Such costs shall include a real estate commission paid to a licensed realtor (not to exceed $3,000 or 6 per centum of sale price, whichever is less), and any prepayment penalty required by the institution holding the mortgage; such costs shall not include the payment of any "points" by the seller.

(B) If the protected employee holds an unexpired lease on a dwelling occupied by him as his home, he shall be protected from all loss and cost in securing the cancellation of said lease.

(C) No claim for costs or loss shall be paid under the provisions of this paragraph unless the claim is presented to the Corporation or an acquiring railroad within 90 days after such costs or loss are incurred.

(D) Should a controversy arise with respect to the value of the home, the costs or loss sustained in its sale, the costs or loss under a contract for purchase, loss or cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or his representative, and the Corporation or an acquiring railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner: One to be selected by the employee or his representative and one by the Corporation or acquiring railroad and these two, if unable to agree upon a valuation within 30 days, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days a third qualified real estate appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

(h) APPLICATION OF TITLE.—Should a railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving a protected employee of benefits to which he otherwise would have become entitled under this title, the provisions of this title will apply to such employee. Provisions of this title shall be applied, upon a conveyance or discontinuance of service, to employees who are otherwise entitled to protective benefits and who were placed in furlough status on or after February 26, 1975.

(i) NONCONTRACT EMPLOYEES.—Compensation, severance, termination, and moving expense benefits for employees not governed by a collective-bargaining agreement shall be consistent with subsections (b), (c), (e), (f), and (g) of this section and shall be in accordance with the following provisions:

(1) A protected employee, whose employment is not governed by the terms of a collective-bargaining agreement, may be required by the Corporation, upon reasonable notice, to transfer to any position on the Corporation's system. If such transfer requires a change in residence, the employee may either voluntarily suspend his employment at his home location in lieu of protective benefits, or he may sever his employment and receive a benefit computed in accordance with subsection (e) or (f) of this section. These provisions supersede all provisions or conditions in subsection (d) of this section.

(2) If any dispute arises between the Corporation and a noncontract employee regarding the interpretation or application of any provision of this title, the Corporation shall establish a resolution procedure with arbitration as the final step. Either party may request arbitration and

the cost and expenses of such arbitration shall be shared equally by the parties.

CONTRACTING OUT

Section 506. [*45 U.S.C. §776*] All work in connection with the operation or services provided by the Corporation on the rail lines, properties, equipment, or facilities acquired pursuant to the provisions of this Act and the maintenance, repair, rehabilitation, or modernization of such lines, properties, equipment, or facilities which has been performed by practice or agreement in accordance with provisions of the existing contracts in effect with the representatives of the employees of the classes or crafts involved shall continue to be performed by said Corporation's employees, including employees on furlough. Should the Corporation lack a sufficient number of employees, including employees on furlough, and be unable to hire additional employees, to perform the work required, it shall be permitted to subcontract that part of such work which cannot be performed by its employees, including those on furlough, except where agreement by the representatives of the employees of the classes or crafts involved is required by applicable collective-bargaining agreements. the term "unable to hire additional employees" as used in this section contemplates establishment and maintenance by the Corporation of an apprenticeship, training, or recruitment program to provide an adequate number of skilled employees to perform the work.

ARBITRATION

Section 507. [*45 U.S.C. § 777*] Any dispute or controversy with respect to the interpretations, application, or enforcement of the provisions of this title, except section 504(d) and those disputes or controversies provided for in subsection (g)(2)(D) of section 505 and subsection (b) of section 504 which have not been resolved within 90 days, may be submitted by either party to an Adjustment Board for a final and binding decision thereon as provided in section 3 Second, of the Railway Labor Act, in which event the burden of proof on all issues so presented shall be upon the Corporation or, where applicable, the Association.

DUTIES OF ACQUIRING AND SELLING RAILROADS

Section 508. [*45 U.S.C. § 778*] (a) ACQUIRING RAILROADS.—(1) An acquiring railroad shall offer such employment, subject to such rules and working conditions, and afford such employment protection to employees of a railroad from which it acquires properties or facilities (including operating rights) pursuant to this Act, and shall afford such protection to its own employees who are adversely affected by such acquisition, as shall be agreed upon between such acquiring railroad and the representatives of such employees prior to such acquisition, except that the protection and benefits (except as to rules and working conditions) provided for protected employees in such agreements shall be the same as those specified in section 505 of this title. Unless and until such agreements are reached, the acquiring railroad shall not enter into purchase agreements pursuant to section 206(d) (4) of this Act. For purposes of this subsection, the National Railroad Passenger Corporation shall be deemed to be an acquiring railroad, with respect to employees described in section 501(3) of this title.

(2) If the National Railroad Passenger Corporation acquires rail properties of a railroad in reorganization in the region, prior to the date of conveyance of rail properties to the Corporation pursuant to section 303(b) (1) of this Act but after the publication of the preliminary system plan, it shall offer such employment and afford such employment protection to employees of a railroad from which it acquires rail properties and shall further protect its own employees who may be adversely affected by such acquisition, as shall be agreed upon between the National Railroad Passenger Corporation and the representatives of such employees prior to such acquisitions. The protection and benefits provided for employees in such agreements shall be the same as those specified in section 505 of this title, and such protection and benefits shall supersede conflicting provisions in any previously applicable job stabilization agreements or agreements implementing such stabilization agreements, and the National Railroad Passenger Corporation shall be reimbursed for expenses incurred as a result of any such acquisition, as provided in section 509 of this title.

(b) SELLING RAILROADS.—A selling railroad shall offer such employment and shall provide such employment protection to each of its employees who are adversely affected by such sale, pursuant to agreements to be entered into between it and the representatives of such employees prior to said sale: *Provided*, That (1) the protection and benefits provided for protected employees in such agreements shall be the same as those specified in section 505 of this title, and (2) unless and until such agreements are reached, the selling railroad shall not enter into selling agreements pursuant to section 206(d) of this Act.

PAYMENT OF BENEFITS

Section 509. [*45 U.S.C. § 779*] The Corporation, the Association (where applicable), and acquiring railroads, as the case may be, shall be responsible for the actual payment of all allowances, expenses, and costs provided protected employees pursuant to the provisions of this title. The Corporation, the Association (where applicable), and acquiring railroads shall then be reimbursed for the actual amounts paid to, or for the benefit of, protected employees, pursuant to the provisions of this title, other than provisions with respect to employee pension benefits, not to exceed the aggregate sum of $250,000,000, by the Railroad Retirement Board, upon certification to such Board, by the Corporation, the Association (where applicable), and acquiring railroads, of the amounts paid such employees. Such reimbursement shall be made from a separate account maintained in the Treasury of the United States to be known as the Regional Rail Transportation Protective Account. Neither the Regional Rail Transportation Protective Account nor the Corporation nor an acquiring railroad shall be charged for any amounts of benefits paid to a protected employee under the provisions of the Railroad Unemployment Insurance Act or any other income protection law or regulation. There is authorized to be appropriated to the Regional Rail Transportation Protective Account annually such sums as may be required to meet the obligations payable hereunder, not to exceed the aggregate sum of $250,000,000. There is further authorized to be appropriated to the Railroad Retirement Board annually such sums as may be necessary to provide for additional administrative expenses to be incurred by the Board in the performance of its functions under this section.

TITLE VI—MISCELLANEOUS PROVISIONS

RELATIONSHIP TO OTHER LAWS

Section 601. [*45 U.S.C. § 791*] (a) ANTITRUST.—(1) Except as specifically provided in paragraph (2) of this subsection, no provision of this Act shall be deemed to convey to any railroad or employee or director thereof any immunity from civil or criminal liability, or to create defenses to actions, under the antitrust laws.

(2) The antitrust laws are inapplicable with respect to any action taken to formulate or implement the final system plan where such action was in compliance with the requirements of such plan and with respect to any action taken to formulate or implement any supplemental transaction.

(3) As used in this subsection, "antitrust laws" includes the Act of July 2, 1890 (ch. 647, 26 Stat. 209), as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), as amended; the Federal Trade Commission Act (38 Stat. 717), as amended; sections 73 and 74 of the Act of

August 27, 1894 (28 Stat. 570), as amended; the Act of June 19, 1936 (ch. 592, 49 Stat. 1526), as amended; and the antitrust laws of any State or subdivision thereof.

(b) COMMERCE, SECURITIES, AND BANKRUPTCY.—(1) The provisions of the Interstate Commerce Act (49 U.S.C. 1 et seq.) and the Bankruptcy Act (11 U.S.C. 205 et seq.) are inapplicable (A) to actions taken under this Act to formulate and implement the final system plan where such action was in compliance with the requirements of such plan, and (B) to actions taken under this Act to formulate or implement any supplemental transaction.

(2) All securities of the Corporation which are issued to the Association as the initial holder, or which are issued in connection with the transfer to the Corporation or a subsidiary thereof of rail properties under this Act, shall be deemed for all purposes to have been issued subject to and authorized pursuant to section 20a of the Interstate Commerce Act (49 U.S.C. 20a).

(3) The provisions of section 5 of the Securities Act of 1933 (15 U.S.C. 77e), shall not apply to transactions involving the issuance of any security of the Corporation to the Association, transactions involving the issuance of any security of the Corporation that is deposited with the special court pursuant to section 303(a) of this Act, or transactions involving the issuance or distribution of any security of the Corporation, where the terms and conditions of such issuance or distribution are approved by the special court pursuant to section 303(c) of this Act.

(4) The powers and duties of the Commission under section 77 of the Bankruptcy Act (11 U.S.C. 205), with respect to a railroad in reorganization in the region which conveys all or substantially all of its designated rail properties to the Corporation or a subsidiary thereof, or to profitable railroads in the region, pursuant to the final system plan, and the requirement that plans of reorganization be filed with the Commission, shall cease upon the date of such conveyance. The powers and duties of the Commission under section 77 of the Bankruptcy Act shall also so terminate, as of the date of enactment of this paragraph, with respect to any railroad in reorganization under such section 77 but not subject to this Act which (1) does not operate any line of railroad, and (2) has transferred all or substantially all of its rail properties to a railroad in reorganization in the region which was subject to this Act prior to the date of enactment of this paragraph. Thereafter, such powers and duties of the Commission shall be vested in the district court of the United States which has jurisdiction of the estate of any such railroad in reorganization at the time of such conveyance. Such court shall proceed to reorganize or liquidate such railroad in reorganization pursuant to such section 77 on such terms as the court deems just and reasonable, or pursuant to any other provisions of the Bankruptcy Act, if the

court finds that such action would be in the best interests of such estate. This paragraph does not effect any obligation of any carrier by railroad subject to regulation under the Interstate Commerce Act. The powers and duties of the Commission under section 77 of the Bankruptcy Act shall continue in effect only to the extent that the railroad in reorganization continues to operate any line of railroad.

(c) ENVIRONMENT.—The provisions of section 102(2) (C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2) (C)) shall not apply with respect to any action taken under authority of this Act before, and including, the conveyance of rail properties ordered by the special court under section 303(b) (1) of this Act, and shall not apply thereafter to any action taken in compliance with the requirements of the final system plan.

APPLICATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

Nothing in this title shall affect the application of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) to actions of the Commission. (Pub. L. 94-210, title VI, 90 Stat. 119)

(d) NORTHEAST CORRIDOR.—(1) Rail properties designated in accordance with section 206(c) (1) (C) of this Act shall be purchased or leased by the National Railroad Passenger Corporation. The Corporation shall negotiate an appropriate sale or lease agreement with the National Railroad Passenger Corporation for the properties designated for transfer pursuant to section 206(c) (1) (C) of this Act (45 U.S.C. 716(c) (1) (C)), which shall take effect on the date of conveyance of such properties to the Corporation.

(2) Properties acquired by purchase, lease, or otherwise pursuant to this subsection shall be improved in order to meet the goal set forth in section 206(a) (3) of this Act, relating to improved high-speed passenger service, by the earliest practicable date after the date of enactment of this Act.

(3) The Secretary shall begin the necessary engineering studies and improvements upon enactment.

(4) The final system plan shall provide for any necessary coordination with freight or commuter services of use of the facilities designated in section 206(c) (1) (C) of this Act. Such coordination may be effectuated through a single operating entity, designated in the final system plan, or as mutually agreed upon by the interested parties.

(5) Construction or improvements made pursuant to this subsection may be made in consultation with the Corps of Engineers.

ANNUAL EVALUATION BY THE SECRETARY

Section 602. [*45 U.S.C. § 792*] As part of his annual report each year, the Secretary shall transmit to Congress each year a comprehensive report on the effectiveness of the Association and the Corporation in implementing the purposes of this Act, together with any recommendations for additional legislative or other action.

FREIGHT RATES FOR RECYCLABLES

Section 603. [*45 U.S.C. § 793*] The Commission shall, by expedited proceedings, adopt appropriate rules under the Interstate Commerce Act (49 U.S.C. 1 et seq.) which will eliminate discrimination against the shipment of recyclable materials in rate structures and in other Commission practices where such discrimination exists.

INVESTIGATION OF DISCRIMINATORY FREIGHT RATES FOR THE TRANSPORTATION OF RECYCLABLE OR RECYCLED MATERIALS

(a) INVESTIGATION.—The Commission, within 12 months after the date of enactment of this Act, and thereafter as appropriate, shall—

(1) conduct an investigation of (A) the rate structure for the transportation, by common carriers by railroad subject to part I of the Interstate Commerce Act, of recyclable or recycled materials and competing virgin natural resource materials, and (B) the manner in which such rate structure has been affected by successive general rate increases approved by the Commission for such common carriers by railroad;

(2) determine, after a public hearing during which the burden of proof shall be upon such common carriers by railroad to show that such rate structure, as affected by rate increases applicable to the transportation of such competing materials, is just, reasonable, and nondiscriminatory, whether such rate structure is, in whole or in part, unjustly discriminatory or unreasonable;

(3) issue, in all cases in which such transportation rate structure is determined to be, in whole or in part, unjustly discriminatory or unreasonable, orders requiring the removal from such rate structure of such unreasonableness or unjust discrimination; and

(4) report to the President and the Congress, in the annual report of the Commission for each of the 3 years following the date of enactment of this Act, and in such other reports as may be appropriate, all actions commenced or completed under this section to eliminate unreasonable and unjustly discriminatory rates for the transportation of recyclable or recycled materials.

(b) PARTICIPATION.—The Administrator of the Environmental Protection Agency shall take such steps as are necessary to assure that the Commission carries out the requirements set forth in subsection (a) of this section as expeditiously as possible. Such Administrator is authorized to participate as a party in the investigation to be commenced by the Commission under such subsection (a).

(c) RESEARCH, DEVELOPMENT, AND DEMONSTRATION.—The Secretary, in cooperation with the Commission, shall establish a research, development, and demonstration program to develop and improve transport terminal operations, transport service characteristics, transport equipment, and collection and processing methods for the purpose of facilitating the competitive and efficient transportation of recyclable or recycled materials by common carriers by railroad subject to part I of the Interstate Commerce Act.

(d) REVIEW.—Orders issued by the Commission pursuant to this section shall be subject to judicial review or enforcement in the same manner as other orders issued by the Commission under the Interstate Commerce Act. In all proceedings under this section, the Commission shall comply fully with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(e) DEFINITIONS.—As used in this section, the term—

(1) "recyclable material" means any material which has been collected or recovered from waste for a commercial or industrial use, whether or not such collection or recovery follows end usage as a product; and

(2) "virgin natural resource material" and "virgin material" mean any raw material, including previously unused metal or metal ore, woodpulp or pulpwood, textile fiber or material, or other resources which is, or which will become (through the application of technology), a source of raw material for commercial or industrial use. (Public L. 94-210, 90 Stat. 40)

SEPARABILITY

Section 604. [*45 U.S.C. § 701 Note*] If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

TAX PAYMENTS TO STATES

Section 605. [*45 U.S.C. §794*] (a) Notwithstanding any other provision of law, no railroad in reorganization shall withhold from any State, or any political subdivision thereof, the payment of the portion of any tax owed by such railroad to such State or subdivision, which portion has been collected by such railroad from any tenant thereof.

(b) Any railroad which violates the provisions of subsection (a) of this section by withholding any portion of a tax referred to in such subsection shall be fined not more than $10,000 for each such violation.

(Public Law 93-236, January 2, 1974, 87 Stat. 985, as amended by Public Law 93-488, October 26, 1974, 88 Stat. 1464; Public Law 94-5, February 28, 1975, 89 Stat. 7; Public Law 94-210, February 5, 1976, 90 Stat. 31; Public Law 94-216, February 17, 1976, 90 Stat. 191; Public Law 94-248, March 25, 1976, 90 Stat. 286)

Regulations of the Commission

40 FR 1624, Jan 8, 1975, Part 1125: Standards for Determining Rail Service Continuation Subsidies. Revised standards on "revenues attributable" and "avoidable costs", effective Jan. 8, 1975.

40 FR 3215, Jan. 20, 1975, Part 1125: Standards for Determining Rail Service Continuation Subsidies, Correction of 40 FR 1624.

40 FR 14186, March 28, 1975, Part 1125: Standards for Determining Rail Service Continuation Subsidies, Miscellaneous amendments, effective March 28, 1975.

40 FR 16066, April 9, 1975, Part 1126: Submission of Cost Data to Justify Reimbursement for Directed Service. New section promulgated, effective March 21, 1975.

RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976

45 U.S.C. Chapter 17

TITLE I—GENERAL PROVISIONS

DECLARATION OF POLICY

Section 101. [*45 U.S.C. §801*] (a) PURPOSE.—It is the purpose of the Congress in this Act to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States, and to promote the revitalization of such railway system, so that this mode of transportation will remain viable in the private sector of the economy and will be able to provide energy-efficient, ecologically compatible transportation services with greater efficiency, effectiveness, and economy, through—

(1) ratemaking and regulatory reform;

(2) the encouragement of efforts to restructure the system on a more economically justified basis, including planning authority in the Secretary of Transportation, an expedited procedure for determining whether merger and consolidation applications are in the public interest, and continuing reorganization authority;

(3) financing mechanisms that will assure adequate rehabilitation and improvement of facilities and equipment, implementation of the final system plan, and implementation of the Northeast Corridor project;

(4) transitional continuation of service on light-density rail lines that are necessary to continued employment and community well-being throughout the United States;

(5) auditing, accounting, reporting, and other requirements to protect Federal funds and to assure repayment of loans and financial responsibility; and

(6) necessary studies.

(b) **POLICY.**—It is declared to be the policy of the Congress in this Act to—

(1) balance the needs of carriers, shippers, and the public;

(2) foster competition among all carriers by railroad and other modes of transportation, to promote more adequate and efficient transportation services, and to increase the attractiveness of investing in railroads and rail-service related enterprises;

(3) permit railroads greater freedom to raise or lower rates for rail services in competitive markets;

(4) promote the establishment of railroad rate structures which are more sensitive to changes in the level of seasonal, regional, and shipper demand;

(5) promote separate pricing of distinct rail and rail-related services;

(6) formulate standards and guidelines for determining adequate revenue levels for railroads; and

(7) modernize and clarify the functions of railroad rate bureaus.

DEFINITIONS

Section 102. [*45 U.S.C. §802*] As used in this Act, unless the context otherwise indicates, the term—

(1) "Association" means the United States Railway Association;

(2) "Commission" means the Interstate Commerce Commission;

(3) "Corporation" means the Consolidated Rail Corporation;

(4) "final system plan" means the final system plan and any additions thereto adopted by the Association pursuant to the Regional Rail Reorganization Act of 1973 (45 U.S.C. 701 et seq.);

(5) "includes" and variants thereof should be read as if the phrase "but is not limited to" were also set forth;

(6) "Office" means the Rail Services Planning Office of the Commission;

(7) "railroad" means a common carrier by railroad or express, as defined in section 1(3) of the Interstate Commerce Act (49 U.S.C. 1(3)), and includes the National Railroad Passenger Corporation and the Alaska Railroad; and

(8) "Secretary" means the Secretary of Transportation or his designated representative.

TITLE V—RAILROAD REHABILITATION AND IMPROVEMENT FINANCING

DEFINITIONS

Section 501. *[45 U.S.C. §821]* As used in this title, the term—

(1) "applicant" means any railroad, or other person (including a governmental entity) which submits an application to the Secretary for the guarantee of an obligation under which it is an obligor or for a commitment to guarantee such an obligation;

(2) "equipment" includes any type of new or rebuilt standard gauge locomotive, caboose, or general service railroad freight car the use of which is not limited to any specialized purpose by particular equipment, design, or other features. General service railroad freight car includes a boxcar, gondola, open-top or covered hopper car, and flatcar. The Secretary may designate other types of cars as equipment upon a written finding, with reasons therefor, that such designation is consistent with the purposes of this Act;

(3) "facilities" means—

(A) track, roadbed, and related structures, including rail, ties, ballast, other track materials, grading, tunnels, bridges, trestles, culverts, elevated structures, stations, office buildings used for operating purposes only, repair shops, enginehouses, and public improvements used or useable for rail service operations;

(B) communication and power transmission systems, including electronic, microwave, wireless, communication, and automatic data processing systems, electrical transmission systems, powerplants, power transmission systems, powerplant machinery and equipment, structures, and facilities for the transmission of electricity for use by railroads;

(C) signals, including signals and interlockers;

(D) terminal or yard facilities, including trailer-on-flatcar and container-on-flat-car terminals, express or railroad terminal and switching facilities, and services to express companies and railroads and their shippers, including ferries, tugs, carfloats, and related shoreside facilities designed for the transportation of equipment by water; or

(E) shop or repair facilities or any other property used or capable of being used in rail freight transportation services or in connection with such services or for originating, terminating, improving, and expediting the movement of equipment;

(4) "Fund" means the Railroad Rehabilitation and Improvement Fund established under section 502 of this title;

(5) "holder" means the obligee or creditor under an obligation, except that when a bank or trust company is acting as agent or trustee for such an obligee or creditor, the term refers to such bank or trust company;

(6) "obligation" means a bond, note, conditional sale agreement, equipment trust certificate, security agreement, or other obligation issued or granted to finance or refinance equipment or facilities acquisition, construction, rehabilitation, or improvement; and

(7) "obligor" means the debtor under an obligation, including the original obligor and any successor or assignee of such obligor who is approved by the Secretary.

THE RAIL FUND

Section 502 *[45 U.S.C. §822].* (a) **ESTABLISHMENT.**—There is hereby established in the Treasury of the United States the Railroad Rehabilitation and Improvement Fund. The Fund shall be administered by the Secretary, without the requirement of annual authorizations, in order (1) to secure the payment, when due, of the principal of, any redemption premium on, and any interest on, all Fund anticipation notes and Fund bonds, by a first pledge of and a lien on all revenues payable to and assets held in the Fund, and (2) to carry out the purposes, functions, and powers authorized in this title.

(b) **PURPOSE.**—The purpose of the Fund is to provide capital which is necessary to furnish financial assistance to railroads, to the extent of appropriated funds, for facilities maintenance, rehabilitation, improvements, and acquisitions, and such other financial needs as the Secretary approves, in accordance with this title.

(c) **GENERAL POWERS.**—In order to achieve the objectives and to carry out the purposes of this title, the Secretary may—

(1) issue and sell securities, including Fund anticipation notes and Fund bonds, as provided for in sections 507 and 508 of this title;

(2) make and enforce such rules and regulations, and make and perform such contracts, agreements, and commitments, as may be necessary to appropriate to carry out the purposes or provisions of this title;

(3) prescribe and impose fees and charges for services by the Secretary, pursuant to this title;

(4) settle, adjust, and compromise, and, with or without consideration or benefit to the Fund, release or waive, in whole or in part, in advance or otherwise, any claim, demand, or right of, by, or against the Secretary or the Fund;

(5) sue and be sued, complain, and defend, in any State, Federal, or other court;

(6) acquire, take, hold, own, deal with, and dispose of, any property, including carrier redeemable preference shares as provided for in section 505 (d) of this title; and

(7) determine, in accordance with appropriations, the amounts to be withdrawn from the Fund and the manner in which such withdrawals shall be effected.

(d) **ASSISTANCE FROM OTHER AGENCIES.**—The Secretary, with the consent of any department, establishment, or corporate or other instrumentality of the Federal Government, may utilize and act through any such department, establishment, or instrumentality. The Secretary may, with such consent, utilize the information, services, facilities, and personnel of any such department, establishment, or instrumentality, on a reimbursable basis. Each such department, establishment, and instrumentality is authorized to furnish any such assistance to the Secretary upon written request from the Secretary.

(e) **JURISDICTION.**—Whenever the Secretary or the Fund is a party to any civil action under this title, such action shall be deemed to arise under the laws of the United States. The district courts of the United States shall have original and removal jurisdiction of any action in which the Secretary or the Fund is a party, without regard to the amount in controversy. No attachment or execution may be issued against the Secretary, the Fund, or any property thereof prior to the entry of final judgment to such effect in any State, Federal, or other court.

(f) **CONTENTS OF FUND.**—There shall be deposited in the Fund, subject to utilization pursuant to subsection (i) of this section—

(1) funds received by the Secretary for deposit in the Fund, representing the proceeds from the issuance and sale by the Secretary to the Secretary of the Treasury of Fund anticipation notes, as provided in section 507 of this title;

(2) funds as may be hereafter appropriated to the Fund, following the submission to the Congress of the Secretary's report, under section 504 of this title, with respect to the perceived needs of the rail industry for facilities rehabilitation and improvement, projected cash shortfalls with-

in the rail industry, and the scope and sources of long-term public sector funding for the Fund;

(3) funds received by the Secretary for deposit in the Fund, representing the proceeds from the issuance and sale of Fund bonds, as provided in section 508 of this title;

(4) redeemable preference shares issued by a railroad and purchased by the Secretary on behalf of the Fund and funds received by the Fund representing dividends and redemption payments on such shares, as provided in sections 505(d) and 506(a) and (b) of this title;

(5) income and gains realized by the Fund from any investment of excess funds, pursuant to subsection (g) of this section, and the obligations or securities comprising such investments; and

(6) any other receipts of the Fund.

(g) **EXCESS FUNDS INVESTMENT.**—If the Secretary determines that the amount of money in the Fund exceeds the amount required for current needs, the Secretary may, subject to sections 508(g) and (h) of this title, direct the Secretary of the Treasury to invest such amounts as the Secretary deems advisable, for such periods as the Secretary directs, in obligations of, or obligations guaranteed by, the Government of the United States, or in such other governmental or agency obligations or other securities of the United States as the Secretary of the Treasury deems appropriate.

(h) **DEPOSITORY.**—The Secretary may deposit moneys of the Fund with any Federal Reserve bank, any depository for public funds, or in such other places and in such manner as the Secretary of the Treasury deems appropriate.

(i) **USES.**—Moneys in the Fund shall be utilized—

(1) to provide financial assistance to railroads for facilities maintenance, rehabilitation, improvement, and acquisition projects, and for such other financial needs as may be approved by the Secretary pursuant to section 505 of this title,

(2) to effect the payment, when due, of the principal of, and any interest on, Fund anticipation notes and Fund bonds issued by the Secretary pursuant to sections 507 and 508 of this title,

(3) to redeem, as contemplated by section 507(c) and section 508(g) of this title, Fund anticipation notes and Fund bonds,

(4) in such amounts as are provided in appropriation acts, to make payment of all expenses incurred by the Secretary in carrying out his duties with respect to the Fund, and

(5) to make transfers to the general fund of the Treasury.

CLASSIFICATION AND DESIGNATION OF RAIL LINES

Section 503. *[45 U.S.C. §823]* (a) **TRAFFIC DENSITY ANALYSIS.**—Within 90 days after the date of enactment of this Act, each railroad designated by the Commission as a class I railroad shall prepare and submit to the Secretary a full and complete analysis of the rail system operated by it. Such analysis shall indicate the traffic density for the preceding 5 calendar years on each of the main and branch rail lines of the railroad submitting such analysis. The requirements of the two preceding sentences shall not apply to any railroad subject to reorganization pursuant to the Regional Rail Reorganization Act of 1973.

(b) **PRELIMINARY STANDARDS AND DESIGNATIONS.**—Within 180 days after the date of enactment of this Act, the Secretary shall develop and publish—

(1) the preliminary standards for classification, in at least 3 categories, of main and branch rail lines according to the degree to which they are essential to the rail transportation system; and

(2) the preliminary designations with respect to each main and branch rail line, in accordance with such standards for classification.

The classification of rail lines for purposes of this subsection shall be based on the level of usage measured in gross-ton-miles, the contribution to the economic viability of the railroad which controls such lines, and the contribution of such lines to the probable economic viability of any other railroads which participate in the traffic originating on such lines. In determining "level of usage" and "probable economic viability", for purposes of such classification, the Secretary shall take into account operational service and other appropriate factors, and he may make reasonable allowance for differences in operation among individual railroads or groups of railroads.

(c) **PUBLIC HEARINGS.**—Commencing 30 days after the date of publication of the standards and designations required under subsection (b) of this section, the Office shall conduct public hearings, at representative locations, to solicit comments and receive views on the preliminary standards for classification and on the preliminary designations. The Office shall give notice of the date, time, and place of each such hearing, and such notices shall be designed and placed in such manner that all interested parties will have a full and fair opportunity to be heard.

(d) **REPORT by OFFICE.**—Within 120 days after the date of publication of the standards and designations required under subsection (b) of this section, the Office shall submit a report to the Secretary containing its conclusions and recommendations with respect to such preliminary standards for classification and such preliminary designations. This report shall be based on the record which was developed by the Office during the hearings under subsection (c) of this section, as supplemented by such studies as may be undertaken by the Office.

(e) **FINAL STANDARDS and DESIGNATIONS.**—Within 60 days after the date of receipt of the report required under subsection (d) of this section, the Secretary, with the cooperation and assistance of the Office, shall, after giving due consideration to such report, prepare and publish—

(1) the final standards for classification of main and branch rail lines; and

(2) the final designations with respect to each main and branch rail line, in accordance with such standards for classification, including findings to support any material change which is made in a final designation from the corresponding preliminary designation.

CAPITAL NEEDS STUDY

Section 504. *[45 U.S.C. §824]* (a) **DEFERRED MAINTENANCE STATEMENT.**—Within 180 days after the date of enactment of this Act, each railroad designated by the Commission as a class I railroad (other than a railroad subject to reorganization pursuant to the Regional Rail Reorganization Act of 1973) shall prepare and submit to the Secretary a full and complete statement (1) of such railroad's deferred maintenance and delayed capital expenditures, as of December 31, 1975, and (2) of the projected amounts of appropriate maintenance to be performed and capital expenditures to be made for such railroad's facilities, during each of the years from 1976 through 1985. Each railroad shall submit such additional information as may be required from it by the Secretary, in connection with his duties under section 503 of this title or under this section, prior to July 1, 1977, including the projected sources of and uses for the funds required by such railroad for such projected program.

(b) **PRELIMINARY FINANCING RECOMMENDATIONS.**—Within 360 days after the date of enactment of this Act, the Secretary, after giving due consideration to (1) the final designations under section 503(e) of this title, (2) the information furnished under subsection (a) of this section, and (3) any other relevant information, shall develop, publish, and transmit—

(A) to the Congress, preliminary recommendations as to the amount and type of carrier equity and other financing to be effected through the Fund, or through any other funding mechanism, recommended by the Secretary, based upon his view of the rail industry's facilities rehabilitation and improvement needs, as projected through December 31, 1985; and

(B) to the Congress and to the Secretary of the Treasury, preliminary recommendations as to the means by which the Federal share, if any, of such equity and other financing should be provided.

In preparing such recommendations, the Secretary shall specifically consider and evaluate the public benefits and costs which would result from public ownership of railroad rights-of-way,

(c) EVALUATION.—Within 90 days after the date of publication of the Secretary's preliminary recommendations under subsection (b) of this section, the Secretary of the Treasury shall publish and transmit to the Secretary and to the Congress his evaluation thereof and any recommendations with respect to the matters referred to in subsection (b)(3)(B) of this section.

(d) FINAL RECOMMENDATIONS.—Within 90 days after the date of receipt of the evaluation, transmitted under subsection (c) of this section, the Secretary shall, after giving due consideration to such recommendations, prepare and transmit to the Congress his final recommendations with respect to the matters referred to in subsection (b) of this section.

REHABILITATION AND IMPROVEMENT FINANCING

Section 505. *[45 U.S.C. §825]* (a) **TIMING.**—Any railroad may apply to the Secretary following the date of enactment of this Act, in accordance with regulations promulgated by the Secretary—

(1) for such financial assistance as may be approved by the Secretary; and

(2) for financial assistance for facilities rehabilitation and improvement financing, except that the Secretary shall not act finally on any such application until the date of publication of the final standards and designations under section 503(e) of this title.

(b) APPLICATION and DETERMINATION.—(1) Each application for facilities rehabilitation and improvement financing shall set forth—

(A) a description of the proposed facilities rehabilitation and improvement project for which such railroad is seeking financial assistance, and of the current physical condition of such facilities;

(B) the classification of each main and branch rail line included in such project, as determined in accordance with the final standards and designations under section 503(e) of this title;

(C) the track standard under which each such line has been and is being operated and the reasons therefor, and the safety standards and signal requirements necessary under such standard to prevent loss of life and serious accident or injury at grade crossings;

(D) the track standard necessary, in the judgment of such railroad, to provide reliable and competitive freight service (and passenger service, where applicable) over each such line, together with such railroad's recommendations as to (i) the most economical method of improving the physical condition of each such line to meet such track standard, (ii) the cost of providing adequate safety standards and signals, and (iii) an economic analysis of the cost of such improvements in condition and in safety standards and signals;

(E) such railroad's estimate as to the cost of labor and materials, and the date of completion, and its opinion as to the priority to be accorded such portions of the proposed project as are reasonably divisible;

(F) the amount and kind of Federal financial assistance required by such railroad in order to complete the proposed project; and

(G) such other information as the Secretary shall by regulation require to assist him in evaluating such application in accordance with this section or for carrying out the purposes of this title.

(2) The Secretary shall act upon each such application within 6 months after the date on which all required information is received, except as otherwise provided in subsection (a)(2) of this section. The Secretary may approve any such application if he determines that providing the requested financial assistance is in the public interest. When making such a determination, the Secretary shall consider (A) the availability of funds from other sources at a cost which is reasonable under principles of prudent railroad financial management in light of the railroad's projected rate of return for the project to be financed, (B) the interest of the public in supplementing such other funds as may be available in order to increase the total amount of funds available for railroad financing, and (C) the public benefits to be realized from the project to be financed in relation to the public costs of such financing and whether the proposed project will return public benefits sufficient to justify such public costs. The Secretary, in granting financial assistance to any applicant, shall assign the highest priority, among applications for assistance which would return equal public benefits, to applications for assistance for providing safety improvements and signals, including underpasses or overpasses at railroad crossings at which injury or loss of life has frequently occurred or is likely to occur.

(c) **FINANCING AGREEMENT.**—Upon the approval of an application for financial assistance under this section, the Secretary shall promptly enter into an agreement with such railroad to provide financing in such amounts and at such times as is sufficient, in the judgment of the Secretary, to meet the reasonable cost, in whole or in part, of the facilities rehabilitation and improvement project which has been approved, in whole or in part. Each such agreement shall include such terms and conditions as are necessary or appropriate, in the judgment of the Secretary, to assure that the financing will be used only in the manner, and for the purposes, approved by the Secretary.

(d) **AUTHORIZATION.**—(1) In the case of a railroad other than a railroad in reorganization under section 77 of the Bankruptcy Act, financing pursuant to this section shall be in the form of purchase by the Secretary of redeemable preference shares at par. Such shares shall be specifically issued for such purpose in accordance with the terms and conditions set forth in section 506 of this title.

(2)(A) In the case of a railroad in reorganization under section 77 of the Bankruptcy Act, the Secretary, in order to provide financing pursuant to this section, may agree to purchase redeemable preference shares of such railroad at par as part of a plan of reorganization of such railroad approved by the court having jurisdiction over the reorganization of such railroad. Such shares shall be specifically issued in accordance with the terms and conditions set forth in section 506 of this title.

(B) The Secretary, in order to provide financing pursuant to this section, may also purchase certificates issued under section 77 (c) (3) of the Bankruptcy Act by a trustee of a railroad in reorganization and approved by the reorganization court, under such terms and conditions as may be approved by the Secretary and the reorganization court. In purchasing such trustee certificates or at any time thereafter, the Secretary may agree with the trustee of such railroad in reorganization, subject to the approval of the reorganization court, to exchange such certificates for redeemable preference shares issued, in accordance with the terms and conditions set forth in section 506 of this title, in connection with a plan of reorganization approved by the reorganization court. No certificate shall be purchased under this section unless and until the Secretary makes a finding in writing that—

(i) such certificates cannot otherwise be sold at a reasonable rate of interest;

(ii) the project to be financed can reasonably be expected to be maintained as part of a financially self-sustaining railroad system; and

(iii) the probable value of the assets of the railroad in the event of liquidation provides reasonable protection to the United States.

(3) The total par value of the redeemable preference shares and the amount of trustee certificates which the Secretary may purchase from the proceeds received from the issuance and sale of Fund anticipation notes shall not exceed $600,000,000. Not more than $100,000,000 of such proceeds may be used to purchase trustee certificates.

(e) **FUTURE PURCHASES of REDEEMABLE PREFERENCE SHARES.**—The total par value of the redeemable preference shares which the Secretary may purchase under this title after September 30, 1978, shall be determined by the Congress following the receipt by the Congress of the Secretary's recommendations as to the scope and sources of funding of the Fund or any recommended alternative financing mechanism, as submitted pursuant to section 504 of this title, except that—

(1) the amount of the Secretary's investment in redeemable preference shares in any fiscal year (out of proceeds other than those derived through the issuance and sale of Fund anticipation notes) shall not, when added to the amount of his prior investment in such shares, exceed 200 percent of the aggregate principal amount of the Fund bonds which (A) have been issued by the Secretary prior to such fiscal year,

and (B) are projected to be issued by the Secretary through the end of such fiscal year; and

(2) neither redemptions of Fund bonds nor their payment at scheduled maturity shall have any bearing on the limitation in paragraph (1) of this subsection.

REDEEMABLE PREFERENCE SHARES

Section 506. *[45 U.S.C. §826]* (a) **CHARACTERISTICS.**—The redeemable preference shares acquired by the Secretary pursuant to section 505(d) of this title are securities which are issued by a railroad for the purpose of obtaining financing under this title. Each such redeemable preference share—

(1) shall be nonvoting and shall have a par value of $10,000;

(2) shall be senior in right (i) to all common stock of the issuing railroad, whenever issued, (ii) to any previously issued preferred stock where such seniority does not mitigate any rights of the holders of such stock accorded by the terms and conditions of such stock, and (iii) to any subsequently issued preferred stock, with respect to dividend and redemption payments and in case of liquidation or dissolution of such railroad, but shall be otherwise subordinate in such matters to any of such railroad's previously issued and outstanding securities which rank ahead of its common stock and shall be subordinate to all securities other than common stock received in exchange as a part of a court approved reorganization plan under section 77 of the Bankruptcy Act (11 U.S.C. 205) approved after the date of enactment of this sentence for previously incurred senior debt or previously issued and outstanding securities which ranked ahead of its common stock;

(3) shall accrue dividends, commencing on the 10th anniversary date of the date of its original issuance, at such rate as shall be fixed by the Secretary for each issuance prior to the issuance thereof and which, when added to the amount of the mandatory redemption payments under subparagraph (4) of this paragraph, shall return to the Fund not less than 150 percent of the aggregate par value thereof, over the scheduled life of the issue and in annual payments which shall be as nearly equal as practicable; and

(4) shall be subject to mandatory redemption, at par, commencing not earlier than the 6th and not later than the 11th (as determined by the Secretary for each issuance) anniversary date of the date of its original issuance, in annual amounts which shall, over the period ending (as determined by the Secretary for each issuance) not later than the 30th anniversary date of the date of its original issuance, aggregate the total par value of such share.

(b) **DEPOSIT.**—All redeemable preference shares which are acquired by the Secretary pursuant to section 505(d) of this title shall, upon such acquisition, be deposited in the Fund.

(c) **OVERDUE PAYMENTS.**—Whenever any dividend or redemption payment which is due on redeemable preference shares issued by any railroad remains unpaid for a period of 4 months, the Secretary shall be entitled to appoint two members to the Board of Directors of such railroad. The term of office of such members shall not extend beyond the period during which such dividend or redemption payments remains unpaid.

FUND ANTICIPATION NOTES

Section 507. *[45 U.S.C. §827]* (a) **GENERAL.**—The Secretary shall, until September 30, 1978, issue and sell, and the Secretary of the Treasury until such date shall, to the extent of appropriated funds, purchase Fund anticipation notes in an aggregate principal amount of not more than $600,000,000, in order to provide financial assistance to railroads for such financing needs as the Secretary approves.

(b) **TERMS of ISSUE.**—Fund anticipation notes shall be issued in denominations of $100,000 (or any integral multiple thereof), upon such terms and conditions, with such maturities, such rates of interest, if any, and such redemption premiums, if any, as the Secretary in his sole discretion may determine. The date of maturity of each Fund anticipation note may not exceed 7 years from the date of its issuance.

(c) **REDEMPTION.**—If the Congress, following its receipt of the recommendations of the Secretary pursuant to section 504(d) of this title (with respect to the amount of facilities rehabilitation and improvement financing which should be effected through the Fund and the method of long-term public sector funding therefor) authorizes the issuance ofFund bonds, the Secretary shall redeem the Fund anticipation notes then outstanding, in such manner, and over such period of time, as the Secretary shall determine, from the proceeds of the sale of such Fund bonds and from other public sector moneys as have been appropriated to the Fund.

(d) **REMITTANCE and TERMINATION.**—If the Congress does not, on or before September 30, 1978, enact legislation of the type referred to in subsection (c) of this section, the Secretary shall hold in trust all redeemable preference shares issued by railroads which are held in the Fund, and the Fund shall thereupon terminate.

FUND BONDS

Section 508. *[45 U.S.C. §828]* (a) **ISSUANCE.**—The Secretary may, following enactment of the legislation referred to in section 507(c) of this title, issue Fund bonds in denominations of $100,000 (or any integral multiple thereof), in such total amounts as may be authorized by the Congress. No fund bonds—

(1) shall be issued which mature in less than 8, or more than 15, years from the date of original issuance thereof;

(2) shall be issued later than the 10th anniversary of the date of publication of the final standards and designations under section 503(e) of this title; and

(3) shall, except as otherwise provided pursuant to subsections (d)(6) and (g) of this section, be subject to redemption (at the option of the Secretary) (A) at any time prior to the 10th anniversary of the date of original issuance thereof, and (B) at any time thereafter.

(b) **PLEDGE and LIEN.**—The Secretary, subject to sections 502(g) and 508(g) of this title, shall impose a first pledge of, and a first lien on, all revenues payable to, and assets held in, the Fund, and appropriated for the use of the Secretary pursuant to this title. The Secretary may impose such a pledge of and lien on all other revenues or property of the Fund. The purpose of any such pledge and lien shall be to secure the payment, when due, of the principal of, any redemption premiums on, and any interest on, all Fund anticipation notes and Fund bonds, and for other purposes incidental thereto. Such incidental purposes may include the creation of reserve and other funds which may be similarly pledged and used, to such extent and in such manner as the Secretary deems necessary or desirable. Any pledge made by the Secretary shall be valid and binding from the time it is made. The revenues and assets held in the Fund, and the revenues or property of the Fund which are so pledged and which are subsequently received by the Fund, shall immediately be subject to the lien of such pledge without any physical delivery thereof or any further act. The lien of any such pledge shall be valid and binding as against all parties having claims of any kind, in tort, contract, or otherwise, against the Secretary or the Fund, without regard to whether such parties have notice thereof. No instrument by which a pledge is created need be recorded or filed to protect such pledge.

(c) **ENHANCEMENT of MARKETABILITY.**—The Secretary may enter into binding covenants with the holders of Fund bonds, and with the trustee, if any, under any agreement entered into in connection with the issuance of such bonds with respect to (1) the establishment of reserves, and other funds; (2) stipulations concerning the subsequent issuance of obligations; and (3) such other matters as the Secretary deems necessary or desirable to enhance the marketability of Fund bonds.

(d) **SPECIFIC DETERMINATIONS.**—Subject to subsection (a) of this section, the Secretary may determine, with respect to Fund bonds—

(1) the form and denominations in which they shall be issued;

(2) the time when they shall be sold, and in what amounts;

(3) the time when they shall mature;

(4) the price thereof at sale;

(5) the rate of interest thereon;

(6) whether, and in what manner, they may be redeemed prior to the date when they mature; and

(7) whether they shall be negotiable or nonnegotiable and whether they shall be bearer or registered instruments, and any indentures or covenants relating thereto.

(e) CHARACTERISTICS.—Fund bonds issued by the Secretary under this section shall—

(1) contain a recital that they are issued under this section, which shall be conclusive evidence as to the validity and regularity of issuance and sale of such Fund bombs;

(2) be subject to such other terms and conditions as the Secretary may, by the resolution authorizing their issuance, determine;

(3) be lawful investments and may be accepted as security for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of any officer or agency of the United States;

(4) not be exempted from Federal, State, and local taxation; and

(5) not be debts or enforceable general obligations of, nor shall payment of the principal thereof or interest thereon be guaranteed by, the United States. Neither the full faith and credit, nor the general taxing power, of the Federal Government shall be pledged to the payment of the principal of, any premium on, or interest on, such Fund bonds.

(f) NO PERSONAL LIABILITY.—Neither the Secretary, nor any other individual, who executes any Fund anticipation notes or Fund bonds, shall be subject to any personal liability or accountability by reason of the issuance of any such notes or bonds.

(g) REDEMPTION and TRANSFER.—If, after the 10th anniversary date of the original issuance of the initial series of Fund bonds, the amount in the Fund, exclusive of the value of any redeemable preference shares held by the Fund, exceeds 250 percent of the amount required to satisfy amounts due in the succeeding fiscal year on account of Fund bonds, the Secretary may use such excess to redeem Fund bonds in accordance with their terms or may withdraw all or part of such excess from the Fund and transfer it to the general fund of the United States. When all Fund bonds have been redeemed, all amounts remaining in the Fund or thereafter accruing to it shall be transferred to the general fund of the United States, except to the extent necessary to cover such expenses of the Fund as may be required to carry on and complete any remaining responsibilities.

(h) PURCHASE by SECRETARY.—The Secretary, subject to such agreements with holders of Fund bonds as may then exist, is authorized (out of any funds available) to purchase Fund anticipation notes or Fund bonds. Upon any such purchase, such bonds and notes shall be canceled.

AUTHORIZATIONS

Section 509. *[45 U.S.C. §829]* There is authorized to be appropriated to the Secretary of the Treasury for the purposes of the Fund not to exceed $600,000,000 and the Secretary of the Treasury is authorized and directed to purchase, from time to time, prior to September 30, 1978, from the Secretary, out of such moneys in the Treasury as are appropriated under this sentence, Fund anticipation notes in such aggregate principal amounts, subject to the foregoing limitation, as the Secretary may so offer for sale. No money in the Fund, regardless of source, shall be obligated, expended, or otherwise committed to any prupose from the Fund prior to or after September 30, 1978, without prior approval thereof in an annual appropriations Act. The Fund shall not qualify as one of the exceptions provided in section 401(d) of the Congressional Budget and Impoundment Control Act of 1974 (31 U.S.C. 1351(d)).

EXEMPTION

Section 510. *[45 U.S.C. §830]* Neither the provisions of section 20a of the Interstate Commerce Act (49 U.S.C. 20a), nor the registration and prospectus delivery requirements of the Securities Act of 1933, nor the provisions of the securities laws of any State, shall be applicable to the issuance and sale of redeemable preference shares by railroads under this title.

GUARANTEE OF OBLIGATIONS

Section 511. *[45 U.S.C. §831]* (a) **GENERAL.**—The Secretary may, in accordance with the provisions of this section, guarantee and make commitments to guarantee the payment of the principal balance of, and any interest on, an obligation of an applicant prior to, on, or after the date of execution or the date of disbursement of such obligation, if the proceeds of such obligation shall be or have been used to acquire or to rehabilitate and improve facilities or equipment. Each guarantee of such an obligation shall be made in accordance with the provisions of sections 511 through 513 of this title and such rules as the Secretary may prescribe to protect reasonably the interest of the United States. Each application for the guarantee of such an obligation or for a commitment to guarantee such an obligation shall be made in writing to the Secretary [illegible] such form and with such content as the Secretary prescribes. Such application shall be granted, in whole or in part, if the Secretary determines that the proposed, negotiated, or executed obligation is eligible for such guarantee. Each such guarantee or commitment to guarantee shall be extended in such form, under such terms and conditions, and pursuant to such regulations as the Secretary deems appropriate, consistent with the purposes of this title. Such a guarantee or commitment to guarantee shall inure to the benefit of the holder of the obligation to which such guarantee or commitment to guarantee applies.

(b) **FUND.**—An obligation guarantee fund shall be established and administered by the Secretary as a revolving fund to carry out the provisions of sections 511 through 513 of this title. Moneys in the obligation guarantee fund shall be deposited in the Treasury of the United States to the credit of such fund or invested in bonds or other obligations of the United States approved by the Secretary of the Treasury.

(c) **VALUATION.**—Before granting any application for a guarantee or a commitment to guarantee any obligation, the Secretary shall make a determination of the value of the facilities or equipment which are or will be financed or refinanced by such obligation. Such determination of value shall be conclusive and not subject to review in any court.

(d) **MODIFICATIONS.**—The Secretary may approve any modification of any provision of a guarantee, or of a commitment to guarantee an obligation, including the rate of interest, time of payment of interest or principal, security, or any other terms and conditions, if the Secretary makes a finding in writing that such modification is equitable and is in the overall best interests of the United States under this title, and that the holder of such obligation consents to such modification.

(e) **EXTENT OF AUTHORITY.**—(1) The aggregate unpaid principal amounts of obligations which may be guaranteed by the Secretary under this section shall not exceed $1,000,000,000 at any one time, of which not to exceed $150,000,000 may be guaranteed for the purposes described in paragraph (2) of this subsection.

(2) Obligations may be guaranteed for the purpose of improving rail properties designated in the final system plan pursuant to section 206(c)(1)(C) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 716(c)(1)(C)), if the proceeds of such obligations shall be or have been used to acquire or rehabilitate and improve facilities or equipment in a manner that returns the most public benefits for the costs involved.

(f) **RATE of INTEREST.**—The rate of interest (exclusive of premium charges for a guarantee and service fees) which shall be paid on the unpaid principal balance of each obligation guaranteed by the Secretary under this section, shall not exceed an annual percentage rate which the Secretary determines to be reasonable, taking into consideration the prevailing interest rates for similar obligations in the private market.

(g) NOTICE.—Upon receipt of an application for the guarantee of an obligation under this section, the Secretary shall cause a notice of such application to be published in the Federal Register and shall invite and afford interested persons an opportunity to submit comments on such application.

(h) PREREQUISITES for GUARANTEES.—No obligation shall be guaranteed and no commitment shall be made to guarantee any obligation under this section, unless and until the Secretary makes a finding in writing that—

(1) an obligation for equipment acquisition, rehabilitation, or improvement is secured by the particular equipment which is to be financed or refinanced by such obligation;

(2) payment of the obligation is required by its terms to be made within 25 years from the date of its execution;

(3) the financing or refinancing is justified by the present and probable future demand for rail services to be rendered by the applicant and will serve to meet demonstrable needs for rail services and to provide shippers with improved service;

(4) the applicant has given reasonable assurances that the facilities or equipment to be acquired, rehabilitated, or improved with the proceeds of the obligation will be economically and efficiently utilized;

(5) the probable value of any equipment or facilities to be improved, rehabilitated, or acquired is sufficient to provide the United States with reasonable security and protection in the event of default by the obligor, in the case of repossession by the holder of the obligation or in the case of possession or purchase by the Secretary; and

(6) the transaction will result in an improvement in the ability of any affected railroad to transport passengers or freight.

(i) GENERAL REQUIREMENT.—The recipients of any guarantees of, or of any commitments to guarantee, an obligation under this section, shall consistent with their capital resources, maintain their facilities, on a continuing basis, in accordance with standards promulgated under this subsection. The Secretary shall assure compliance with this requirement by regular periodic inspection.

(j) CONDITIONS of GUARANTEES.—No guarantee of, and no commitment to guarantee, an obligation may be granted, approved, or extended under this section, unless the obligor first agrees in writing that so long as any principal or interest is due and payable on such obligation—

(1) there will be no increase in discretionary dividend payments over the average ratio which such payments bore to earnings for the applicable fiscal period during the 5 years preceding such proposed increase, without prior approval of such increase by the Secretary;

(2) the obligor will not use assets or revenues (other than cash) related to or derived from railroad operations in nonrailroad enterprises, without prior approval in writing from the Secretary; and

(3) the obligor will take all reasonable and practicable steps possible, in accordance with such guidelines as may be established by the Secretary, to improve the equitable distribution and efficient and expeditious use of all equipment and facilities in order to improve rail service.

Approval under paragraph (1) or (2) of this subsection may only be granted if, after a public hearing with an opportunity for interested persons to submit comments, the Secretary makes a written finding that such increase in dividends (or such use of assets or revenues) will not materially affect the ability of the obligor to comply with the requirements of this section.

(k) **BREACH of CONDITIONS.**—The Attorney General shall commence a civil action in any appropriate district court of the United States to enjoin any activity which the Secretary finds is in violation of any requirement or condition specified in subsection (i) or (j) of this section, and to secure any other appropriate relief, including termination, suspension, and punitive damages.

(l) **INVESTIGATION CHARGE.**—The Secretary shall charge and collect from each applicant such amounts as he deems reasonable for the investigation of any application submitted under this section, for appraisal of the value of the equipment or facilities involved, and for making the necessary determinations and findings. Such charges shall not aggregate more than one-half of 1 percent of the principal amount of the obligation with respect to which the applicant seeks a guarantee or commitment to guarantee.

(m) **PREMIUM CHARGE.**—The Secretary shall assess and collect from the obligor an annual premium charge on each obligation guaranteed under this section. The amount of such premium may not exceed an annual rate of 1 percent on the unpaid principal balance of such obligation at the time payment is due. Payment is due initially when the obligation is guaranteed by the Secretary, and thereafter, on the anniversary date of such guarantee.

(n) **ADMINISTRATIVE COSTS.**—All moneys received by the Secretary under this section shall be deposited in the obligation guarantee fund, and to the extent provided in appropriation acts, may be used by the Secretary to pay administrative costs and expenses incurred by him pursuant to this section.

ISSUANCE OF NOTES OR OBLIGATIONS

Section 512. *[45 U.S.C. §832]* (a) **AUTHORIZATION.**—The Secretary may issue, in such amounts as are provided in appropriation acts, notes or other obligations to the Secretary of the Treasury, in such forms and denominations, bearing such maturities, and subject to such terms and conditions as the Secretary may prescribe. Such obligations may be issued whenever the moneys in the obligation guarantee fund are not sufficient to pay any amount which the Secretary is required to pay under section 513 of this title. Such obligations shall bear interest at a rate to be determined by the Secretary of the Treasury on the basis of the current average market yield on outstanding marketable obligations of the United States on comparable maturities during the month preceding the issuance of such obligations. The Secretary of the Treasury shall purchase any such obligations, and for such purpose he may use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act, as now or hereafter in force. The purposes for which securities may be issued under such Act are extended to include any purchase of notes or other obligations issued under this subsection. The Secretary of the Treasury may sell any such obligations at such times and price and upon such terms and conditions as he shall determine in his discretion. All purchases, redemptions, and sales of such obligations by such Secretary shall be treated as public debt transactions of the United States. Moneys obtained under this subsection shall be deposited in the obligation guarantee fund, and redemptions of any such obligations shall be made by the Secretary from such fund.

(b) **VALIDITY.**—No guarantee or commitment to guarantee under section 511 of this title may be terminated, suspended, canceled, or otherwise revoked, except in accordance with lawful terms and conditions prescribed by the Secretary. Such a guarantee or commitment shall be conclusive evidence that the underlying obligation is in compliance with the provisions of such sections of this title, and that such obligation has been approved and is legal as to principal, interest, and other terms. Such a guarantee or commitment to guarantee shall be valid and incontestable in the hands of the holder thereof, as of the date when the Secretary granted the application therefor, except as to fraud or material misrepresentation by such holder.

(c) **DEFINITION.**—As used in this section, the term "Secretary of the Treasury" includes any designated representative of such Secretary.

DEFAULT ON GUARANTEED OBLIGATIONS

Section 513. *[45 U.S.C. §833]* (a) **GENERAL.**—If there is a default by the obligor in any payment of principal or interest due under an obligation guaranteed under section 511 of this title, and if such default continues for 30 days, the holder of such obligation or his agent has the right to demand payment by the Secretary of the unpaid interest on, and the unpaid principal of, such obligation consistent with the terms of the guarantee of such obligation. Such payment may be demanded after or before the expiration of such period as may be specified in the guarantee or related agreements, but not later than 90 days from the date of such default. Within such specified period, but not later than 60 days from the date of such demand, the Secretary shall pay to such holder the unpaid interest on, and the unpaid principal of, such obligation, consistent with the terms of the guarantee of such obligation, except that (1) the Secretary shall not be required to make any such payment if he finds prior to the expiration of such period, that there was no default by the obligor in the payment of interest or principal or that such default has been remedied, and (2) no such holder shall receive payment or be entitled to retain payment in a total amount which, together with an other recovery (including any recovery based upon a security interest in equipment or facilities) exceeds the actual loss of such holder.

(b) RIGHTS of the SECRETARY.—(1) If the Secretary makes payment to a holder under subsection (a) of this section, the Secretary shall thereupon—

(A) have all of the rights granted to him by law or agreement with the obligor; and

(B) be subrogated to all of the rights which were granted such holder, by law, assignment, or security agreement between such holder and the obligor.

(2) The Secretary may, in his discretion, complete, recondition, reconstruct, renovate, repair, maintain, operate, charter, rent, sell, or otherwise dispose of any property or other interests obtained by him pursuant to this section. The terms of any such sale or other disposition shall be as approved bv the Secretary.

(c) FORM of PAYMENT.—Any amount required to be paid by the Secretary pursuant to subsection (a) of this section shall be paid in cash.

(d) ACTION AGAINST OBLIGOR.—If there is a default by the obligor in any payment due under an obligation guaranteed under section 511 of this title, the Secretary shall take such action against such obligor or any other person as is, in his discretion, necessary or appropriate to protect the interests of the United States. Such an action may be brought in the name of the United States or in the name of the holder of such obligation. Such holder shall make available to the Secretary all records and evidence necessary to prosecute any such suit. The Secretary may, in his discretion, accept a conveyance of property in full or partial satisfaction of any sums owed to him. If the Secretary receives, through the sale of property, an amount greater than his cost and the amount paid to the holder under subsection (a) of this section, he shall pay such excess to the obligor.

AUDIT OF TRANSACTIONS

Section 514. *[45 U.S.C. §834]* **(a) GENERAL.**—The Comptroller General of the United States is authorized to audit the operations of the Fund and of the obligation guarantee fund in accordance with such rules and regulations as he may prescribe. Any such audit shall be conducted at the place or places where accounts of the Fund or of the obligation guarantee fund are normally kept. The representatives of the Comptroller General shall have access to all books, accounts, records, reports, files, and other papers, things, or property belonging to, or in use by or in connection with the Fund, the obligation guarantee fund, or the Secretary which pertain to the financial transactions of the Fund or the obligation guarantee fund and which are necessary to facilitate an audit. Such representatives shall be afforded full facilities for verifying transactions with the balances of securities held by depositories, fiscal agents, and custodians. All such books, accounts, records, reports, files, papers, things, and property shall remain in the possession and custody of the Fund, the obligation guarantee fund, or the Secretary, as the case may be.

(b) **ACCESS to INFORMATION.**—The representatives of the Comptroller General shall have access to all books, accounts, records, reports, files, and other papers, things, or property belonging to or in use by any person or entity which has entered into a financial transaction with or involving the Fund, the obligation guarantee fund, or the Secretary, under this title, to the extent deemed necessary by the Comptroller General to facilitate any audit of financial transactions pursuant to subsection (a) of this section. Such representatives shall be afforded full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians. All such property of such person or entity shall, to the extent practicable, remain in the possession and custody of such person or entity.

(c) **REPORT.**—The Comptroller General shall make a report of each such audit to the Congress. Such report shall contain all comments and information which the Comptroller General deems necessary to inform Congress of the financial operations and condition of the Fund and of the obligation guarantee fund and any recommendations which he deems advisable. Such report shall indicate specifically and describe in detail any program, expenditure, or other financial transaction or undertaking observed in the course of such audit which the Comptroller General deems to have been carried on or made without lawful authority or which is inconsistent with the purposes and provisions of this title. A copy of such report shall be furnished to the President, the Secretary, and the Commission, at the time it is submitted to the Congress.

ANNUAL REPORT

Section 515. *[45 U.S.C. §835]* The Secretary shall report to the Congress within 90 days following the end of each fiscal year on the financial condition and operations of the Fund and of the obligation guarantee fund during such fiscal year, and on the anticipated condition and operations of the Fund and of the obligation guarantee fund during the current fiscal year.

EMPLOYEE PROTECTION

Section 516. *[45 U.S.C. §836]* (a) **GENERAL.**—Fair and equitable arrangements shall be provided, in accordance with this section, to protect the interests of any employees not otherwise protected under title V of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 771 et seq.), who may be affected by actions taken pursuant to authorizations or approval obtained under this title. Such arrangements shall be determined by the execution of an agreement between the representatives of the railroads and the representatives of their employees, within 120 days after the date of enactment of this title. In the absence of such an executed agreement, the Secretary of Labor shall prescribe the applicable protective arrangements, within 150 days after the date of enactment of this title.

(b) **TERMS.**—The arrangements required by subsection (a) of this section shall apply to each employee who has an employment relationship with a railroad on the date on which such railroad first applies for applicable financial assistance under this title. Such arrangements shall include such provisions as may be necessary for the negotiation and execution of agreements as to the manner in which the protective arrangements shall be applied, including notice requirements. Such agreements shall be executed prior to implementation of work funded from financial assistance under this title. If such an agreement is not reached within 30 days after the date on which an application for such assistance is approved, either party to the dispute may submit the issue for final and binding arbitration. The decision on any such arbitration shall be rendered within 30 days after such submission. Such arbitration decision shall in no way modify the protection afforded in the protective arrangements established pursuant to this section, shall be final and binding on the parties thereto, and shall become a part of the agreement. Such arrangements shall also include such provisions as may be necessary—

(1) for the preservation of compensation (including subsequent general wage increases, vacation allowances, and monthly compensation guarantees), rights, privileges, and benefits (including fringe benefits such as pensions, hospitalization, and vacations, under the same conditions and so long as such benefits continue to be accorded to other employees of the employing railroad in active service or on furlough, as the case may be) to such employees under existing collective-bargaining agreements or otherwise;

(2) to provide for final and binding arbitration of any dispute which cannot be settled by the parties, with respect to the interpretation, ap-

plication, or enforcement of the provisions of the protective arrangements;

(3) to provide that an employee who is unable to secure employment by the exercise of his or her seniority rights, as a result of actions taken with financial assistance obtained under this title, shall be offered reassignment and, where necessary, retraining to fill a position comparable to the position held at the time of such adverse effect and for which he is, or by training and retraining, can become, physically and mentally qualified, so long as such offer is not in contravention of collective bargaining agreements relating thereto; and

(4) to provide that the protection afforded pursuant to this section shall not be applicable to employees benefited solely as a result of the work which is financed by funds provided pursuant to this title.

(c) **SUBCONTRACTING.**—The arrangements which are required to be negotiated by the parties or prescribed by the Secretary of Labor, pursuant to subsections (a) and (b) of this section, shall include provisions regulating subcontracting by the railroads of work which is financed by funds provided pursuant to this title.

INTERCITY RAIL PASSENGER SERVICE

Section 517. *[45 U.S.C. §837]* The Secretary is authorized, pursuant to the provisions of, and within the authorizations contained in, this title, to provide financial assistance, in the aggregate sum of up to $200,000,000, to any railroad or railroads for the purpose of improving intercity rail passenger service on any lines of such railroad or railroads which are located outside of the Northeast Corridor (as defined in section 701(c) of this Act).

TITLE VII—NORTHEAST CORRIDOR PROJECT IMPLEMENTATION

NATIONAL RAILROAD PASSENGER CORPORATION

Section 701. *[45 U.S.C. §851]* (a) **GENERAL.**—To carry out the purposes of this title, the Rail Passenger Service Act, and the Regional Rail Reorganization Act of 1973, the National Railroad Passenger Corporation is authorized to—

(1) acquire by purchase, lease, exchange, gift, or otherwise and to hold, maintain, sell, lease or otherwise dispose of, any real or personal property or interest therein which is necessary or useful in establishing and maintaining improved high-speed rail services, as specified in section 703 of this title;

(2) enter into and implement such contracts and agreements as are necessary or appropriate in the conduct of its functions;

(3) provide for the continuous operation and maintenance of rail freight, intercity rail passenger, and commuter rail passenger service over the properties acquired pursuant to this section: *Provided,* That any provision of rail freight or rail commuter service shall be effectuated by a compensatory contract with the responsible carrier;

(4) improve railroad rights-of-way between Boston, Massachusetts, and Washington, District of Columbia (including at its option, the route through Springfield, Massachusetts, and routes to Harrisburg, Pennsylvania, and Albany, New York, from the Northeast Corridor main line) to enable improved high-speed rail passenger service to be provided between Boston, Massachusetts, and Washington, District of Columbia, and intermediate intercity markets, in accordance with the goals set forth in section 703 of this title:

(5) acquire, construct, improve, and install passenger stations; communications, electric power, and other facilities and equipment; public and private highway and pedestrian crossings; other safety facilities or equipment; and any other facilities or equipment which it determines are necessary to enable improved high-speed rail passenger service to be provided over the railroad rights-of-way to be improved under paragraph (4) of this subsection;

(6) enter into agreements with other railroads, other carriers, and commuter agencies, for the purpose of granting, acquiring, or entering into trackage rights, contract services, and other appropriate arrangements for freight and commuter services over the rights-of-way acquired under this title, with such agreement to be on such terms and conditions as are necessary to reibursement for costs on an equitable and fair basis, except that cross subsidization among intercity, commuter, or rail freight services is prohibited;

(7) appoint a qualified individual to serve as the General Manager of the Northeast Corridor improvement project; and

(8) enter into agreements with telecommunications common carriers on a basis which is consistent with, and subject to, the Communications Act of 1934, for the purpose of continuing existing, and creating new and improved, rail passenger radio mobile telephone service in the high-speed rail passenger service area specified in section 703(1) of this title.

(b) TRANSFER of RAIL PROPERTIES.—The Corporation, on the date of conveyance pursuant to section 303(b)(1) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 743), shall, by purchase or lease, transfer to the National Railroad Passenger Corporation all rail properties designated pursuant to sections 206(c)(1)(C) and 601(d) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 716(c)(1)(C) and 791(d)), and it shall, within 180 days after the date of enactment of this title, execute agreements providing for the National Railroad Passenger Corporation to assume (1) all operational responsibility for intercity rail passenger services with respect to such properties, and (2) control and maintenance of the properties transferred. Such parties may agree to retaining or transferring, in whole or in part, operational responsibility for rail freight or commuter rail services in the area specified.

(c) **DEFINITION.**—As used in this title, the term "Northeast Corridor" means the States of Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, and Maryland, and the District of Columbia.

OPERATIONS REVIEW PANEL

Section 702. *[45 U.S.C. §852]* (a) **ESTABLISHMENT.**—There is established an entity which shall be representative of the various users of Northeast Corridor rail transportation facilities, to be known as the Operations Review Panel (hereafter in this section referred to as the "Panel"). The Panel shall have the authority to take such actions as are necessary to resolve differences of opinion concerning operations (among or between the National Railroad Passenger Corporation, other railroads, and State, local, and regional agencies responsible for the provision of commuter rail, rapid rail, or rail freight services), with respect to all matters except those conferred on the Commission in section 402(a) of the Rail Passenger Service Act (45 U.S.C. 562(a)).

(b) **MEMBERSHIP.**—The Panel shall consist of 5 members, as follows:

(1) one member who shall be selected by the chief executive officer of the National Railroad Passenger Corporation;

(2) one member who shall be selected by majority vote of the commuter rail authorities which are subject to the jurisdiction of the Panel;

(3) one member who shall be selected by the chief executive officer of the corporation; and

(4) two neutral members who shall be selected by the Chairman of the National Mediation Board.

The members shall each serve a term of 4 years from the date of such selection, or until a successor has been selected. If, within 45 days after the date of enactment of this Act, the National Railroad Passenger Corporation, the commuter authorities, or the Corporation fails to select the member who it is authorized to select under this subsection, the Chairman of the National Mediation Board shall, within 30 days after the expiration of such 45-day period, appoint a member on behalf of such party. Any member so appointed shall serve until such time as the party so represented selects a successor.

(c) **DECISIONS and REVIEW.**—All decisions of the Panel shall be final and binding on the parties. All costs and expenses of the Panel shall be paid by (1) the National Railroad Passenger Corporation, (2) the commuter rail authorities which are subject to such Panel, and (3) the Corporation, each of which shall pay one-third of such costs and expenses, unless otherwise determined by a majority of the members of such Panel. The Panel may adopt such rules of procedure and may employ such resources as it considers appropriate. It may issue preliminary and final orders, which shall have the force and effect of law, with respect to any difference of opinion concerning any operational matter which is the subject of such an order. No order of the Panel shall be subject to review by any court. Upon petition by any party subject to the Panel, the United States District Court for the District of Columbia shall enforce any final order issued by the Panel.

REQUIRED GOALS

Section 703. *[45 U.S.C. §853]* The Northeast Corridor improvement project shall be implemented by the Secretary in order to achieve the following goals:

(1) **INTERCITY RAIL PASSENGER SERVICES.**—(A)(i) Within 5 years after the date of enactment of this Act, the establishment of regularly scheduled and dependable intercity rail passenger service between Boston, Massachusetts, and New York, New York, operating on a 3-hour-and-40-minute schedule, including appropriate intermediate stops; and regularly scheduled and dependable intercity rail passenger service between New York, New York, and Washington, District of Columbia, operating on 2-hour-and-40-minute schedule, including appropriate intermediate stops.

(ii) Improvements in facilities in accordance with route criteria approved by the Congress, on routes to Harrisburg, Pennsylvania, and Albany, New York, from the Northeast Corridor main line, and from Springfield, Massachusetts, to Boston, Massachusetts, and New Haven, Connecticut, in order to facilitate compatibility with improved high-speed rail service operated on the Northeast Corridor main line.

(B) The improvement of nonoperational portions of stations (as determined by the Secretary in consultation with the National Railroad Passenger Corporation) used in intercity rail passenger service and of related facilities and fencing. Fifty percent of the cost of such improvements shall be borne by States (or local or regional transportation authorities), except that the Secretary may, in his sole discretion, fund entirely any safety-related improvement.

(C) The improvements required by this section shall be accomplished in a manner which is compatible with the accomplishment in the future of additional improvements in service levels, and which will produce the maximum labor benefit in terms of hiring persons who are presently unemployed.

(D) The submission by the Secretary and the National Railroad Passenger Corporation to the Congress of annual reports on progress achieved and work in progress and planned (including the need for further improvements) with respect to the completion of this program, including an up-to-date accounting of intercity passenger ridership, revenues from such ridership, expenses, and on-time dependability of intercity passenger trains in the Northeast Corridor.

(E) Within 2 years after the date of enactment of this Act, the submission by the Secretary to the Congress of a report on the financial and operating results of the intercity rail passenger service established under this section, on the rail freight service improved and maintained pursuant to this section, and on the practicability, considering engineering and financial feasibility and market demand, of the establishment of regularly scheduled and dependable intercity rail passenger service between Boston, Massachusetts, and New York, New York, operating on a 3-hour schedule, including appropriate intermediate stops, and regularly scheduled and dependable intercity rail passenger service between New York, New York, and Washington, District of Columbia, operating on a 2½-hour schedule, including appropriate intermediate stops. Such report shall include a full and complete accounting of the need for improvements in intercity passenger transportation within the Northeast Corridor and a full accounting of the public costs and benefits of improving various modes of transportation to meet those needs. If such report shows (i) that further improvements are needed in intercity passenger transportation in the Northeast Corridor, and (ii) that improvements (in addition to those required by subparagraph (A)(i) of this paragraph) in the rail system in such area would return the most public benefits for the public costs involved, the Secretary shall make appropriate recommendations to the Congress. Within 6 years after the date of enactment of this Act, the Secretary shall submit an updated comprehensive report on the matters referred to in this subparagraph. Thereafter, if it is practicable, the Secretary shall facilitate the establishment of intercity rail passenger service in the Corridor which achieves the service goals specified in this subparagraph.

(2) **RAIL COMMUTER SERVICES, RAIL RAPID TRANSIT, and LOCAL TRANSPORTATION.**—To the extent compatible with the goals contained in paragraph (1) of this section, the facilitation of improvements in and usage of rail commuter services, rail rapid transit, and local public transportation.

(3) Rail Freight Service.—The maintenance and improvement of rail freight service to all users of rail freight service located on or adjacent to the Northeast Corridor and the maintenance and improvement of all through-freight services which remain in the Northeast Corridor, to the

extent compatible with the goals contained in paragraphs (1) and (2) of this section.

(4) **PASSENGER RADIO TELEPHONE SERVICE.**—To the extent compatible with the goals contained in paragraph (1) of this section, the continuation of and improvement in passenger radio telephone service aboard trains operated in high-speed rail service between Washington, District of Columbia, and Boston, Massachusetts. The President and relevant Federal agencies, including the Federal Communications Commission, shall take such actions as are necessary to achieve this goal, subject to the provisions of the Communications Act of 1934 (47 U.S.C. 151 et seq.), including necessary licensing, construction, operation, and maintenance standards for the radio service, as determined by the Federal Communications Commission to be in the public interest, convenience, and necessity.

FUNDING

Section 704. *[45 U.S.C. §854]* (a) **AUTHORIZATION of APPROPRIATIONS.**—There is authorized to be appropriated to the Secretary—

(1) $1,600,000,000 to remain available until expended in order to effectuate the goals of section 703(1)(A)(i) of this title and after such goals have been achieved, the goals of section 703(1)(A)(ii);

(2) $150,000,000 to remain available until expended in order to effectuate the goal of section 703(1)(B);

(3) for payment to the National Railroad Passenger Corporation—

(A) $10,000,000 to remain available until expended for nonrecurring costs related to the initial assumption of control and responsibility for maintaining rail operations on the Northeast Corridor;

(B) $85,182,956 to acquire the properties of the Northeast Corridor;

(C) $650,000 to remain available until expended, for the development and utilization of mobile radio frequencies for high-speed rail passenger radio telephone service; and

(D) $20,000,000, to remain available until expended, for acquiring and improving properties designated in accordance with section 206(c)(1)(D) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 716(c)(1)(D)).

(b) **LIMITATION.**—No funds appropriated under this section or pursuant to section 601 of the Rail Passenger Service Act may be used to subsidize any operating losses of commuter rail or rail freight services.

(c) **COORDINATION.**—The Secretary shall take all steps necessary to coordinate all transportation programs related to the Northeast Corridor to assure that all such programs are integrated and consistent with implementation of the Northeast Corridor improvement project under this title, including, if the Secretary finds any significant noncompliance with the implementation of the goals of section 703 of this title, the denial of funding to any noncomplying program until such noncompliance is corrected.

(d) **EMERGENCY MAINTENANCE CONTINUATION.**—After the conveyance of rail properties, pursuant to section 303(b) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 743(b)) and section 701(b) of this title, not to exceed $25,000,000 of the funds appropriated pursuant to Public Law 94-6 (89 Stat. 11) shall remain available to be utilized by the Secretary for the purpose of performing emergency maintenance on the rail properties designated in accordance with section 206(c)(1)(C) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 716(c)(1)(C)).

TITLE IX—MISCELLANEOUS PROVISIONS

NONDISCRIMINATION

Section 905. *[45 U.S.C. §803]* (a) GENERAL.—No person in the United States shall on the ground of race, color, national origin, or sex be excluded from participation in, or denied the benefits of, or be subjected to discrimination under, any project, program, or activity funded in whole or in part through financial assistance under this Act.

(b) COMPLIANCE.—(1) Whenever the Secretary determines that any person receiving financial assistance, directly or indirectly, under this Act, or under any provision of law amended by this Act, has failed to comply with subsection (a) of this section, with any Federal civil rights statute, or with any order or regulation issued under such a statute, the Secretary shall notify such person of such determination and shall direct such person to take such action as may be necessary to assure compliance with such subsection.

(2) If, within a reasonable period of time after receiving notification pursuant to paragraph (1) of this subsection, such person fails or refuses to comply with subsection (a) of this section, the Secretary shall—

(A) direct that no further Federal financial assistance be provided to such person;

(B) refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted;

(C) exercise the powers and functions provided by title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.); and/or

(D) take such other actions as may be provided by law.

(c) CIVIL ACTION.—Whenever a matter is referred to the Attorney General pursuant to subsection (b) of this section, or whenever the Attorney General has reason to believe that any person is engaged in a pattern or practice in violation of the provisions of this section, the Attorney General may commence a civil action in any appropriate district court of the United States for such relief as may be appropriate, including injunctive relief.

(d) **REGULATIONS.**—The Secretary may prescribe such regulations and take such actions as are necessary to monitor, enforce, and affirmatively carry out the purposes of this section.

(e) **JUDICIAL REVIEW.**—Any determinations made or actions taken by the Secretary pursuant to this section shall be subject to judicial review.

(f) **DEFINITION.**—For purposes of this section, the term "financial assistance" includes obligation guarantees. (Public Law 94-210, Feb. 5, 1976, 90 Stat. 31).

SHIPPING

Section 289. Shipping Act of 1916, section 832. [Unchanged. See vol. 4, p. 3399, vol. 14, p. 11756, vol. 15, p. 12376.]

Notes of Decisions

§289: Volume 14—p. 11756: §832: Volume 7—p. 6201: Volume 16—p. 13017.

Power of Interstate Commerce Commission not affected

1. In general.—[Vols. 7, 16].—Although the Hawaiian Statehood Act vested jurisdiction over water carriage between ports of that State and other States in the Federal Maritime Commission, the operations of defendant Intermountain were proven to be those of a freight forwarder and as such are within the jurisdiction of this Commission as provided by §33 of the Shipping Act (46 USC 832).—Star Forwarders, Inc. v. Intermountain Fast Frt., 337 I.C.C. 265 (267-8).

MERCHANT MARINE ACT

Chapter 24.—Title 46

Sections 867, 876. Investigation, port facilities, etc.; Power of Secretary and Board.—[Unchanged. See vol. 4, pp. 3400, 3402, vol. 10, p. 8509, vol. 15, p. 12376.]

Historical notes, see vol. 4, p. 3401. 10, p. 8508.

Notes of Decisions

Volume 4—pp. 3401, 3403; Volume 7—p. 6201.

Section 883. Transportation of merchandise between points in United States in other than domestic-built or rebuilt and documented vessels.—[Unchanged. See Vol. 18, p. 14775.]

Historical note. See vol. 19 p. 16085.

Notes of Decisions

Volume 4—3405; Volume 7—p. 6202; Volume 10—p. 8510; Volume 11—p. 9780.

Section 884. Charges for transportation subject to Interstate Commerce Act.—[Unchanged. See vol. 4, p. 3407, vol. 15, p. 12376.]

Historical notes, see vol. 4, pp. 3401, 3404.

Notes of Decisions

Volume 4—p. 3407.

PUERTO RICO

Chapter 4.—Title 48

Section 751. Interstate commerce and certain other laws inapplicable to Puerto Rico.—[Unchanged. See vol. 11, p. 9781.]

TITLE 50—WAR

Chapter 8.—Federal Explosives Act

Section 127.—Transportation.—[Repealed. And §123 of the act, which superseded the transportation provisions, was repealed by Pub. Law 91-452, title XI, §1106(a), Oct. 15, 1970, 84 Stat. 960.]

GENERAL RULES OF PRACTICE

[Unchanged except Rules 15, 16, 42(f), 51, 55, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 87, 96(b), 102, 225(g), 247.]

Historical Note

REFORM OF RULES OF PRACTICE BEFORE THE COMMISSION

(a) Within 360 days after the date of enactment of this Act, the Commission shall study, develop, and submit to the Congress an initial proposal setting forth rules of practice under which the Commission proposes to conduct all adjudicatory and rulemaking proceedings with respect to any matter involving a common carrier by railroad subject to this part. Such rules of practice before the Commission shall be consistent with existing law, shall take into consideration the varying nature of proceedings before the Commission, and shall include—

(1) specific time limits upon the filing and disposition of all complaints, applications, petitions, pleadings, motions, appeals, and rulemaking proceedings before an administrative law judge, individual Commissioner, review board, division, or panel of the Commission, or the full Commission;

(2) specific methods of taking testimony, receiving evidence, hearing cross-examination, and the modification of such procedures so as to facilitate the timely execution of the functions of the Commission;

(3) utilization of additional administrative law judges or the assignment of employees of the Office, in complex adjudicatory or rulemaking proceedings, so as to facilitate proper focus and timely resolution of the issues within the required time limits; and

(4) specific remedies in any case of failure to observe required time limits.

(b) Within 420 days after the date of enactment of this Act, the Administrative Conference of the United States shall submit to the Congress and to the Commission its comments on the rules of practice before the Commission proposed pursuant to subsection (a) of this section, together with such recommendations as it considers appropriate.

(c) Within 30 days after the receipt of comments submitted pursuant to subsection (b) of this section, the Commission shall consider such comments and shall submit to the Congress a final proposal setting forth the rules of practice before the Commission with respect to matters involving common carriers by railroad. Such rules of practice shall take effect at the end of the first period of 60 calendar days of continuous session of the Congress after the date of submission of such final proposal, unless either the Senate or the House of Representatives adopts a resolution during such period stating that it does not approve such final proposal. If no resolution is adopted as provided in the preceding sentence, the Commission shall adopt such proposed rules of practice. For purposes of this subsection, continuity of session of the Congress is broken only by an adjournment sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded from the computation of the 60-day period.

(d) If either the Senate or the House of Representatives passes a resolution of disapproval under subsection (c) of this section, the Commission shall develop a revised proposal setting forth the rules of practice before the Commission pursuant to this section. Within 60 days after the date of such disapproval, each such revised proposal shall be submitted to the Congress by the Commission for review pursuant to such subsection (c).

(e) The Commission shall periodically, but not less than once every 3 years, review the rules of practice adopted pursuant to subsection (c) of this section, and shall revise such rules as it considers necessary. (Pub. L. 94-210, 90 Stat. 53, Feb. 5, 1976)

NOTES OF DECISIONS

Volume 12—p. 10593; Volume 13—p. 11235; Volume 14—p. 11757; Volume 15—p. 12376; Volume 16—p. 13018; Volume 17—p. 13769; Volume 18—p. 14778; Volume 19—p. 16086; Volume 21—p. 17928.

Rule 15. Typographical specifications generally.—Except as otherwise provided respecting applications (Rule 38(a)), exhibits (Rule 84(a)), and informal complaints (Rules 24(a)), all pleadings, documents, and papers to be filed under these rules shall be on opaque, unglazed, durable paper not exceeding 8½ by 11 inches. To permit binding in covers of uniform size, margins of at least 1½ and 1 inch, respectively, shall be allowed on the left and right margins. Binding shall be on the left margin. Reproduction may be by printing, printing by offset press, multigraphing, or mimeographing, or by any other process, provided the copies are clear and permanently legible. Whiteline blueprints which cannot be reproduced by photography are not acceptable. If directly typewritten, or if in facsimile reproduction of typewriting, the impression may be on both sides of the paper and must be double-spaced, except that long quotations shall be single-spaced and indented. Nothing less in size than Elite type shall be used. If printed, adequate leading and nothing less than 10-point type shall be used, except that 8-point type may be employed in footnotes and in tabular matter where printing limitations so require. A pleading or brief in excess of 50 pages (except a pleading under modified or shortened procedure), including cover pages, indexes, and appendixes, must be printed. Printing by offset press will be accepted: *Provided*, That the type used is not reduced in size smaller than that required for typewritten documents and that where the pleading or brief exceeds 50 pages, the impression is on both sides of the paper. Failure to observe these specifications will result in rejection.

Effective Jan. 24, 1975. 40 FR 3767

Rule 16. Copies. —(a) *Generally*. The original and 8 copies of every pleading, document, or paper permitted or required to be filed under this part shall be furnished for the use of the Commission except as a different number is required under paragraph (b) of this section, or as otherwise provided respecting: answers (Rule 35(c)), applications (Rule 38(b) and Rule 40 (c)); complaints, formal (Rules 26 and 37) and informal (Rule 24(a) and Rule 25(d)); depositions (Rule 64); exhibits (Rules 84(c) and 86); modified procedure (Rule 52); petitions in intervention (Rule 72(d)); prepared statements (Rule 77); protests in investigation-and-suspension proceedings (Rule 42(c)); replies (Rule 23(b)); and matters respecting oral argument (Rule 98); subpenas (Rule 56(a)); time modification (Rule 21(b)); transcript correction (Rule 90(b)), and petitions for rehearing, reargument, or reconsideration (Rule 101(a)).

(b) *In bankruptcy proceedings*. Except as otherwise provided in an application form or instruction (Rule 38) and respecting exhibits (Rule 84(c)), the original and 19 copies of every pleading, document, or paper filed in a proceeding arising under the Uniform Bankruptcy Act shall be furnished for the use of the Commission.

Effective Jan 24. 1975. 40 FR 3767.

Rule 23. Replies.—(a) *Time for filing*.—Applicant's motion to strike the reply of protestants to its exceptions on the grounds that the reply constituted exceptions which were not timely filed and contained misstated evidence was overruled on the basis that applicant's motion represented a reply to a reply, which is prohibited by rule 23(a).—American Delivery Systems, Inc., Frt. Forwarder Applic., 340 I.C.C. 776 (778).

Rule 42. Petitions for suspension of tariffs or schedules.—New paragraph (f) added as follows: (f) *Special requirements for protests against revisions to rail rates and charges*. Protests against, and requests for suspension of, tariffs or schedules filed by rail carriers or their publishing agents that result in revisions of rates or charges shall also include a verified complaint containing specific facts showing: (1) that without suspension the protested tariffs or schedules will cause substantial injury to the complainant or the party represented by the complainant, and (2) that it is likely that complainant or the party represented by the complainant will prevail on the merits pursuant to any applicable provisions of the Interstate Commerce Act, as amended.

Effective March 1, 1976, 41 FR 8790

Rule 49. Modified procedure; content of pleadings.— Rule 49 permits argument in a statement filed under modified procedure. In the instant proceeding, the thrust of protestant's objections went to the weight to be accorded the evidence, not to its admissibility, and applicant's affidavits indicate that the pleadings were mailed in the usual manner. Accordingly, the motion to strike was overruled for the reasons (a) that the pleadings in question comply substantially with the reopening order and the General Rules of Practice, (b) that no sufficient cause appeared for striking such pleadings, and (c) that applicant is entitled to consideration to their merits.—Jet Forwarding, Inc., Freight Forwarding Application, 340 I.C.C. 337 (340)*.

Employee board's rationale in denying protestant's motion to strike certain specific statements in supporting shipper's rebuttal statement, on grounds that matter challenged was directly related and complementary to data in shipper's initial verified statement, is a technically proper interpretation of rule 49 as pertains to content of applicant's statement in rebuttal of protestant's statement. However, when applicant failed to state specifically and factually in its initial statement protestant's service deficiencies, protestant had no way to counter the nebulous criticism and then was precluded from entering a defense against the specific allegations in the shipper's rebuttal because of rule 23 which prohibits filing of a reply to a reply.—Kerr Contract Carriage, Inc., Contr. Car. Applic., 115 M.C.C. 862 (865-66).

Controlling in this situation is rule 51 which, as made applicable to contested motor carrier application proceedings by rule 247(e)(3), requires that within the time fixed in the order assigning the proceedings for handling under modified procedure applicant "shall serve upon the other parties a statement of all the evidence upon which it relies." When applicant failed in the duty of submitting the evidence in the rebuttal in its initial statement, and based its case on the inadequacy of existing service, protestant was prevented from presenting an adequate defense, against the spirit and intent of the rules of practice. Motion to strike granted.—Id., pp. 866-67.

Rule 51. Modified procedure; when pleadings filed and served.—Within 20 days from the date of an order requiring modified procedure, complainant shall serve upon the other parties a statement of all the evidence upon which it relies. Within 30 days thereafter defendant shall serve its statement. Within 20 days thereafter complainant shall serve its statement in reply. No further reply may be made by any party except by permission of the Commission.

Effective Oct. 1, 1973. 38 FR 31008.

Rule 51, as made applicable to contested motor carrier application proceedings by rule 247(e)(3), requires that within the time fixed in the order assigning the proceedings for handling under modified procedure applicant "shall serve upon the other parties a statement of all the evidence upon which it relies." When applicant, basing its case on the inadequacy of existing service, failed in duty of submitting specific evidence of service deficiencies in its initial statement, but presented such specific evidence in its rebuttal statement, protestant (by rule 23, prohibiting filing of a reply to a reply) was prevented from presenting an adequate defense, contrary to the spirit and intent of the rules of practice. Motion to strike specific evidence in rebuttal granted.—Kerr Contract Carriage, Inc., Contr. Car. Applic., 115 M.C.C. 862 (866-67).

Rule 55. Notice of hearing; subpenas; discovery; depositions.—The caption preceding rule 55 is amended to read as stated, effective Jan. 15, 1975, 39 FR 40296.

Rule 57. Discovery.—(a) *In general.*—Unless otherwise ordered in accordance with these rules, or as required by the Interstate Commerce Act or other applicable statutes, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending proceeding (other than those informal proceedings specified in rules 200 and 225), including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b) *Protective conditions.*—Upon motion by any party, by the person from whom discovery is sought, or by any person with a reasonable interest in the data, information, or material sought to be discovered, and for good cause shown, any order which justice requires may be entered to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of issues untimely or inappropriate to the proceeding. Relief through a protective order may include one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time and place; (3) that the discovery may be had only upon such terms and conditions as the Commission may impose to insure financial responsibility in indemnifying the party or person against whom discovery is sought to cover the reasonable expenses incurred; (4) that the discovery may be had only by a method other than that selected by the party seeking discovery; (5) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; (6) that discovery be conducted with no one present except persons designated in the protective order; (7) that a deposition after being sealed be opened only by order of the Commission; (8) that a trade secret or other confidential research development, or commercial information not be disclosed or be disclosed only in a designated way; and (9) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened only upon direction or order of the Commission.

If the motion for a protective order is denied in whole or in part, the Commission may, on such terms and conditions as it deems just, enter an order requiring any party or person to provide or permit discovery.

(c) *Sequence and timing of discovery.*—Unless the Commission upon motion, for the convenience of parties and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(d) *Stipulations regarding discovery.*—Unless otherwise ordered, the parties may by written stipulation filed with the Commission (1) provide that depositions be taken before any person, at any time or place, upon sufficient notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

Effective Jan. 15, 1975. 39 FR 40296.

Rule 58. Deposition.—(a) *Purpose.*—The Commission will either upon its own initiative, or upon receipt of a verified petition filed by a party or one who reasonably expects to be a party to a proceeding, and upon good cause shown, issue an order to take the testimony of any person, including a party, by deposition upon oral examination (a) for use as evidence, (b) for discovery, or (c) for any person who desires to perpetuate his testimony or that of another person regarding any matter that may be cognizable in any proceeding before the Commission.

(b) *Petitions.*—A petition requesting an order to take a deposition and perpetuate testimony or to produce documents and materials (1) shall be filed with due regard to the time periods specified in rule 59(c); (2) shall set forth the facts it desires to establish and the substance it expects to elicit; (3) shall be served upon all parties to the proceeding and upon the person sought to be deposed and/or the custodian of the documents or materials sought to be produced; (4) shall set forth the name and address of the witness, the place where, the time when, the name and office of the officer before whom, and the cause or reason why such deposition should be taken; and (5) shall specify with particularity the documents and materials which the deponent is requested to produce.

(c) *Order.*—If the Commission is convinced on its own initiative or by the petition requesting an order to take a deposition that the deposition will prevent a failure or delay of justice, it shall issue an order, which action may be taken without awaiting the filing of a reply, and serve such order upon the parties and the witness, naming the witness whose deposition is to be taken, specifying the time when, the place where, and the officer before whom the deposition is to be taken, and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The provisions for the taking of the deposition specified in the Commission's order may or may not be the same as requested in the petition. The deposition may then be taken in accordance with these rules, and the Commission or presiding officer may make orders of the character provided by rule 67.

Effective Jan. 15, 1975. 39 FR 40296.

Rule 59. Depositions, location, officer, time, fees, absence, disqualification.—(a) *Where deposition shall be taken.*—Unless otherwise ordered or agreed to by stipulation, depositions shall be taken in the city or municipality where the deponent is located.

(b) *Officer before whom taken.*—Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Within a foreign country, depositions may be taken before an officer or person designated by the Commission or agreed upon by the parties by stipulation in writing to be filed with the Commission.

(c) *When taken.*—Unless under special circumstances and for good cause shown, no deposition shall be taken within 10 days prior to the date assigned for commencement of hearing or the filing of opening statements of fact and argument under the modified procedure, and when the deposition is taken in a foreign country it shall not be taken within 30 days prior to such date.

(d) *Fees.*—A witness whose deposition is taken pursuant to these rules and the officer taking same, unless he be employed by the Commission, shall be entitled to the same fee paid for like service in the courts of the United States, which fee shall be paid by the party at whose instance the deposition is taken.

(e) *Failure to attend or to serve subpena; expenses.*

(1) If the party who filed a petition pursuant to rule 58(b) fails to attend and proceed with the taking of the deposition and another party attends in person or by representative pursuant to an order entered under rule 58(c), the Commission may order the party who filed the petition to pay to such other party the reasonable expenses incurred by him and his representative in so attending, including reasonable attorney's fees.

(2) If the party who filed a petition pursuant to rule 58(b) fails to serve a subpena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by representative because he expects the deposition of the witness to be taken, the Commission may order the party who filed the petition to pay to such other party the reasonable expenses incurred by him and his representative in so attending, including reasonable attorney's fees.

(f) *Disqualification for interest.*—No deposition shall be taken before a person who is a relative or employee or representative or counsel of any of the parties, or is a relative or employee of such representative or counsel or is financially interested in the proceeding.

Effective Jan. 15, 1975, 39 FR 40296

Rule 60. Depositions, procedures.—(a) *Examination.*—Examination and cross-examination of witnesses shall proceed as permitted at a hearing. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition, and he shall transmit them to the officer, who shall open the sealed envelope, propound the questions to the witness, and record the answers verbatim.

(b) *Use of depositions.*—At the hearing, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated to testify on behalf of a public or private corporation, partnership, association or governmental agency (other than this Commission, except in those instances where the Commission itself is a party to the proceeding) which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the presiding officer or Commission finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally at public hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken.

(c) *Effect of taking or using depositions.*—A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subdivision (b)(2) of this rule. At the hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) *Motions to protect.*—At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the Commission may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in rule 57(b). If the order made terminates the examination, it shall be resumed thereafter only if so ordered. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

(e) *Recordation.*—The officer before whom the deposition is to be taken shall observe the provisions of rules 71 and 15 respecting appearances and typographical specifications, shall put the witness on oath, and shall personally, or by someone acting under his direction and in his presence, record and transcribe the testimony of the witness as required by these rules.

(f) *Signing.*—When the testimony is fully transcribed or otherwise recorded, the deposition shall be submitted to the witness for examination and shall be read to or by him unless such examination and reading are waived by the witness and the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 15 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used fully as though signed, unless, on a motion to suppress, it is found that the reasons given for refusal to sign require rejection of the deposition in whole or in part.

(g) *Attestation.*—The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and that the officer is not a relative or employee or representative or counsel of any of the parties, or is a relative or employee of such representative or counsel, or is financially interested in the proceeding.

(h) *Return.*—The officer shall securely seal the deposition in an envelope indorsed with sufficient information to identify the proceeding and marked "Deposition of (here insert name of witness)" and shall promptly send the original and one copy of all exhibits, by registered mail to the Secretary of the Commission. A deposition to be offered in evidence must reach the Commission not later than 5 days before the date it is to be so offered.

(i) *Notice.*—The party taking the deposition shall give prompt notice of its filing to all other parties.

(j) *Copies.*—Upon payment of reasonable charges therefor, the officer before whom the deposition is taken shall furnish a copy of it to any interested party or to the deponent.

Effective Jan. 15, 1975. 39 FR 40296

Rule 61. Effect of errors and irregularities in depositions.—(a) *As to disqualification of officer.*—Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(b) *As to taking of deposition.*

(1) Objection to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the con-

duct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

(c) *As to completion and return of deposition.*—Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under rules 59 and 60 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Effective Jan. 15, 1975. 39 FR 40296.

Rule 62. Written interrogatories to parties.—(a) *Availability; procedures for use.*—Any party may serve upon any other party written interrogatories to be answered by the party served, or if the party served is a public or private corporation, partnership, association, or governmental agency (other than this Commission, except in those instances where the Commission itself is a party to the proceeding), by any officer or agent, who shall furnish such information as is available to the party. Copies of any interrogatories served shall also be filed with the Commission.

Each interrogatory shall be answered separately and fully in writing, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them and subscribed by an appropriate verification generally in the form prescribed in No. 6 of appendix B to these rules. Objections are to be signed by the representative or counsel making them. The person upon whom the interrogatories have been served shall serve a copy of the answers and objections within the time period designated by the party submitting the interrogatories, but not less than 15 days after the service thereof.

(b) *Option to produce business records.*—Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies thereof, or compilations, abstracts, or summaries therefrom.

If information sought is contained in computer runs, punchcards, or tapes which also contain privileged or proprietary information or information the disclosure of which is proscribed by the Interstate Commerce Act, it shall be sufficient response under these rules that the person upon whom the interrogatory has been served is willing to make available to and permit an independent professional organization not interested in the proceeding and paid by the party serving the interrogatory to extract from such runs, punchcards, or tapes the information sought in the interrogatory that is not privileged or proprietary information or information the disclosure of which is proscribed by the Interstate Commerce Act.

(c) *When written interrogatories must be served.*—Unless under special circumstances and for good cause shown, no written interrogatories shall be served within 10 days prior to the date assigned for commencement of hearing or the filing of opening statements of fact and argument under the modified procedure, and when the written interrogatories are to be served in a foreign country, they shall not be served within 30 days prior to such date.

Effective Jan. 15, 1975. 39 FR 40296

Rule 63. Request for admission.—(a) *Availability; procedures for use.*—A party may serve upon any other party a written request for the admission, for purposes of the pending proceeding only, of the truth of any matters within the scope of rule 57(a) set forth in the request, including the genuineness of any documents described in the request for admission. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Copies of any requests for admission served shall also be filed with the Commission.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within a period designated in the request, not less than 15 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or his representative or counsel. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for hearing may not on that ground alone, object to the request; he may, subject to the provisions of rule 67(c), deny the matter or set forth reasons why he cannot admit or deny it. Copies of any answers or objections shall be filed with the Commission.

(b) *Effect of admission.*—Any matter admitted under this rule is conclusively established unless upon petition and a showing of good cause the Commission enters an order permitting withdrawal or amendment of the admission. Any admission made by a party under this rule is for the purpose of the pending proceeding only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

(c) *When written requests for admission must be served.*—Unless under special circumstances and for good cause shown, no requests for admission shall be served within 10 days prior to the date assigned for commencement of hearing or the filing of opening statements of fact and argument under the modified procedure, and when requests for admission are to be served in a foreign country, they shall not be served within 30 days prior to such date.

Effective Jan. 15, 1975. 39 FR 40296.

Rule 64. Depositions, requests for admission, and written interrogatories: inclusion in record.—At the oral hearing, or upon the submission of statements under the modified procedure, depositions, requests for admission, and written interrogatories may be offered in evidence by the party at whose instance they were taken. If not offered by such party, they may be offered in whole or in part by any other party. If only part of a deposition, request for admission, or written interrogatory is offered in evidence by a party, any other party (where the matter is being heard orally) may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts. Such depositions, requests for admission, and written interrogatories shall be admissible in evidence subject to such objections as to competency of the witness, or competency, relevancy, or materiality of the testimony as were noted at the time of their taking or are made at the time they are offered in evidence.

Effective Jan. 15, 1975. 39 FR 40296.

Rule 65. Supplementation of responses.—A party who has responded to a request for discovery with a response that was complete when made is under a duty to supplement his response to include information thereafter acquired in the following instances:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at the hearing, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party who knows or later learns that his response is incorrect is under a duty seasonably to correct his response.

(3) A duty to supplement responses may be imposed by order, agreement of the parties, or at any time prior to the hearing or the submission of verified statements under the modified procedure through new requests for supplementation of prior responses.

Effective Jan. 15, 1975. 39 FR 40296.

Rule 66. Production of documents and things and entry upon land for inspection and other purposes.—(a) *Scope.*—Upon petition by any party and upon good cause shown, the Commission may issue an order and direct any party (1) to produce and permit the petitioning party to inspect any designated documents (including writings, drawings, graphs, charts, photographs, phonograph records, tapes, and other data compilations from which information can be obtained, translated, if necessary, with or without the use of detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of rule 57(a) and which are in the possession, custody, or control of the party upon whom the order is served, but if the writings or data compilations (including computer runs, punchcards, and tapes) include privileged or proprietary information or information the disclosure of which is proscribed by the Interstate Commerce Act, such writings or data compilations need not be produced under this rule but may be provided pursuant to rule 62(b); or (2) to permit, subject to appropriate liability releases and safety and operating considerations, entry upon designated land or other property in the possession or control of the party upon whom the order is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of rule 57(a).

(b) *Procedure.*—The petition shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The petition shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

Effective Jan. 15, 1975. 39 FR 40296.

Rule 67. Failure to respond to discovery.—(a) *Failure to answer.*—If a deponent fails to answer or gives an evasive or incomplete answer to a question propounded under rule 60(a), or a party fails to answer or gives evasive or incomplete answers to written interrogatories served pursuant to rule 62(a), the party seeking discovery may apply for an order compelling an answer, by motion filed with the Commission and served on all parties and persons affected thereby. On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(b) *Failure to comply with order.*

(1) If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the Commission, such refusal may subject the refusing party or person to action by the Commission under sections 12(3) and 12(4) of the Interstate Commerce Act to compel appearance and compliance with the Commission's order.

(2) If any party or an officer, director, managing agent, or employee of a party or person refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under rule 66 requiring him to produce any document or other thing for inspection, copying, testing, sampling, or photographing or to permit it to be done, or to permit entry upon land or other property, the Commission may make such orders in regard to the refusal as are just, and among others the following:

(A) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or any other designated facts shall be taken to be established for the purposes of the proceeding in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the proceeding or any part thereof.

(c) *Expenses on refusal to admit.*—If a party, after being served with a request under rule 63 to admit the genuineness of any document or the truth of any matter of fact, serves a sworn denial thereof, and if the party requesting the admission thereafter proves the genuineness of any such document or the truth of any such matter of fact, the Commission may order the party making such denial to pay to such other party the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

(d) *Failure of party to attend or serve answers.*—If a party or a person or an officer, director, managing agent, or employee of a party or person willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under rule 62, after proper service of such interrogatories, the Commission on motion and notice may strike out all or any part of any pleading of that party or person, or dismiss the proceeding or any part thereof.

(e) *Expenses against United States.*—Expenses and attorney's fees are not to be imposed upon the United States under this rule.

Effective Jan. 15, 1975. 39 FR 40296.

Rule 87. Evidence; objections to.—Section 1100.87 is amended by adding the following language after the last sentence: Rulings of the presiding officer may not be appealed during the hearing except where such ruling (a) may result in substantial detriment to the public interest or undue prejudice to any party, and the presiding officer so finds, (b) denies or terminates any person's participation, (c) grants a request for the inspection of documents not ordinarily available for public inspection, (d) overrules an objection based on privilege, the result of which ruling is to require the presentation of testimony or documents, or (e) for some other reason might, in the opinion of the presiding officer, result in substantial irreparable harm.

Effective upon publication. 39 FR 22426, June 24, 1974.

Rule 96. Exceptions to officer's report.—(b) *When filed.*—Section 303(a) of the act of Feb. 5, 1976, Pub. L. 94-210, 90 Stat. 48, adds a new paragraph (9) to §17 of the Interstate Commerce Act, providing, in part, that if no appeal with respect to an initial decision, report, or order is filed "within 20 days after such service, or within such further period (not to exceed 20 days) as the Commission, or a duly designated division thereof, may authorize, the order set forth in such initial decision or report shall become the order of the Commission and shall become effective unless, within such period, the order shall have been stayed or postponed by the Commission. . . ."

Rule 101. Petitions for rehearing, reargument, or reconsideration.—Commission held that under rules 101(g)(1), 101(e), and 102 of our General Rules of Practice, applicant's petition is incorrectly and untimely filed. Furthermore, inasmuch as applicant has failed to specify any new factual matters it would introduce, it apparently does not desire a further hearing pursuant to rule 101(b). Protestants' petition to file "newly discovered evidence" is denied as such evidence has not been shown relevant to the matters at issue.—CTI—Container Transport Internat., Frt. Forwarder Applic., 341 I.C.C. 169 (180-81).

Rule 102. Petitions not otherwise covered.—Rule 102 is amended by eliminating the phrase "which relief shall be construed as including appropriate discovery procedures", effective Jan. 15. 1975, 39 FR 40296.

Rule 225. Special rules of practice governing the procedure of the Motor Carrier Board, the Finance Board, the Operations Boards, the Special Permission Board, the Released Rates Board, and the Tariff Rules Board.—Paragraph (g) is revised to read as follows:

(g) A petition seeking reconsideration or other relief of an order of the Motor Carrier Board entered pursuant to the rules and regulations governing transfers of property brokers' licenses, Part 1045 of this chapter; Passenger brokers licenses, Part 1133 of this chapter; motor carrier operating rights and certificates of registration, Part 1132 of this chapter (or pertaining to the disposition of a gateway elimination or conversion application directly related to such transfer); water carrier operating rights, Part 1141 of this chapter; and freight forwarder permits, Part 1151 of this chapter, must be filed with the Secretary of this Commission and all parties of record within 20 days of the service date of such order, or within such further period as may be authorized. In such a petition, matters claimed to have been erroneously decided and alleged errors must be specified with particularity. Within 20 days after the final date for filing such petitions with the Commission or within such further period as may be authorized, any interested person may file and serve a reply thereto.

Effective Jan. 8, 1976, 41 FR 1485.

Rule 247. Special rules governing notice of filing of applications by motor carriers of property or passengers and brokers under sections 206 (except section 206(a)(6) relating to Certificates of Registration), 209 and 211, by water carriers under sections 302(e), 303, and 309, and by freight forwarders under section 410 of the Interstate Commerce Act, and certain other procedural matters with respect thereto.—Rule 247 is amended as follows:

(1) Subparagraph (a)(2) is amended by inserting at the beginning thereof the following words "Except as otherwise provided herein,"

(2) Subparagraph (b)(1) in its present form be, and it is hereby, deleted and replaced by the following subparagraph:

(b) *Applications.*—(1) *Form and content.* An application filed with the Commission under these special rules shall be prepared in accord with and contain the information called for in the form of application prescribed by the Commission or in instructions which may have been issued by the Commission with respect to the filing of such an application. An application for a certificate, permit, or license as defined in subparagraph (a)(1) must be accompanied by certifications of support on the prescribed form for each individual, corporation or partnership known to the applicant upon whose support applicant intends to rely. Except for good cause shown, no application will be accepted for filing unless it is accompanied by certifications as herein required. Upon request by any party, the applicant shall furnish such party with copies of all certifications filed with the application. If, subsequent to the filing of an application, additional witnesses become known to the applicant, applicant shall file a certification for each such witness with the Commission and shall concurrently serve copies thereof upon all parties of record. The total number of witnesses subject to this rule whose testimony is offered in support of the application may not exceed twice the number for whom certifications were filed with the application, whether the case is designated for oral hearing or for modified procedure. In cases designated for oral hearing, certifications of additional witnesses as provided above must be filed and served not later than 30 days prior to the date assigned for commencement of hearing: *Provided,* That, the presiding officer may authorize additional certifications for witnesses to be presented at a continued hearing to be filed and served not later than 30 days prior to the date of the continued hearing. No testimony will be received from witnesses for whom such certifications have not been timely received. *Provided,* however, that the provisions of this paragraph limiting the total number of witnesses and requiring certifications for subsequently discovered witnesses shall not be applicable to applications to transport passengers, and that certifications for subsequently discovered witnesses shall not be required in cases handled under modified procedure except when reassigned for oral hearing.

(3) Subparagraph (c)(2) is amended by deleting the second sentence thereof and substituting in its place the following:

Restrictive amendments acceptable to the Commission may be submitted at any time: *Provided,* That, except as hereinafter provided, in cases assigned for oral hearing amendments must be received by the Commission not later than (1) 30 days after the service date of a notice that the case has been assigned for oral hearing, or (2) the date of a prehearing conference assigned to consider such amendments. Restrictive amendments submitted after such date may be considered by the Commission or presiding officer only if exceptional reason is shown why the amendment could not have been timely filed. Prehearing conferences assigned for the consideration of amendments shall be subject to the provisions of subparagraph (d)(6) of this rule respecting appearance at hearings.

Effective Jan. 20, 1975. 39 FR 43725

(4) Subparagraph (f) in its present form is deleted and replaced by the following subparagraph:

(f) *Failure to prosecute applications.* An applicant who does not intend timely to prosecute its application shall promptly request dismissal thereof. Failure to prosecute an application under procedures ordered by the Commission will result in dismissal thereof. Submission of a request for dismissal of an application later than 15 calendar days after the service date of a notice setting it for oral hearing, or failure by applicant to appear and prosecute the application at such hearing will result in dismissal thereof and will bar the filing of any application for the same or any part of the same authority by the same applicant for a period of 1 year after the date of the dismissal order except upon a petition showing good cause why this rule should be waived. Such petition shall be served upon all protestants to the prior application.

Effective Sept. 15, 1975. 350 ICC 475, 484.

Applicant's allegation that protestant Import Freight did not appear at hearing and is thus no longer a party to these proceedings is not justified. Protestant Lyons controls Import Freight and Lyons did appear and actively participated in the hearing. It would be hypertechnical to exclude Import Freight. Applicant's allegations that protestants' reply to exceptions is not supported by evidence are without merit.—CTI—Container Transport Internat., Frt. Forwarder Applic., 341 I.C.C. 169 (178-80).

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